

151. (Follow-up to RFI 28) Provide copies of PowerPoint presentations, reports, recommendations, or letters from DoD and the Services' leadership to Congressional members and their staffs that pertain to sexual assault since January 2012, which have not been previously provided to the RSP. In particular, please provide all communications to Congressional members or their staffs since DoD's previous response to this RFI request in November 2013.

DOD	<p>The following communications have been provided to Congressional members/staffs since November 2013. The below listed documents are provided at Q#151 using the following link:</p> <p>https://pmev2.bah.com/sites/DSAID/Document_Transfer/Forms/AllItems.aspx</p> <p>TAB</p> <ul style="list-style-type: none"> A. Response to Senator Mark Warner B. Information Paper provided Congressional Research Service C. Response to Senators Levin and Inhofe D. Status report on the Defense Sexual Assault Incident Database E. Response to Senators Levin and Inhofe F. Interim response to Report requirement G. SASC Staffer Day Briefing Charts H. HASC Staffer Day Briefing Charts <p>Links to Congressional reports are provided as follows:</p> <ul style="list-style-type: none"> • Establishment of Special Victim Capabilities within the Military Departments to Respond to Allegations of Certain Special Victim Offenses <p>http://www.sapr.mil/public/docs/reports/DoD_SpecialVictimsCapabilities_Report_2013_1213.pdf</p> <ul style="list-style-type: none"> • Annual Report on Sexual Harassment and Violence at the Military Service Academies <p>http://www.sapr.mil/public/docs/reports/FINAL_APY_12-13_MSA_Report.pdf</p>
USA	Recent responsive materials, if any, will be provided as an attachment.
USAF	<p>See the attached documents:</p> <ul style="list-style-type: none"> 1) Talking Paper on MRE 513 2) Letter from the Deputy Judge Advocate General to Senator Lindsey Graham w/ Attachment 3) Power Point Presentation to House Armed Services Committee Military Personnel Subcommittee on prosecution/conviction rates for sexual assault offenses.
USN	Please see attached letters to Senator Gillibrand (10 Jan 14) and Senator Graham (10 Feb 14).

USM C	The Marine Corps appended a letter from the Staff Judge Advocate to the Commandant of the Marine Corps to Senator Graham letter and slides presented to the HASC Military Personnel Subcommittee to these responses.
USC G	No additional communications to congressional members or their staffs to provide.

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Tab A

033222

UNITED STATES SENATOR

November 7, 2013

Mr. Joseph Hicken
Legislative Affairs
Department Of Defense
1300 Defense Pentagon, Room 3D844
Washington, DC 20301-0001

Dear Mr. Hicken,

I have recently been contacted by New Point Strategies, LLC of McLean, Virginia, please consider their experiences and services. Attached please find a copy of that correspondence. I would appreciate it if you could look into this matter and provide me with an appropriate response. Thank you.

Sincerely,



MARK R. WARNER
United States Senator

MRW/ms
Enclosure

003223

NewPoint Strategies LLC

November 7, 2013

Senator Mark R. Warner
United States Senate

Dear Senator Warner,

I am a founding partner of NewPoint Strategies LLC, a Women Owned Small Business in Virginia with significant expertise in Sexual Assault Prevention training. I would greatly appreciate your assistance in presenting our capabilities to the SHARP office at DoD as an expert resource to help the Service Branches succeed in carrying out the mandatory requirements of Senate National Defense Authorization Act for FY14.

With our strong track record on Sexual Assault prevention training, and extensive cadre of expert trainers and consultants with military background, we can bring a cost-effective, diverse team to the job with a fresh set of "eyes and ears." Importantly, we have credibility in both the military and outside organizations who advocate on behalf of women and men who are victims of this crime. My firm has worked successfully with West Point and the Navy on these issues.

I have attached a one page summary of how we can help to achieve the following requirements in the Defense Authorization Act with regard to four key points in the bill:

- 1. Leadership Training:** Expresses the sense of the Senate that commanding officers should be held accountable for maintaining a command climate in which sexual assault allegations are properly managed and fairly evaluated, and victims can report criminal activity, including sexual assault, without fear of retaliation.
- 2. Training Design and Training Military Trainers:** Enhances the responsibilities of the Sexual Assault Prevention and Response Office for DOD's sexual assault prevention and response program.
- 3. Independent Audit of Training:** Requires the Secretary of Defense to conduct a comprehensive review of the adequacy of training for members of the armed forces on sexual assault prevention and response.

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NewPoint Strategies LLC

4. Targeted Training Design and Audit: Requires a report on training for sexual assault first responders.

I have attached a short summary of NewPoint's expertise to assist in the requirements of the Defense bill above. I have also attached a letter of recommendation from West Point and NewPoint's corporate qualifications.

Thank you very much Senator for your help. As a women-owned, expert firm in Virginia, I know that we can make a difference in the imperative of eradicating Sexual Assault in the military.

Best Regards,

Lynne Revo-Cohen

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NewPoint Strategies LLC

NewPoint Strategies LLC Summary

Background: Founded 2003 by Lynne Revo-Cohen and Karetta Hubbard
Women Owned Small Business, 35 consultants (civilian and ex-military)
On GSA FSS General Schedule: SIN 595-25 EEO Training/Consulting
Registered on www.sam.gov: served West Point and NAVSEA
Strong reputation in Sexual Harassment, Sexual Assault Prevention, EEO,
Diversity and Inclusion; Conflict Management
Respected by advocacy groups on women in the military – DACOWITS,
SWAN, Protect Our Defenders, National Women's Law Center

Opportunities Sought by NewPoint:

Sexual Harassment/Sexual Assault Prevention Training and Consulting
Diversity and Inclusion Training and Consulting
EEO Training and Consulting
Conflict Management Training and Consulting

Key areas NewPoint can provide on Sexual Harassment/Assault Prevention

NewPoint can help DoD and the Service Branches achieve their goal of eliminating sexual harassment/assault in the military by focusing on the following 4 areas that are essential to strengthening the "first line of defense" – the training of Leaders and Rank and File soldiers and civilians in effective sexual assault prevention strategies.

- 1. Audit of existing training programs**
 - Identify strengths and weaknesses, conduct "gap analysis" to determine change required and strategies for improvement.
- 2. Design new training suite of programs**
 - Based on audit results, design improved modules for Leaders, IMT, Rank and File, Civilians and Contractors. Best combination of classroom, online, and mobile apps/social media training methods.
- 3. Design, deliver, and audit Train The Trainer (T-3) Program**
 - Goal to empower internal training team at DoD and within the service branches to independently deliver comprehensive suite of programs.
- 4. Leadership Communications Strategy that Promotes Responsibility and Accountability for Culture Change**
 - Develop and deliver communications strategy to ensure leaders "walk the talk" in their everyday interactions both with peers and subordinates;
 - Develop "thought leader" pieces to include personal accountability for eliminating Sexual Assault in the Army.

April 11, 2013

**Letter of Recommendation
NewPoint Strategies LLC**

Sexual assault and sexual harassment are serious issues for any organization or institution. Addressing the causes and outcomes of these actions is an essential step in protecting an organization's reputation. The selection of an organization outside of your current structure as a trusted agent is an important decision.

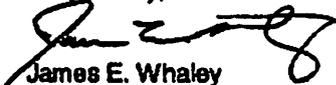
In 2004, while the Director of Public Affairs at the United States Military Academy at West Point, I was involved in selection of NewPoint Strategies to conduct a study for the academy in light of concerns about an increase in sexual assault and sexual harassment. The leadership of West Point wanted to do a thorough review and do so in a transparent way. NewPoint Strategies LLC (NewPoint) was retained by USMA to undertake a review of the Academy's sexual assault prevention and response programs and provide recommendations for improvement. The NewPoint team, located in McLean, Virginia, has over twenty-five years of professional experience in the areas of sexual assault and sexual harassment and was recommended to me as Director of Public Affairs by the then current Chairman of our Civilian Public Affairs Council, Sheila Tate. NewPoint conducted an intensive review over a six-week period that involved extensive contact with the leadership and Cadets and provided findings and recommendations to the Superintendent for action.

The mission of the United States Military Academy is to "educate, train and inspire the Corps of Cadets so that each graduate is a commissioned leader of character committed to the values of Duty, Honor, and Country." Academy leadership recognizes the importance of inculcating Army Values and providing a safe and healthy environment for Cadets, staff and faculty. Any incidence of sexual assault runs contrary to successfully accomplishing this important mission. The Superintendent, therefore, specifically directed NewPoint to make recommendations on how USMA could eliminate sexual assault; better respond to allegations of sexual assault; better care for victims of sexual assault; improve USMA's environment in the areas of culture, reporting, and alcohol use/abuse; and make improvements in the area of sexual harassment/sexual assault prevention.

NewPoint interacted with officers, enlisted personnel, cadets and DoD personnel in a highly professional manner and provided findings in collaboration with all the stake holders on this issue. Their findings and recommendations were on target, relevant to West Point's needs, and forward thinking. The leadership at West Point proceeded to implement NewPoint's recommendations to the best of my knowledge.

I highly recommend NewPoint to any DoD agency to provide an excellent independent review of its sexual assault prevention and response programs. The Newpoint team could deliver an assessment and recommendations on the new training initiatives underway throughout DOD and within each of the armed services branches. NewPoint could also provide an independent consultation on the adequacy of reporting and policy changes with regard to sexual assault prevention and response.

Respectfully,



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Tab B

003228

1/14/2014

Information Paper in Response to
Congressional Research Service:

Sexual Assault Inquiries

1. Statistics/demographics/general information on male victims of *military sexual trauma*.

NOTE: "*Military sexual trauma*" is a term for use in the Department of Veterans Affairs (DVA), and is defined as: "...psychological trauma, which in the judgment of a mental health professional employed by the Department [of Veterans Affairs], resulted from a physical assault of a sexual nature, battery of a sexual nature or sexual harassment which occurred while the Veteran was serving on active duty or active duty for training." (38 USC 1720D). Given that the mission of the DVA is to provide care, services, and possibly compensation for the impact of trauma associated with sexual harassment and/or sexual assault experienced on active duty, this combined term is a diagnostic tool and cannot be used to measure prevalence of either sexual assault or sexual harassment as an individual phenomenon.

Within the Department of Defense, the statistics tracked and reported by the Sexual Assault Prevention and Response Office (SAPRO) refer only to the range of crimes that constitute *sexual assault* under military law. These crimes are:

- Rape (Article 120, Uniform Code of Military Justice (UCMJ))
- Sexual Assault (Art. 120, UCMJ)
- Aggravated Sexual Contact (Art 120, UCMJ)
- Abusive Sexual Contact (Art 120, UCMJ)
- Forcible Sodomy (Art 125, UCMJ)
- Attempts (to commit any of the listed crimes) (Art 80, UCMJ)

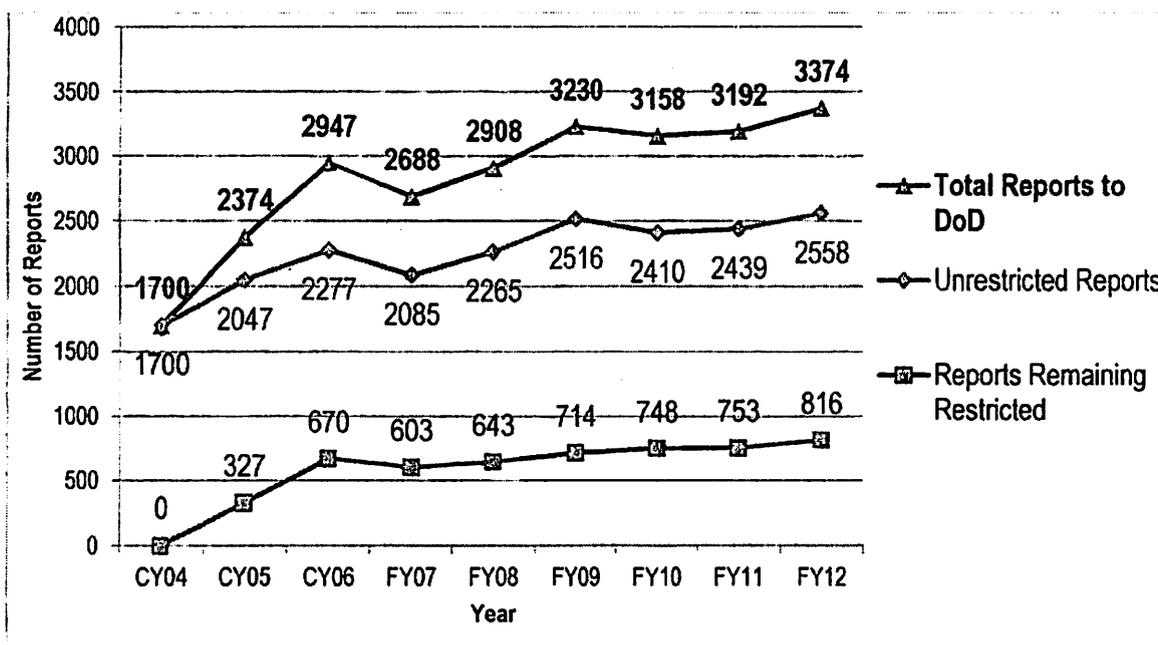
For prevention purposes, there is general agreement in the scientific community that sexual harassment and sexual assault are part of the same continuum of harm. However, the crimes that constitute sexual assault require a much different response than do the behaviors that constitute most forms of sexual harassment. As a result, the Department of Defense addresses the two issues with different programs. The prevention and response to sexual harassment falls under the purview of the Defense Military Equal Opportunity Program (DoD Directive 1350.2). Prevention and response of sexual assault fall under the purview of SAPRO (DoD Directive 6495.01; DoD Instruction 6595.02).

For this reason, most of the information that follows from the Department of Defense will focus on either sexual assault OR sexual harassment.

Based on recommendations from the Centers for Disease Control and Prevention, the Department of Defense approaches the problem of sexual assault with a public health model. That means, the Department defines the problem through data collection from two main sources:

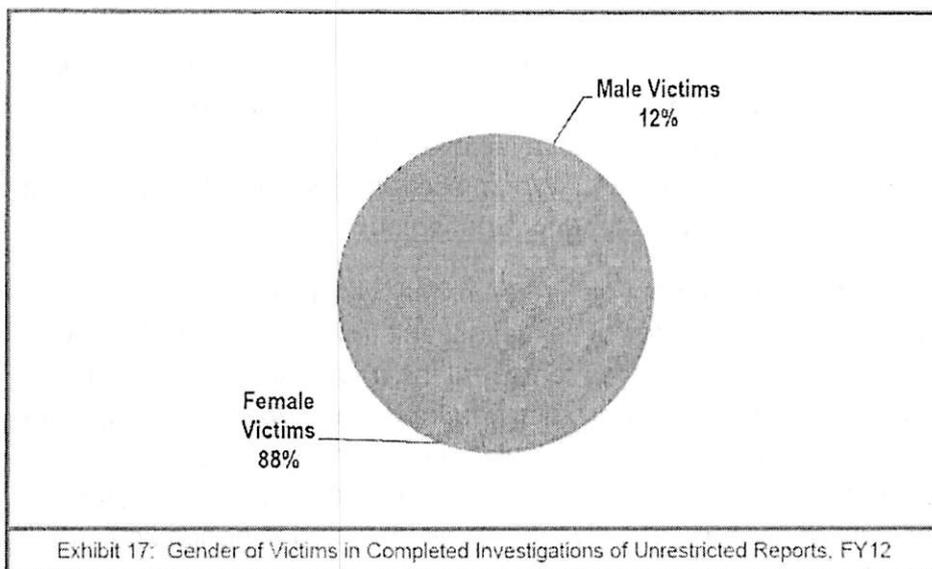
- **Reports of sexual assault** – provide information about the experience of victimized individuals who make Unrestricted and Restricted Reports to DoD authorities. The Department's Annual Reports are available here: <http://www.sapr.mil/index.php/annual-reports>
- **Population-based surveys** – provide information about the experience of victimized individuals through the use of anonymous and/or confidential surveys that are representative of the military population. The Department's population based surveys are available here: <http://www.sapr.mil/index.php/research>

A. Reports of sexual assault. The Department began tracking reports of sexual assault in 2004. In June 2005, the Department introduced the Restricted Reporting option and collected six months worth of Restricted Reports. Data from 2006 reflects a full year's worth of Restricted Reports. The following chart reflects the number of reports received from Calendar Year (CY) 2004 through Fiscal Year (FY) 2012. The Department switched reporting from CY to FY in 2007.

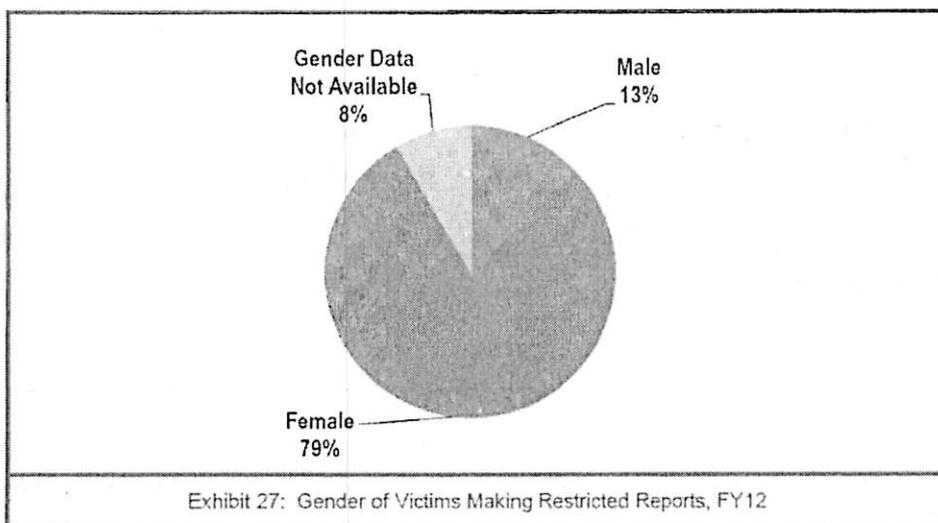


In FY12, 12% of the 2,558 Unrestricted Reports involved a male victim (See Exhibit 17 extracted from the *FY12 Annual Report on Sexual Assault in the Military* on the next page). Because each Unrestricted Report can involve one or more victims, the number of Unrestricted Reports does not equate to the number of victims. Also in FY12, 13% of

the Restricted Reports involved a male victim. Restricted Reports have a single victim, so the number of Restricted Reports equates to the number of victims (See Exhibit 27 extracted from the *FY12 Annual Report*, below). The number of male victims in completed FY12 investigations of sexual assault is fairly consistent with the number of male victims in preceding years. That is, each year men account for about 10 percent of the victims in completed investigations of sexual assault. Exhibit 17 illustrates that in FY12, 12% of the victims in completed investigations were male.



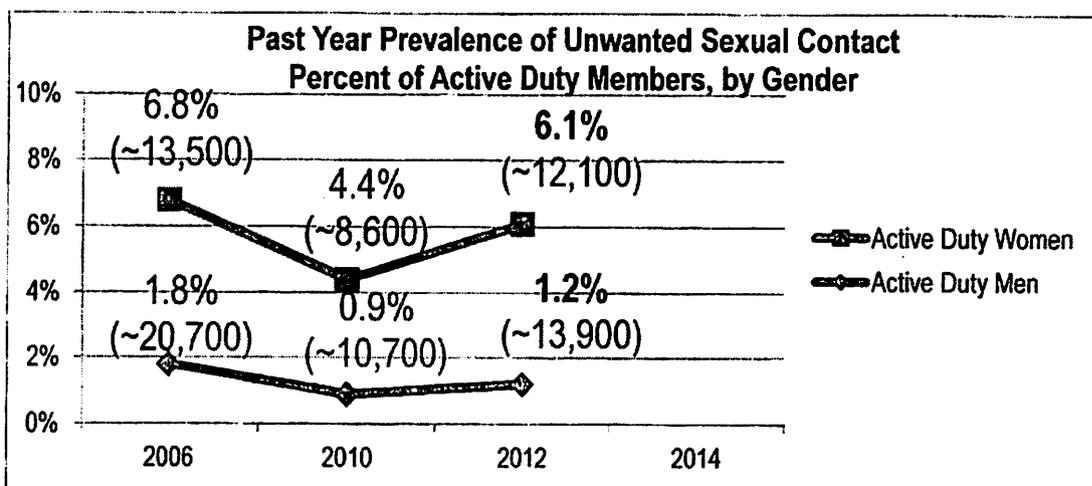
A similar proportion of male victims make Restricted Reports each year. Exhibit 27 from the FY12 Annual Report shows that 13% of victims making Restricted Reports were male.



B. Population-based surveys. The Department began using its current measure of “unwanted sexual contact” to estimate the number of military victims of sexual assault in the 2006 *Workplace and Gender Relations Survey of the Active Duty (WGRA)*. The term unwanted sexual contact is the survey term for the range of crimes between adults that constitute sexual assault under military law. A detailed description of survey methodology is available in the 2010 WGRA report, available at http://www.sapr.mil/public/docs/research/DMDC_2010_WGRA_Overview_Report_of_Sexual_Assault.pdf

NOTE: The following information is largely taken from the 2012 Workplace and Gender Relations Survey. For source data and comparative information for female active duty members, please consult the survey information available here: http://www.sapr.mil/public/docs/research/2012_Workplace_and_Gender_Relations_Survey_of_Active_Duty_Members-Survey_Note_and_Briefing.pdf

Survey data paints a substantially different picture of military victims of sexual assault. The following chart demonstrates the rates of sexual assault from a series of WGRA surveys from 2006 to 2012. The percentages represent the past-year prevalence of unwanted sexual contact, reported by gender. The figures beneath the percentages are estimates of the number of Service members, calculated by multiplying the rate of unwanted sexual contact by the end-strength of military members on active duty during that year. For example, in FY12, 1.2% of active duty men indicated experiencing unwanted sexual contact in the year prior to being surveyed. The Department estimates that 1.2% of active duty men in FY12 represents about 13,900 men.



Findings from the 2012 WGRA Survey:

In 2012, 6.1% of women and 1.2% of men indicated experiencing USC
 For women, the 2012 percentage is statistically significantly higher than 2010; there are no statistically significant differences for men between 2012 and 2010
 Of the women and men who experienced USC in the past 12 months, 45% of these women and 19% of these men also experienced USC prior to entering the military
 Only 18% of active women and 22% of active men indicated the offender was either unidentified or a person in the local community; the majority of offenders were primarily military members or DoD civilians/contractors

While the Department's scientifically conducted surveys show that active duty women indicate experiencing unwanted sexual contact at a higher rate than active duty men, more men each year experience unwanted sexual contact than women. This is a function of gender distribution in the US Armed Forces. In FY12, women comprised only about 15% of the total active force; men about 85%. The percentage of women in the force varies by Service, ranging from 7% in the Marine Corps to 19% in the Air Force.

The 2012 WGRA also found that active duty men and women experience different kinds of unwanted sexual contact. The graph that follows illustrates that 51% of men indicated experiencing unwanted sexual touching and only 10% of men indicated experiencing a completed oral or anal penetration. In contrast, 32% of women indicated experiencing unwanted sexual touching and 31% indicated experiencing a completed oral, anal, or vaginal penetration.

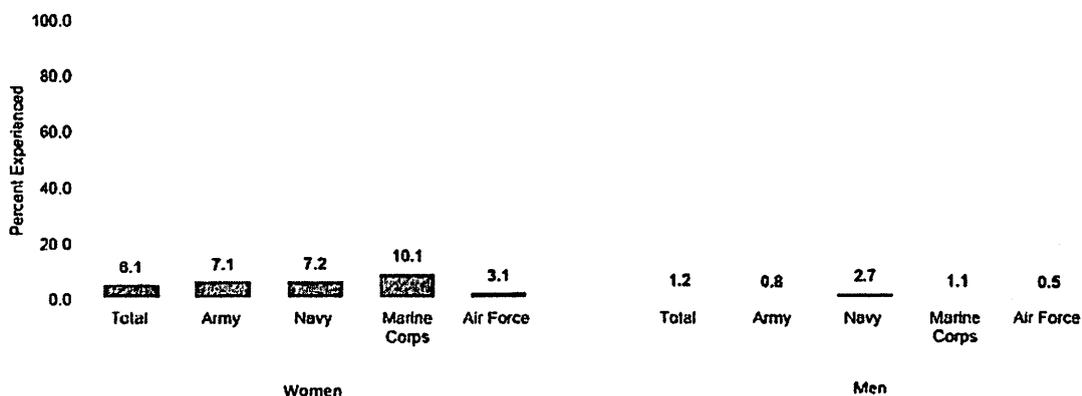
Unwanted Sexual Contact Experienced (2012 WGRA)



**Unwanted sexual contact is the DoD survey term for the range of contact sex crimes between adults, prohibited by the Uniform Code of Military (UCMJ)*

Rates of USC also vary by gender and by Service:

Past Year Prevalence of Unwanted Sexual Contact
Percent of Active Duty Women and Men, by Service (2012 WGRA)



Findings from the 2012 WGRA Survey:

Marine Corps women were more likely than women in the other Services to indicate experiencing USC

Air Force women were less likely than women in the other Services to indicate experiencing USC

For Navy and Marine Corps women, the 2012 percentages are statistically significantly higher than 2010 (7.2% vs. 4.4% and 10.1% vs. 6.6%, respectively); there are no statistically significant differences for men between 2012 and 2010

Circumstances of the Unwanted Sexual Contact

In the 2012 WGRA, of the 1.2% of men who experienced USC:

- 73% indicated the situation occurred at a military installation
- 49% indicated the situation occurred during their work day/duty hours
- 26% indicated the situation occurred while they were deployed to a combat zone or to an area where they drew imminent danger pay
- 24% indicated the situation occurred during any type of military combat training
- 23% indicated the situation occurred while they were on TDY/TAD, at sea or during field exercises/alerts
- 22% indicated the situation occurred during military occupational specialty school/technical training/advanced individual training
- 13% indicated the situation occurred during recruit training/basic training
- 13% indicated the situation occurred during the delayed entry program
- 10% indicated the situation occurred during Officer Candidate or Training School/Basic or Advanced Officer Course

Substance Involvement

Of the 1.2% of men who experienced USC:

- 9% indicated the offender used drugs to knock them out;
- 79% indicated the offender did not use drugs
- 11% indicated they were not sure

Of the 1.2% of men who experienced USC:

- 19% indicated they or the offender had been drinking alcohol before the incident

Of the 1.2% of men who experienced USC:

- 8% indicated they or the offender had been using drugs before the incident

Use of Force, Coercion, and Threats

Of the 1.2% of men who experienced USC:

- 22% indicated the offender used some degree of physical force
- 21% indicated the offender threatened to ruin their reputation if they did not consent
- 18% indicated the offender threatened to physically harm them if they did not consent

Sexual Harassment and Stalking

Of the 1.2% of men who experienced USC:

- 19% indicated the offender sexually harassed them before or after the incident
- 2% indicated the offender stalked them before or after the incident
- 21% indicated the offender both sexually harassed and stalked them before or after the incident
- 58% indicated the offender neither sexually harassed nor stalked them before or after the incident

Impact of USC on duty

Of the 1.2% of men who experienced USC:

- 21% indicated that as a result of the incident they experienced *they thought about getting out of their Service* to a large extent; 66% indicated they did not think about getting out of their Service
- 19% indicated that as a result of the incident *their work performance decreased* to a large extent; 66% indicated it did not impact their work performance
- 13% indicated that as a result of the situation *they considered requesting a transfer* to a large extent; 72% indicated they did not consider requesting a transfer

Sexual Assault Reporting

Of the 1.2% of men who experienced USC:

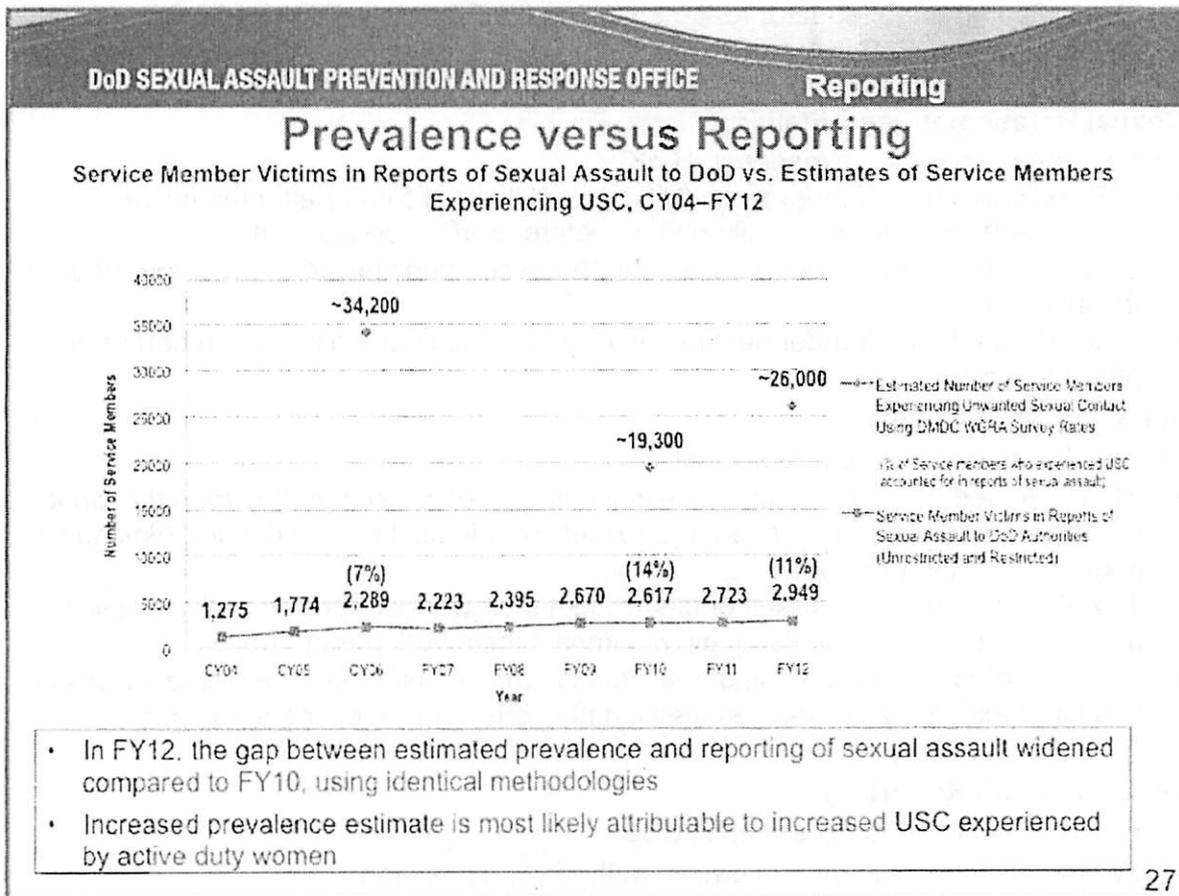
- 5% reported the incident to a civilian authority/organization;
- 10% reported to a military authority/organization;
- 9% reported to both a military and civilian authority;
- 76% did not report the incident at all

Sexual Assault History

Of the active duty men who responded to the 2012 WGRA:

- 6% of men indicated they experienced an incident of unwanted sexual contact *prior* to joining the military (30% of women indicated USC prior to joining the military)
- 4% indicated they had experienced an incident of unwanted sexual contact *since* joining the military (23% of women indicated USC since joining the military)

C. Prevalence Data (Surveys) vs. Reporting Data (Unrestricted and Restricted Reports). Sexual assault is an underreported crime, meaning that each year the number of victims making reports to law enforcement are vastly outnumbered by the number of victims experiencing sexual assault, as estimated with population-based surveys. This is a phenomenon that occurs in both the military and civilian sectors. The chart below shows that about 11% of the number of estimated victims of unwanted sexual contact¹ made a report to a DoD authority in FY12.



¹ Unwanted sexual contact is The DoD survey term for the crimes between adults that constitute sexual assault, ranging from contact crimes like groping to penetrating crimes like rape.

However, the data shown in the above slide is combined for both male and female victims. When data for male and female underreporting are considered separately,² it becomes clear that women report at might higher rates than do men.

	Active Duty Rate of USC in WGRA	Estimated Number of Victims of USC (WGRA USC Rate * Service End Strength)	Number of Victims in Unrestricted & Restricted Reports (Where Gender is Known)	Percent of Estimated Active Duty Victims Making a Report to DoD Authority
Men				
CY06	1.8%	20,700	N/A*	N/A*
FY10	0.9%	10,700	335	3%
FY12	1.2%	13,900	416	3%
Women				
CY06	6.8%	13,500	N/A*	N/A*
FY10	4.4%	8,600	2260	26%
FY12	6.1%	12,100	2471	20%

*Victim gender data not collected in 2006

Based on the data in the above table, the Department estimates that only about 3% of the active duty men who experience some form of unwanted sexual contact in the past year make a report of sexual assault to a DoD authority. Between one-fifth and one-quarter of active duty women who experience some form of unwanted sexual contact in the past year make a report of sexual assault to a DoD authority.

² Please note that the data in the table are estimates, based on the best available information. Victim gender and rates of conversion for men and women are not always complete for Restricted Reports and have been estimated in this table.

2. Specific obstacles that male victims face in reporting victimization.

There is a cultural presumption in the United States that sexual assault primarily affects females. Consequently, men that experience sexual assault must consider reporting the crime in an environment where most first responders (police, attorneys, medical providers) presume that most victims are female and most perpetrators are male. This presumption about the predominate gender of the parties involved in sexual assault can leave male sexual assault survivors feeling isolated and embarrassed, and inhibit them from coming forward (Scarce, 1997).

The 2012 Workplace and Gender Relations Survey (WGRA) found that, due to the relatively small numbers of Active Duty men who indicated experiencing Unwanted Sexual Contact (USC) and reported it to a military authority, there was considerable variance in the reasons why men reported. As a result, most responses were not reportable.

Of the 81% of men who did *not* report their experience of USC to a military authority, the reportable reasons for not reporting the USC were:

- 22% feared they or others would be punished for infractions, such as underage drinking
- 17% thought they would not be believed
- 16% thought their performance evaluation or chance for promotion would suffer
- 15% thought they might lose their security clearance/personnel reliability certification
- 14% heard about negative experiences other victims went through who reported their situation
- 5% did not know how to report

3. The risk factors associated with males being sexually assaulted in the military.

The Department has limited data on established risk factors for sexual assault. However, what data is available indicates that the prime risk-factor is young age. Most male victims are between the ages of 18 and 25. Other situational variables found by the 2012 WGRA are as follows:

Overall findings for the 6.1% of women and 1.2% of men who experienced unwanted sexual contact in 2012:

- 47% of women and 19% of men indicated *you or the offender had been drinking alcohol before the incident*
- 50% of women and 22% of men indicated the *offender used physical force*
- 58% of women and 42% of men indicated the offender sexually harassed and/or stalked them before/after the situation
- 67% of women and 73% of men indicated the situation occurred at a military installation
- 41% of women and 49% of men indicated the situation occurred during their work day/duty hours
- 57% of women and 52% of men indicated the offender was a military co-worker

Taking the above and other 2012 WGRA survey data in sum, it appears that many active duty men who indicated experiencing unwanted sexual contact in the year prior to being surveyed were between the ages of 18 and 25 and sexually assaulted on a military installation during duty hours by a military co-worker who may have sexually harassed and/or stalked them before or after the situation. Many of these men experienced unwanted sexual touching (non-penetrating crimes like groping) or declined to specify the kind of USC they experienced.

4. The stigmas that might exist in the military culture that discourage male victims from reporting.

The Department has limited empirical data with regard to the stigmas that might discourage male victims from reporting.

As noted in Question #2 above, there was very limited data about the reasons why male victims chose not to report. It is also difficult to find a stigma-based reason experienced by a majority of men who indicated experiencing unwanted sexual contact in the year prior to being surveyed. However, over 40% of active duty men indicated in 2006 and 2010 that they didn't report because they didn't want anyone to know. This suggests that there must be some kind of stigma present.

Anecdotal information drawn from SAPRO's interaction with male victims indicates that some male victims feared being labeled either weak or homosexual, which are also common concerns in the civilian population. The military is a hyper-masculine environment where feelings of "helplessness and powerlessness" are not acceptable. There are concerns about the stigma related to being the victim of a male on male sexual assault and reporting it. Before the repeal of "Don't Ask, Don't Tell", male survivors avoided reporting as they were concerned that command or law enforcement would be judgmental and make assumptions about their sexual orientation. The repeal of "Don't Ask, Don't Tell" enacted by Congress in December 2010 has made it easier for male survivors to come forward without fear of judgment or discharge relating to suspicions about sexual orientation.

5. Description of outreach (if any) has been done to encourage male victims to report.

SAPRO expanded the DoD Safe Helpline, operated by the Rape, Abuse, and Incest National Network (RAINN,) by adding content to safehelpline.org which specifically addresses concerns and questions asked by male survivors in the military. Based on Safe Helpline staff interactions with callers, it appears that sometimes men find it easier to first tell an anonymous Safe Helpline staffer rather than a loved one about their sexual assault. This allows the survivor to speak to someone who is impartial and trained to listen and help. Many men find that talking to staff first makes it easier to tell friends and family later.

Male victimization data on Safe Helpline is available here:
<http://www.safehelpline.org/>

6. Any historical trends that shows the military may have inadvertently discouraged male victims from reporting because of the long standing don't ask don't tell policy.

The DoD does not have data to answer this question. In order to address the question, DoD would have to have data about the sexual orientation of Service members before, during, or after Don't Ask, Don't Tell (DADT) policy implementation. However, such data collection was never conducted.

In addition, the Department has never requested that respondents to the WGRA surveys indicate a sexual orientation, nor are victims of sexual assault who make Restricted or Unrestricted Reports asked to document their sexual orientation. Sexual orientation is not a predicate for the provision of services, medical care or counseling within the DoD.

Tab C

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CARL LEVIN, MICHIGAN, CHAIRMAN

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United States Senate

COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

PETER K. LEVINE, STAFF DIRECTOR
JOHN A. BONSELL, MINORITY STAFF DIRECTOR

February 11, 2014

Honorable Charles T. Hagel
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Hagel:

To assist us in our continuing Senate debate and action on legislative measures to address the sexual assault crisis in the military, we request an analysis of data contained in the Department of Defense Fiscal Year 2012 Annual Report on Sexual Assault in the Military. This analysis should include an accounting of the reported cases cited in the report, including how many military subjects were identified, how many were prosecuted, and what happened in those cases where there was no prosecution.

I also request that you provide us with the Department's estimate of how many cases would have to be referred to the newly created Judge Advocate disposition authority for a prosecution determination if Senator Gillibrand's legislative proposal, S. 1752, is enacted.

Please expedite your response to this request so that this information can be used in the upcoming Senate debate and vote on sexual assault legislative proposals.

Sincerely,



James M. Inhofe
Ranking Member



Carl Levin
Chairman



OSD001442-14
053244



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND
READINESS

FEB 28 2014

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for the opportunity to provide you with some important data to help inform the Senate's ongoing consideration of legislative measures intended to address sexual assault in the military. Eliminating sexual assault from the Armed Forces is one of the Department's top priorities, and we are committed to working with Congress to achieve this goal. The success of these efforts depends in large part on leveraging all available data to assess and improve the Department's efforts to prevent and respond to incidents of sexual assault.

In particular, you have requested a summary of relevant military justice data from the Fiscal Year 2012 Department of Defense Annual Report on Sexual Assault in the Military. In Fiscal Year (FY) 2012, there were 3,374 reports of sexual assault involving Service members, covering a range of crimes prohibited by the Uniform Code of Military Justice (UCMJ), from abusive sexual contact to rape. These reports involved one or more Service members as either the victim or subject (alleged perpetrator) of an investigation. Of these reports, 2,558 were Unrestricted Reports (including 165 Restricted Reports that were converted to Unrestricted Reports), each requiring an investigation pursuant to DoD policy, leaving 816 Restricted Reports that were not available for investigation or prosecution.

There were 2,661 subjects investigated for sexual assault for whom dispositions were reported in FY 2012 (see Exhibit 1). However, the Department does not have jurisdiction over many subjects in its sexual assault investigations—often several hundred per year. Examples of cases that fall outside the Department's legal authority include incidents when the subject of an investigation is a U.S. civilian, a foreign national, or when the subject of investigation has not been identified. Accordingly, the Department did not take action against 947 subjects in FY 2012 because they were either outside the Department's legal authority or could not be identified, or because the allegations of sexual assault against them were determined by a military criminal investigative organization (MCIO) to be unfounded. The remaining 1,714 subjects investigated for sexual assault were Service members under the authority of the Department.

Ultimately, commanders determined that they had sufficient evidence and legal authority to take disciplinary action against 1,124 of the 1,714 subjects under the authority of the Department (see Exhibit 2). Of these 1,124 subjects, disciplinary action was initiated for a sexual assault offense for 880 subjects. For the remaining 244 subjects, evidence supported command action for other misconduct discovered during the sexual assault investigation (such as making a false official statement, adultery, underage drinking, or other crimes under the UCMJ), but not a sexual assault charge. Of the 880 subjects against whom disciplinary action was initiated for a sexual assault offense, 594 (67.5 percent) had court-martial charges preferred against them, 158 (18 percent) received nonjudicial punishment, and 128 (14.5 percent) received a discharge or other adverse administrative action.

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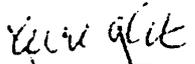
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You have also asked for the Department's estimate of how many cases would be affected by S. 1752, the "Military Justice Improvement Act". Under S. 1752, the decision whether to refer a charge or specification to a court-martial would be made by a judge advocate disposition authority for specified offenses. A good indicator of how many cases would be affected by S. 1752 is the number of MCIO investigations that include at least one of these offenses. At the conclusion of every MCIO investigation, a report is forwarded to the appropriate commander for disposition. Accordingly, the number of closed MCIO investigations that include such an offense is a reasonable approximation of the number of cases that could require disposition by a judge advocate disposition authority. In FY 2012, approximately 12,579 MCIO investigations were closed. Of these, 5,607 (45 percent) included an offense that would require disposition by the judge advocate disposition authority.

To handle these cases, the Services have estimated that at least 74 judge advocate disposition authorities in the grade of O-6 or higher would be required. This number significantly exceeds the existing personnel inventory of the Services. Thus, S. 1752 would necessarily remove these senior judge advocates from critical billets as military judges, senior prosecutors and defense attorneys, and staff judge advocates.

It is also important to note that most of the cases and MCIO investigations that include offenses that would require disposition by the judge advocate disposition authority do not include a sexual assault offense. For example, while 45 percent of MCIO investigations closed in FY 2012 included such offenses, only 16 percent included a sexual assault offense. Therefore, the vast majority of offenses that would require disposition by the judge advocate disposition authority would not be sex-related offenses.

Sincerely,


Jessica L. Wright
Acting

Attachments:
As stated



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

FEB 28 2014

The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Senator Inhofe:

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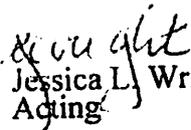
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Sincerely,


Jessica L. Wright
Acting

Attachments:
As stated

Tab D

003249



**Department of Defense
Status Report on the
Defense Sexual Assault Incident Database
February 2014**

**Report to the
Committees on Armed Services of the
U.S. Senate and the U.S. House of Representatives**

***Section 598 of Public Law No. 111-84,
National Defense Authorization Act for
Fiscal Year 2010***

The estimated cost of report or study for the Department of Defense (DoD) is approximately \$3,390 for the 2014 Fiscal Year. This includes \$2,260 in expenses and \$1,130 in DoD labor.

Generated on 2014 February 12 RefID: C-74A2694

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PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

FEB 25 2014

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Section 598 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2010 (Public Law 111-84) requires that not later than 120 days after enactment, and every six months thereafter, the Department shall submit reports detailing the implementation progress of the Defense Sexual Assault Incident Database (DSAID). Enclosed you will find the February 2014 DSAID status report.

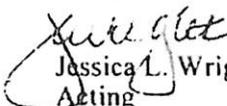
Since the last update in August 2013, the Department continued efforts to enhance DSAID's operational status.

- Addition of required certification information to SARC and Victim Advocate profiles, to comply with congressional mandates
- Addition of a Case Synopsis module to allow for tracking of subject case outcomes
- Implementation of an interface with Army's Criminal Investigation/Intelligence System to capture sexual assault investigative data

In accordance with the NDAA for FY 2009, section 593, the Department met all required mandates to develop a centralized, case-level database for the collection and maintenance of information regarding sexual assaults involving a member of the Armed Forces. The Department also certified DSAID for compliance with all security requirements and is accredited for operation by the designated approval authority. Having met all requirements, please accept this report as the last DSAID status report.

A similar letter is being sent to the Committee on Armed Services of the House of Representatives.

Sincerely,


Jessica L. Wright
Acting

Enclosure:
As stated

cc:
The Honorable James M. Inhofe
Ranking Member

003251



UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

FEB 25 2014

The Honorable Howard P. "Buck" McKeon
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

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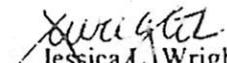
Since the last update in August 2013, the Department continued efforts to enhance DSAID's operational status.

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A similar letter is being sent to the Committee on Armed Services of the Senate.

Sincerely,


Jessica L. Wright
Acting

Enclosure:
As stated

cc:
The Honorable Adam Smith
Ranking Member

003252

EXECUTIVE SUMMARY

The Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2009 called upon the Department of Defense (DoD) to develop a centralized, case-level database for the collection and maintenance of information regarding sexual assaults involving a member of the Armed Forces. The database is called the Defense Sexual Assault Incident Database (DSAID).

It contains Sexual Assault Prevention and Response (SAPR) data, and allows for case management, business management and ad-hoc query and reporting functionality. DSAID improves the data collection and reporting environment in which Sexual Assault Response Coordinators (SARCs) and SAPR Program Managers (PMs) operate, and also helps DoD Sexual Assault Prevention and Response Office (SAPRO) and the Military Services meet congressional reporting requirements. As a result, DSAID further enhances SAPR policy and the Department's SAPR and Service SAPR oversight activities.

Since the last update to Congress in August 2013, the Department has continued efforts to enhance DSAID's operational status. Accomplishments include:

- Addition of required certification information to SARC and SAPR Victim Advocate (VA) profiles, to comply with congressional mandates
- Addition of a Case Synopsis module to allow for tracking of subject case outcomes
- Implementation of an interface with Army's Criminal Investigation/Intelligence System (ACI²) to capture sexual assault investigative data

These enhancements represent an improvement in tracking certification status of SARCs and SAPR VAs performing case management in DSAID. The Case Synopsis module will streamline capturing and reporting case outcomes across the Military Services.

In accordance with the NDAA for FY 2009, section 563, the Department met all required mandates to develop a centralized, case-level database for the collection and maintenance of information regarding sexual assaults involving a member of the Armed Forces. The Department also certified DSAID for compliance with all security requirements and is accredited for operation by the designated approval authority. Having met all requirements under section 563 of Public Law 110-417, the Department offers this report as the final submission to the Committees on Armed Services.

**DEFENSE SEXUAL ASSAULT INCIDENT DATABASE
STATUS REPORT
February 2014**

PURPOSE

The purpose of this status report is to satisfy congressional reporting requirements in section 598 of the NDAA for FY 2010 (Public Law 111-84).

BACKGROUND

In October 2008, the Duncan Hunter NDAA for FY 2009 (section 563 of Public Law 110-417) directed the Department to develop a centralized, case-level database for the collection, in a manner consistent with Department of Defense regulations for restricted reporting, and maintenance of information regarding sexual assaults involving a member of the Armed Forces. Since February 2010, the Department has provided status reports on the DSAID development to the Committees on Armed Services of the Senate and the House of Representatives, as required by section 598 of the NDAA for FY 2010. The most recent status report was delivered August 2013.

PROGRESS SINCE AUGUST 2013 UPDATE

Since August 2013, the Department has continued efforts to enhance DSAID's operational status, in accordance with the integrated master schedule for development, implementation, and maintenance.

Acquisition Update: The Department continues to follow departmental acquisition processes to successfully acquire and deploy an information technology system, in line with the Government Accountability Office's report, *Military Personnel: Additional Actions are needed to Strengthen DoD's and the Coast Guard's Sexual Assault Prevention and Response Programs (GAO-10-215)*. SAPRO submitted a recertification/annual review package to the Human Resources Management (HRM) Investment Review Board (IRB) for a \$1.34M Operations and Maintenance (O&M) funding request for FY 2014. The package was submitted to the Defense Business Council (DBC) as part of Defense Human Resource Activity's (DHRA) Organizational Execution Plan (OEP) and approved September 25, 2013.

Infrastructure Update: SAPRO completed the original Department of Defense Information Assurance Certification and Accreditation Process (DIACAP), which is required to maintain compliance on 100 controls for DSAID, in March 2012. DSAID received Authority to Operate on March 21, 2012. The next annual DIACAP review is planned for March 2014.

Development Update: The Department continued to develop and test DSAID in alignment with the phases of the system development lifecycle, and in accordance with the DSAID integrated master schedule. The Department has managed the development of DSAID by conducting weekly joint application design sessions with the developer to ensure requirements are accurately incorporated into DSAID.

Enhancements to the reporting functionality for SAPR PMs continue and are projected for completion by the end of FY 2014. Additionally, the release of DSAID version (v) 3.0 occurred in October 2013 and included:

- The addition of the DoD Sexual Assault Advocate Certification Program (D-SAACP) certification information in SARC and SAPR VA profiles, to include putting controls in place to deactivate noncompliant profiles. Also included in this enhancement is the ability for SARCs to track their continuing education needed for recertification. The addition of these requirements in DSAID ensures only certified SARCs have access to DSAID and further enhances their capability to provide support to victims.
- The addition of a Case Synopsis module to allow for tracking of subject case outcomes.

These v3.0 enhancements represent an improvement in victim care and enables the Department to track certification status of SARCs and SAPR VAs performing case management in DSAID. Additionally, the Case Synopsis module will streamline capturing and reporting case outcomes across the Military Services.

Following the v3.0 release, improved ad-hoc reporting query capabilities, such as Case Level Reports, were deployed for SAPR PMs in December 2013.

In August 2013, the Army decided to leverage the full capability of DSAID for sexual assault case management, ensuring an increase in SAPR program standardization and consistency in reporting across the Department, and a reduction in overlap among Service systems. To complete this transition, SAPRO developed and deployed an interface between DSAID and the Army's Criminal Investigation/Intelligence System, ACI², to capture sexual assault investigative data. This interface also included the transfer of 1,363 cases from the Army's legacy database, Sexual Assault Data Management System (SADMS), to DSAID. Additionally, more than 100 certified Army SARCs completed the DSAID web-based training course and were approved to use the system. The Army's decision to fully transition to DSAID means the system is now the enterprise solution for the Department of Defense.

Change Control Board Update: The DSAID Change Control Board (CCB), which includes representation from the Military Services, continues to provide leadership and guidance in the management of updates or modifications to DSAID. Since established, the DSAID CCB has held 25 meetings and has approved numerous modifications to DSAID.

Approved modifications to DSAID include enhancements to make the system more user-friendly, such as displaying confirmation messages when data is saved, reducing the number of steps to open a case, and the addition of an ad-hoc query for SARCs.

Training Update: DSAID Training, a web-based course hosted through Joint Knowledge Online (JKO), is a self-guided training consisting of simulations demonstrating DSAID's capabilities, and includes necessary resources for SARCs and Service SAPR PMs to perform their roles effectively. In October 2013, the Department updated the course by incorporating DSAID v3.0 requirements. To date, more than 550 Service SAPR PMs and SARCs from the Army, Air Force, Navy, Marine Corps, and National Guard have completed the training. Feedback on the

training is collected in JKO and will be used to improve future versions of the course, with the next major update scheduled for release in October 2014. The Department continues to host a monthly webinar series to inform and train SARC's and SAPR PMs on a range of DSAID topics, including policy, new releases and/or updates to DSAID, and how to get the most out of available resources. To date, eight webinars have been conducted.

WAY AHEAD

The Department will continue to enhance DSAID according to internal and external requirements, while collaborating with the developer and the Military Services through the full system development lifecycle, in accordance with industry best practices. The Department of the Army's complete transition from SADMS to DSAID means the system is now the enterprise solution for the Department of Defense. The Department will continue to work with the Military Services to refine the process and gain greater data integrity.

In accordance with the NIDAA FY 2009, section 563, the Department has met all required mandates to develop a centralized, case-level database for the collection and maintenance of information regarding sexual assaults involving a member of the Armed Forces. The Department has also adhered to the revised delivery timeline while providing bi-annual status updates detailing implementation progress of DSAID. The Department has also certified DSAID for compliance with all security requirements and is accredited for operation by the Enterprise Information Technology Services Directorate Designated Approval Authority Representative. Having met all requirements, the Department offers this report as the final submission under section 563 of Public Law 110-417.

TabE

003257

CARL LEVIN, MICHIGAN, CHAIRMAN

JACK REED, RHODE ISLAND
BILL NELSON, FLORIDA
CLAIRE McCASKILL, MISSOURI
MARK UDALL, COLORADO
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LINDSEY GRAHAM, SOUTH CAROLINA
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ROY BLUNT, MISSOURI
MIKE LEE, UTAH
TED CRUZ, TEXAS

United States Senate

COMMITTEE ON ARMED SERVICES
WASHINGTON, DC 20510-6050

PETER K. LEVINE, STAFF DIRECTOR
JOHN A. BONSELL, MINORITY STAFF DIRECTOR

February 11, 2014

Honorable Charles T. Hagel
Secretary of Defense
U.S. Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

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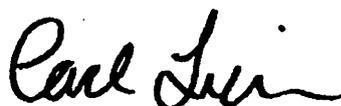
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James M. Inhofe
Ranking Member



Carl Levin
Chairman



OSD001442-14

003258



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

FEB 25 2014

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Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

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003259

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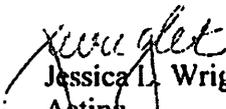
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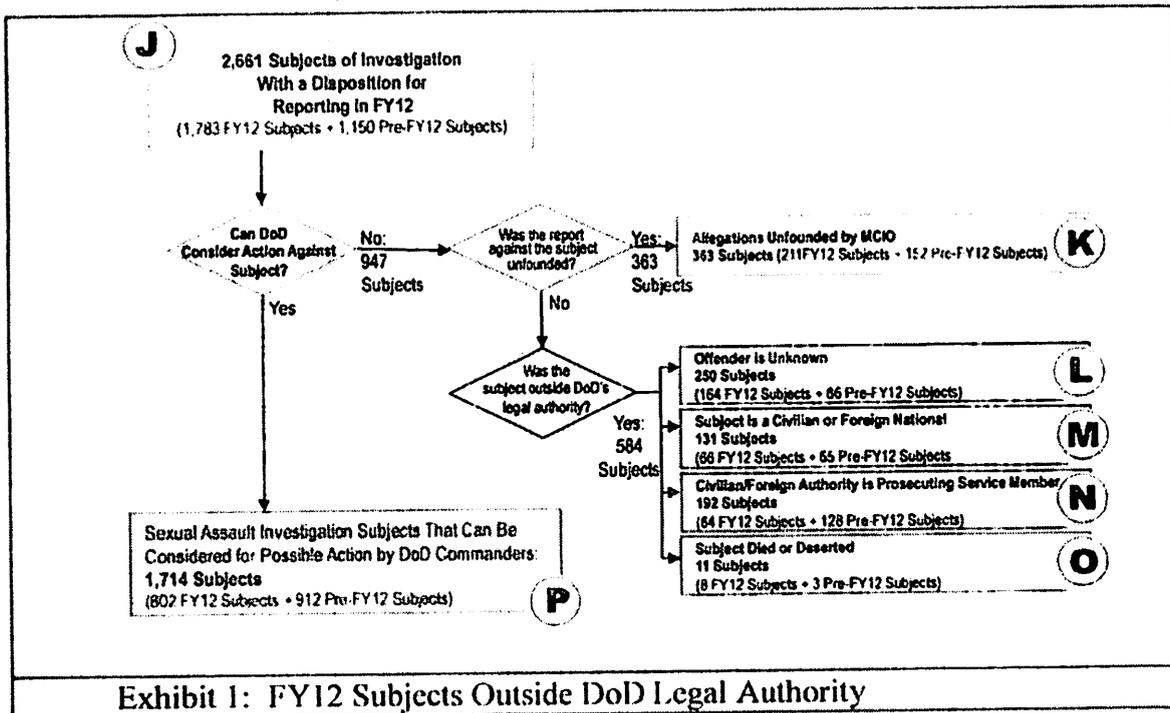
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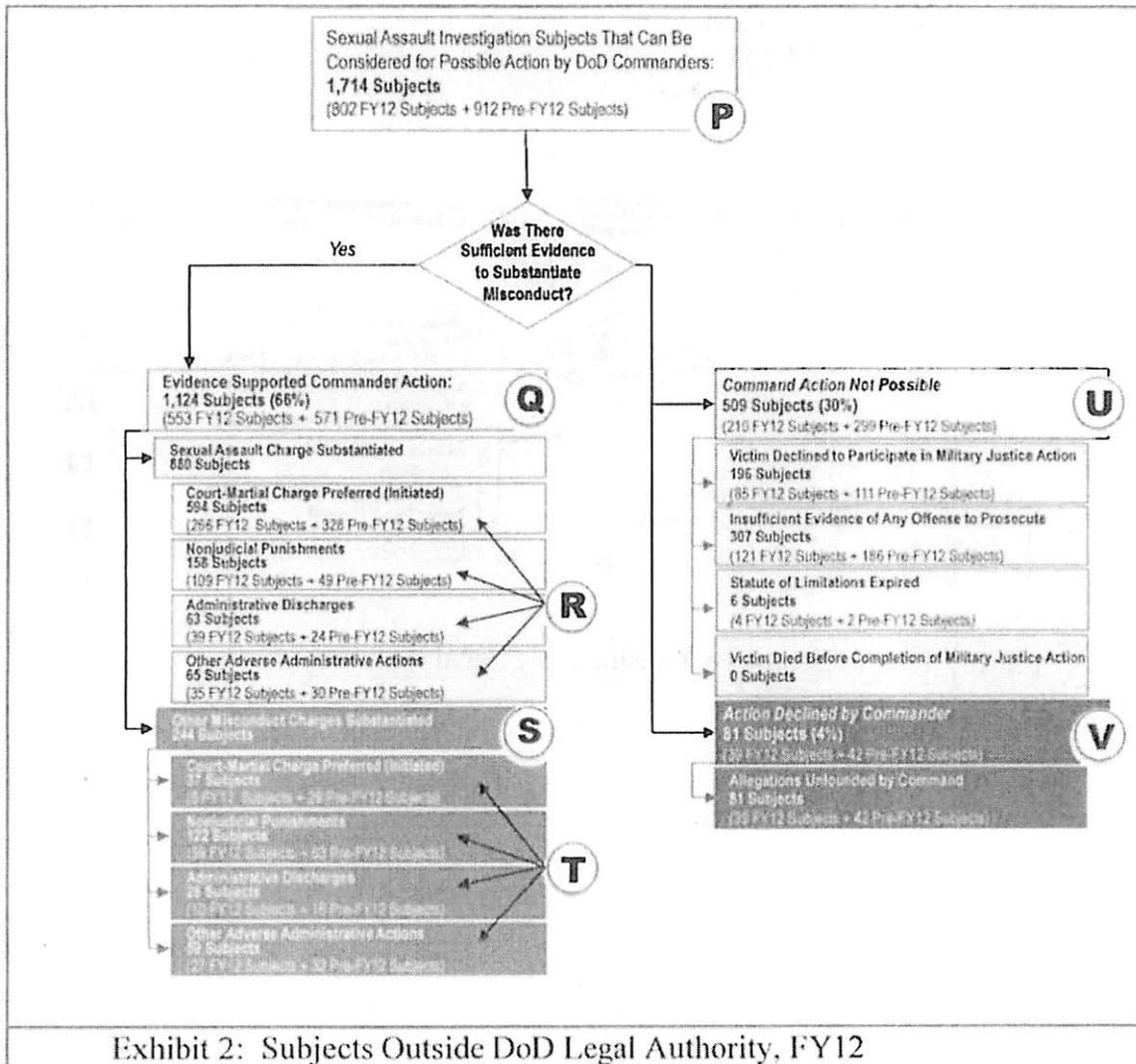
It is also important to note that most of the cases and MCIO investigations that include a covered offense do not include a sexual assault offense. For example, while 45 percent of MCIO investigations closed in FY 2012 included a covered offense, only 16 percent included a sexual assault offense. Therefore, the vast majority of covered offenses would not be sex-related offenses.

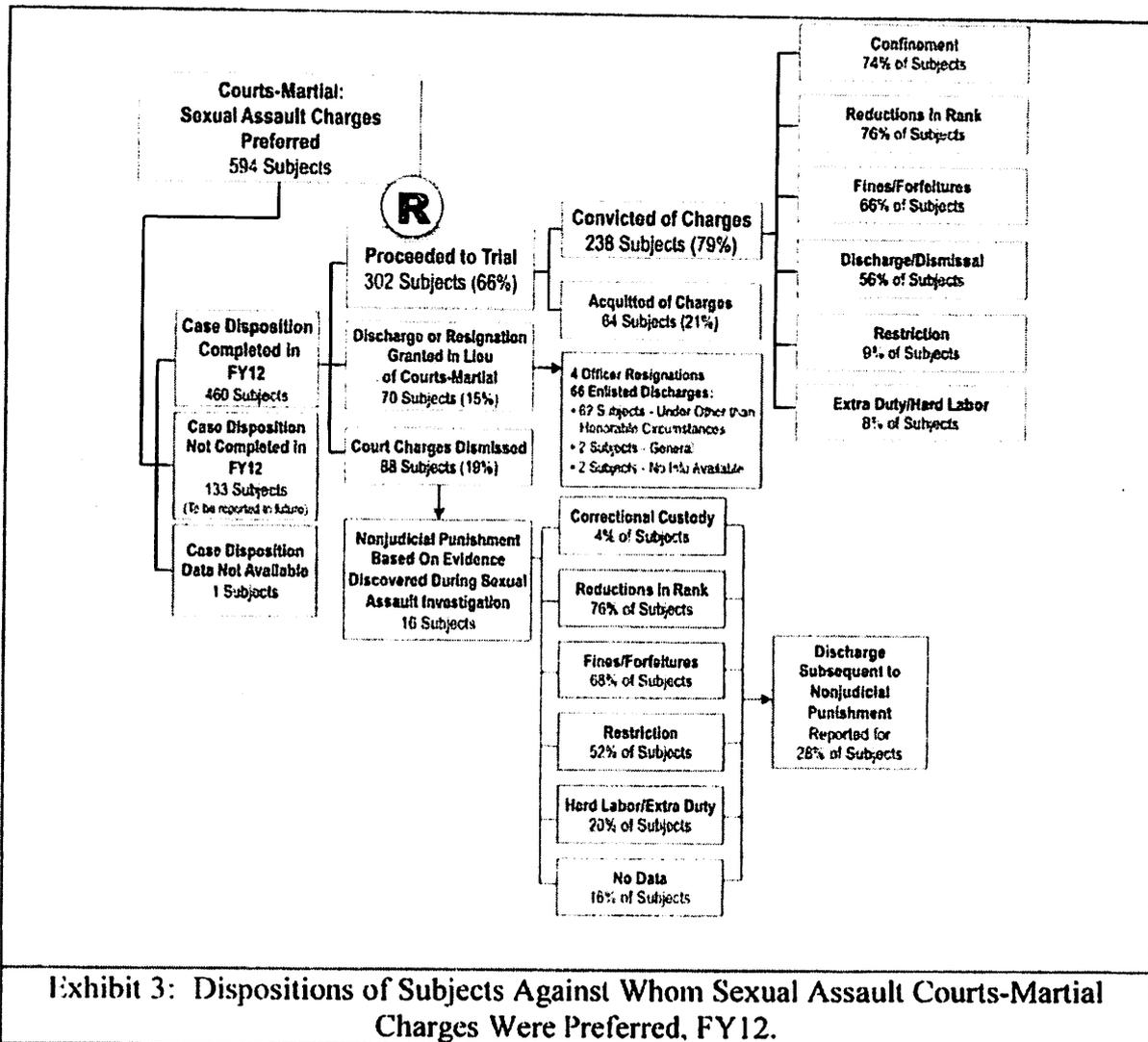
Sincerely,


Jessica L. Wright
Acting

Attachment:
As stated









PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

FEB 25 2014

The Honorable James Inhofe
Ranking Member
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Senator Inhofe:

Thank you for the opportunity to provide you with some important data to help inform the Senate's ongoing consideration of legislative measures intended to address sexual assault in the military. Eliminating sexual assault from the Armed Forces is one of the Department's top priorities, and we are committed to working with Congress to achieve this goal. The success of these efforts depends in large part on leveraging all available data to assess and improve the Department's efforts to prevent and respond to incidents of sexual assault.

In particular, you have requested a summary of relevant military justice data from the Fiscal Year (FY) 2012 Department of Defense (DoD) Annual Report on Sexual Assault in the Military. In FY 2012, there were 3,374 reports of sexual assault involving Service members, covering a range of crimes prohibited by the Uniform Code of Military Justice (UCMJ), from abusive sexual contact to rape. These reports involved one or more Service members as either the victim or subject (alleged perpetrator) of an investigation. Of these reports, 2,558 were Unrestricted Reports (including 165 Restricted Reports that were converted to Unrestricted Reports), each requiring an investigation pursuant to DoD policy, leaving 816 Restricted Reports that were not available for investigation or prosecution.

There were 2,661 subjects investigated for sexual assault for whom dispositions were reported in FY 2012 (see Exhibit 1 in the attachment). Each year, however, the Department does not have jurisdiction over several hundred subjects in its sexual assault investigations. For example, when the subject of an investigation is a U.S. civilian, a foreign national, or an unidentified subject, the subject usually falls outside the Department's legal authority. Accordingly, the Department did not take action against 947 subjects in FY 2012 because they were either outside the Department's legal authority or could not be identified, or because the allegations of sexual assault against them were determined by a military criminal investigative organization (MCIO) to be unfounded. The remaining 1,714 subjects investigated for sexual assault were Service members under the authority of the Department.

Ultimately, commanders determined that they had sufficient evidence and legal authority to take disciplinary action against 1,124 of the 1,714 subjects under the authority of the Department (see Exhibit 2 in the attachment). Of these 1,124 subjects, disciplinary action was initiated for a sexual assault offense for 880 subjects. For the remaining 244 subjects, evidence supported command action for other misconduct discovered during the sexual assault investigation (such as making a false official statement, adultery, underage drinking, or other crimes under the UCMJ), but not a sexual assault charge. Of the 880 subjects against whom

003264

disciplinary action was initiated for a sexual assault offense. 594 (67.5 percent) had court-martial charges preferred against them, 158 (18 percent) received nonjudicial punishment, and 128 (14.5 percent) received a discharge or other adverse administrative action.

Four hundred and sixty of the 594 subjects who had court-martial charges preferred against them had their charges adjudicated to completion in FY 2012 (see Exhibit 3 in the attachment). Of these 460 subjects, 302 (66 percent) had at least 1 sexual assault charge referred to court-martial, 88 (19 percent) had their charges dismissed (16 resulting in nonjudicial punishment for another offense), and 70 (15 percent) were granted a resignation or discharge in lieu of court-martial. With respect to the 302 subjects with at least 1 sexual assault charge referred to court-martial, 238 were convicted. In other words, 79 percent of Service members tried for a sexual assault offense in FY 2012 were convicted of at least 1 charge at trial. In most of these cases, punishment included confinement, a fine or forfeiture of pay, reduction in rank, and a punitive discharge.

You have also asked for the Department's estimate of how many cases would be affected by S. 1752, the "Military Justice Improvement Act". Under S. 1752, the decision whether to refer a charge or specification to a court-martial would be made by a judge advocate disposition authority for specified offenses. A good indicator of how many cases would be affected by S. 1752 is the number of MCIO investigations that include a covered offense. At the conclusion of every MCIO investigation, a report is forwarded to the appropriate commander for disposition. Accordingly, the number of closed MCIO investigations that include a covered offense is a reasonable approximation of the number of cases that could require disposition by a judge advocate disposition authority. In FY 2012, approximately 12,579 MCIO investigations were closed. Of these, 5,607 (45 percent) included a covered offense.

To handle these cases, the Services have estimated that at least 74 judge advocate disposition authorities in the grade of O-6 or higher would be required. This number significantly exceeds the existing personnel inventory of the Services. Thus, S. 1752 would necessarily remove these senior judge advocates from critical billets as military judges, senior prosecutors and defense attorneys, and staff judge advocates.

It is also important to note that most of the cases and MCIO investigations that include a covered offense do not include a sexual assault offense. For example, while 45 percent of MCIO investigations closed in FY 2012 included a covered offense, only 16 percent included a sexual assault offense. Therefore, the vast majority of covered offenses would not be sex-related offenses.

Sincerely,


Jessica L. Wright
Acting

Attachment:
As stated

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Tab F

093267



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MAR 7 2014

The Honorable Carl Levin
Chairman
Committee on Armed Services
U.S. Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter provides an interim response to the report requirement under Section 1725 of the National Defense Authorization Act for Fiscal Year 2014. Additionally, the information required by this report is substantially the same as the information requested under Senate Report 113-44, which accompanied S. 1197. As such, we anticipate providing one report that will respond to both requests by April 25, 2014.

The information requested focuses on first responders and requires a comprehensive collection of Department of Defense-wide training data for a wide variety of personnel to include: Sexual Assault Response Coordinators, Sexual Assault Victim Advocates, Chaplains, health care providers, Judge Advocates and law enforcement personnel.

I appreciate your commitment to the well-being of our Service members and look forward to continuing to work with you and the Congress on the issue of sexual assault prevention and response. A similar letter is being sent to the Chairmen and Ranking Member of the House of Representatives.

Sincerely,


Jessica L. Wright
Acting

cc:
The Honorable James Inhofe
Ranking Member

003268



PERSONNEL AND
READINESS

UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

MAR 7 2014

The Honorable Howard "Buck" McKeon
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

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Sincerely,


Jessica L. Wright
Acting

cc:
The Honorable Adam Smith
Ranking Member

003269

Tab G

003270

**Office of the Under Secretary of
Defense for Personnel & Readiness
Staffer Day**

SASC-MP: March 14, 2014



PERSONNEL AND READINESS

Sexual Assault Prevention and Response Office



- Update on Key Issues
 - Update on Reports: Annual & POTUS
 - Status of
 - FY 2013 NDAA Implementation
 - FY 2014 NDAA Implementation
 - FY 2015 NDAA Proposed legislation

Personnel and Readiness

Update on Reports

- **Annual Report.**
 - **Due 30 April 2014**
 - **Analysis of Service Data underway**
 - **Requested additional Service input**
- **POTUS Report.**
 - **Due Dec 2014**
 - **Report Design Determined**
 - **Data call and Surveys under development**

Status of FY 2013 NDAA Implementation

- We are tracking 18 substantive provisions and five Congressional reports found in the FY13 NDAA
- With the issuance of an updated SAPR DoD Instruction (DoDI 6495.02) last month, the vast majority of these provisions have been fully implemented

Status of FY 2014 NDAA Implementation

- The FY14 NDAA included 33 sections of law (including multiple provisions within each section) and the most sweeping reform to the Uniform Code of Military Justice since 1968, with 16 different military justice provisions that enhance victims' rights and constrain convening authorities' power
- We are decisively engaged in implementing these wide-ranging reforms, and have already taken action to put into effect three provisions:
 - ✓ The prohibitions on accessions for those who have sexual assault convictions
 - ✓ The ability to conduct an expedited transfer of the suspect
 - ✓ The mandatory referral of sexual assault incidents to independent Military Criminal Investigative Organization

Summary of Sections FY 2014 (cont.)

- **SAPR Provisions**
 - ✓ 3 reports
- **Military Personnel Policy, Readiness, Legal Policy**
 - ✓ No report
- **Investigations**
 - ✓ No report
- **Climate Assessment**
 - ✓ No report
- **Retaliation**
 - ✓ No report
- **Legal**
 - ✓ 5 reports (3 legal + 2 panel reports)

FY 2015 NDAA Proposed Legislation

Return of Personal Property

- Amends FY 2012, §586 to allow for the return of personal property following the conclusion of all legal, adverse action, and administrative proceedings
- Corrects an unintended consequence of automatically holding all personal property for 5 years
 - ✓ This would allow, for example, a victim to request the return of a family heirloom necklace that was seized for DNA evidence

Tab H

033278

**Office of the Under Secretary of
Defense for Personnel & Readiness
Staffer Day**

HASC-MP: April 2, 2014



PERSONNEL AND READINESS

Sexual Assault Prevention and Response Office

- **Update on Key Issues**
 - Update on Reports: Annual & POTUS
 - Status of
 - FY 2013 NDAA Implementation
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Personnel and Readiness

Update on Reports

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 - **Due 30 April 2014**
 - **In Formal Coordination**
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Key Issues

Return of Personal Property

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Headquarters U.S. Air Force

Integrity - Service - Excellence

Air Force Waterfall Slides



Lt Col Mike Lewis

Chief, Military Justice Division

DSN 612-4820, Comm 240-612-4820

michael.a.lewis11.mil@mail.mil

U.S. AIR FORCE



U.S. AIR FORCE

Substantiated Reports

■ Substantiated Reports

- Unrestricted Reports that have been investigated and found to have sufficient evidence to provide to command for consideration of action to take some form of punitive, corrective, or discharge action against an offender.

■ Air Force Practice

- All Unrestricted Reports are investigated by AFOSI
- AFOSI does not substantiate or unsubstantiate allegations
- Upon the completion of every investigation, AFOSI provides a Report of Investigation to the Commander of the subject



U.S. AIR FORCE

Disposition of 399 Sexual Assault Subjects (FY12)

Number of subjects
 Subjects awaiting command action
 Any command action precluded
 SUBTOTAL

399
 -179
 -43
 177

Civ/Foreign Prosecution	12
Subj is Civ/Foreign Nat'l	13
Offender Unknown	17
Subj Died/Deserted	1

Cases presented to Commanders for Action 177 (44%)

Cmd Action Precluded/Declined for SA -- 121	
Prob cause only for non-SA offense	54
Insufficient evidence of any offense	32
Victim declined to participate	24
Unfounded by command	11
Commander declined action	0
Unfounded by invest agency	0

Commander took Action for SA -- 56	
CM Preferred (Initiated)	42
Nonjudicial Punishment	14
Admin Discharge	0
Other Admin Action	0

Prosecution Rate: AF: 24% (42/177)
 Conviction Rate (for sexual assault offense): AF: 57% (13/23)



U.S. AIR FORCE

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U.S. AIR FORCE

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U.S. AIR FORCE

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U.S. AIR FORCE

Prosecution and Conviction Rates (FY12) (SAPR Report Data)

Prosecution Rate

DoD Methodology	75%
Removing Cases Where no Probable Cause for Sexual Assault Offense	34%
AF Methodology	24%

Conviction Rate

Any Offense (DoD Methodology)	87%
Sexual Assault Offense (AF Methodology)	57%



Prosecution and Conviction Rates (FY11 – FY13) (SAPR Report Data)

	AF Prosecution Rate for Sexual Assault Offense (DoD Methodology)	AF Prosecution Rate for Sexual Assault Offense (AF Methodology)	AF Conviction Rate for Any Offense (DoD Methodology)	AF Conviction Rate for Sexual Assault Offense (AF Methodology)
FY13	85%*	45%*	61%*	46%*
FY12	75%	24%	87%	57%
FY11	70%	22%	80%	48%

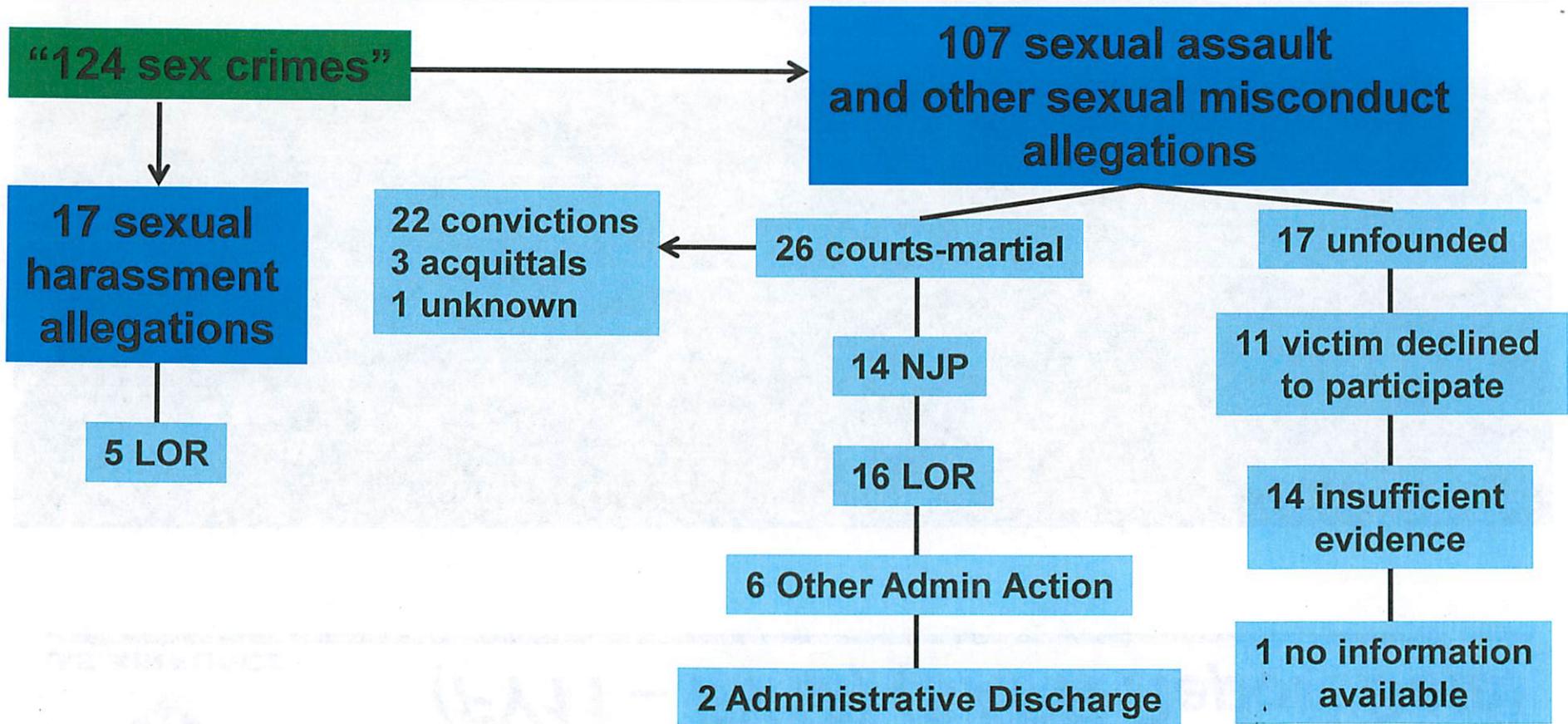
***NOTE: FY13 statistics are not final at this time.**



U.S. AIR FORCE

AP Article

AP Story: "The AF was the most lenient. Of 124 sex crimes, the only punishment for 21 offenders was a letter of reprimand."





DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON DC 20330

FEB -7 2014

HQ USAF/JA
1420 Air Force Pentagon
Washington, DC 20330-1420

The Honorable Lindsey O. Graham
United States Senate
Washington, DC 20510

Dear Senator Graham:

On 24 July 2013, Lt Gen Harding responded to your invitation to provide his personal, professional opinion regarding the programs and initiatives being implemented by the Air Force to combat sexual assault and whether removing or restricting commanders as the UCMJ disposition authority will help combat sexual assault in the Armed Forces. In his response, he discussed his optimism that the Air Force Special Victims' Counsel program is a "game-changer", his concern that victims must feel free from the threat of retaliation to ensure that sexual assaults are reported, and his conviction that the solution to this problem must be led by our commanders.

Now, more than six months later, in the wake of profound changes to the practice of military justice included in the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), and with an impending vote on the Military Justice Improvement Act (MJIA), I am grateful for the opportunity to express my personal, professional opinion regarding the MJIA. I believe the Department of Defense must be given sufficient time to implement the FY14 NDAA changes, and to evaluate their impact before considering additional military justice revisions.

The Military Justice Improvement Act would critically undermine our ability to evaluate the new protections to military victims that we are implementing as a result of the FY14 NDAA. Over the course of 2014, our military leaders will be hard at work to implement the changes to our justice system required by the FY14 NDAA. Among numerous other important reforms, chapter 17 of the FY14 NDAA entitles military victims of sex-related offenses to special victims' counsel, greater protections at Article 32 hearings, and the right to be heard at the sentencing phase of a trial and at clemency. So as not to inadvertently undermine other aspects of our military justice system, our commanders, legal experts, and victims' advocates must be given the opportunity to evaluate the efficacy of these new protections. Only then will we be able to accurately determine whether additional reforms are needed.

The MJIA also threatens to divert our attention from sexual assault by shifting our focus to a much wider range of offenses, to include crimes of violence, theft, and fraud. In a very short period of time, our nation's military has benefitted greatly from the national dialogue on sex-related offenses. This benefit has extended beyond just our military; it has spurred meaningful dialogue in civilian jurisdictions, and in the militaries of our allies. We must be responsible stewards of this cultural shift. Part of that stewardship requires that we maintain our focus on the central problem of sexual assault while the NDAA reforms are implemented.

302123

Finally, the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (RSP) recently completed and released its initial assessment of whether senior commanders should retain authority to refer cases of sexual assault to courts-martial. I have attached their report and commend it to you and your colleagues. In it, after over six months of detailed study, the subcommittee dispelled several mistakenly-held assumptions that I believe have caused many of our well-meaning elected officials, members of the media, and members of the public to misunderstand why and how commanders make military justice decisions. The RSP concluded that "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."

I wholeheartedly concur with the sentiments expressed by Lt Gen Harding. Our effectiveness as a military fighting force relies on our collective faith in our commanders' ability to create, maintain, and enhance our ability to fight and win our nation's battles. As Lt Gen Harding stated in his letter, "removing commanders' authority over disciplining service members for committing serious crimes is an outward expression of the Congress' lack of confidence in commanders and a message that will resonate as a vote of no confidence in the ranks of the service members they command." We ask so much of our military men and women. We owe it to them to maintain their commanders' authority to sustain the good order and discipline so crucial to any effective fighting force.

Like so many other problems America's military has faced and helped a larger American society overcome, sexual assault has our complete attention. Defeating it is the focus of our most determined efforts. I am confident that we can overcome this threat to our Airmen and our mission, and restore our nation's confidence in the Air Force as a place where its sons and daughters will be respected and protected.

Sincerely,



STEVEN J. LEPPER
Major General, USAF
Deputy Judge Advocate General
Performing Duties of The Judge Advocate General
10 U.S.C. 8037

Attach:
RSP Role of Commander Initial Assessment

302124



**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
ROLE OF THE COMMANDER SUBCOMMITTEE
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995**

January 29, 2014

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

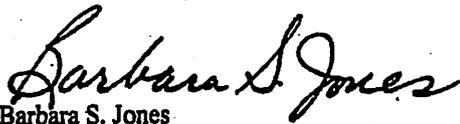
302125

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

302126

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."¹ 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."²

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

² National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(a)(1)(A), 127 Stat. 672 (2013).

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; Rape, 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."⁴

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

³ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(5) and R.C.M. 103(6) (2012) [hereinafter MCM].

⁴ MCM, *supra* note 3, pt. I, ¶3.

"Don't Ask, Don't Tell,"⁵ the Services relied on commanders to set the appropriate tone and effect change among subordinates under their command.⁶

A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command⁷ in achieving change in the attitudes and behaviors of service members.⁸ As Senator Carl Levin, Chair of the Senate Armed Services Committee, observed, the chain of command has been "[t]he key to cultural change in the military."⁹ Stated directly, commanders—the leaders of military organizations—set and enforce standards and drive cultural change in the military.¹⁰

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.¹¹ Under these articles, convening authority is a specific, statutory authority that attaches to individual officers serving in certain positions and designations.

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.¹² 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.¹³ Enactment of the UCMJ, as well as its significant amendments in 1968 and 1983,

⁵ 10 U.S.C. § 654 (repealed Dec. 22, 2010).

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 assault").

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"); *accord 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 and 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.").

¹¹ 10 U.S.C. §§ 822-824 (UCMJ arts. 22-24).

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 his 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 command, or with The Judge Advocate General, see 10 U.S.C. § 806(b) (UCMJ art. 6(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).

reflects a continual effort by Congress, in response to the experience of the military justice system in practice, to enhance the balance between the needs for command discipline and a system that dispenses justice fairly. For its part, the Supreme Court has largely left undisturbed—and periodically endorsed—the commander-centered framework of the UCMJ.¹⁴

With limited statutory exceptions,¹⁵ 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, while nearly all convening authorities are commanders, few commanders possess the 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 considerable 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.¹⁶ In addition to requisite training, each Service allocates dedicated 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 SPCMCA generally have at least 20 years of service and have been selected for this level of command through a rigorous and highly competitive Service-level process. An officer's leadership ability, career service record, and previous performance in lower levels of command are central to selection for command positions at the grade of O-6 and above.

Officers serving as GCMCA have long records of service, with distinguished performance and substantial command experience. In general, an officer serving as a GCMCA has also "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."¹⁷ GCMCA are normally two-star flag officers and higher.

The law officer was replaced in 1968, when Congress created the office of military judge and greatly enhanced his judicial powers. See *Transcript of RSP Public Meeting 194-96* (June 27, 2013) (testimony of Mr. Borch) (discussing Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335).

¹⁴ In *Relford v. Commandant*, 401 U.S. 355, 367 (1971), for example, the Supreme Court "stress[ed] . . . [t]he responsibility of the military commander for maintenance of order in his command." Although the High Court in *O'Callahan v. Parker*, 395 U.S. 258, 272-73 (1969), had held that court-martial jurisdiction does not exist unless the charged offense is "service-connected," less than two years later in *Relford* the Court upheld court-martial jurisdiction over a soldier's on-base rapes of a military dependent and a fellow service member's relative. See *Relford*, 401 U.S. at 367 (emphasizing "[t]he impact and adverse effect that a crime committed 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"). The Court ultimately overruled *O'Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987), in which it held that the mere military status of an accused is sufficient to support court-martial jurisdiction. See *id.* at 447 (noting that "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military"); see also *Transcript of RSP Public Meeting 198-200* (June 27, 2013) (testimony of Mr. Borch).

¹⁵ 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, and 4) (UCMJ art. 22(a)(1, 2, and 4)).

¹⁶ Army commanders selected for SPCMCA positions attend Senior Officer Legal Orientation; Air Force Commanders receive legal training at the Wing Commanders Course; Navy Executive Officers, Commanders, and Officers in Charge, as well as Marine Corps Commanders, attend the Senior Officer Course. See DoD and Service responses to Request for Information 1(e), dated Nov. 21, 2013.

¹⁷ *Transcript of RSP Public Meeting 270-71* (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino).

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:¹⁸

	Active Duty Personnel	Commanders	SPCMCAs	SPCMCAs who convened 1 or more court-martial in FY13	GCMCAs	GCMCAs who convened 1 or more court-martial in FY13
Army	528,527	7,000 (approx.)	424	Not tracked	85	70
Navy	323,251	1,422	1,080	94	200	17
Marine Corps	194,561	2,182	451	106	50	29
Air Force	329,452	3,943	97	70	58	23
Coast Guard	40,962	677	350	12	18	9

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 engenders 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.”¹⁹ Further, they expressed concern that commanders may be unduly influenced²⁰ 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 officer, commanders are not properly trained or prepared to make informed

¹⁸ Active duty personnel figures reflect Nov. 2013 data. Defense Manpower Data Center, Service Totals – current month, DMDC Military Personnel Reports, available at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>. Commander and convening authority data provided by Services in response to RSP Request for Information (Jan. 14, 2014) (on file with RSP). The number of Coast Guard commanders includes 272 senior enlisted personnel who serve in officer-in-charge positions.

¹⁹ *Transcript of Role of the Commander Subcommittee Meeting 52* (Jan. 8, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense and U.S. Representative).

²⁰ See MCM, *supra* note 3, R.C.M. 104(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 acts.”) (emphasis added).

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.²¹

Many proponents described the significant expectations of victims and survivors and the optimism they express that change will build trust with victims. A retired Army general officer called the proposed shift from commanders to legal officers at the core of the Military Justice Improvement Act "a proxy for what might have made it different in their situation."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

²¹ 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 Senate Armed Services Committee. This letter stated in part: "There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel 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 Amos Guiora, S.J. Quinney College of Law, Univ. of Utah, to S. Armed Services Comm. (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.

²² *Transcript of RSP Role of the Commander Subcommittee Meeting 147* (Jan. 8, 2014) (testimony of Brigadier General (Retired) Loree Sutton, U.S. Army).

²³ *Transcript of RSP Public Meeting 7-75* (Nov. 8, 2013); *id.* at 19-20 (testimony of BL); *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://responsesystemspanel.whs.mil/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."²⁴ 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.²⁵

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.²⁶

²⁴ *Transcript of RSP Public Meeting 11* (Sept. 25, 2013) (testimony of Lieutenant General Michael Linnington, U.S. Army).

²⁵ *Id.* at 207-09 (testimony of Brigadier General Richard Gross, U.S. Army).

²⁶ *Transcript of RSP Public Meeting 411-22* (Nov. 7, 2013) (public comment of DA); *Transcript of RSP Public Meeting 8-17* (Nov. 8, 2013) (testimony of Command Sergeant Major JG, U.S. Army); *Transcript of RSP Public Meeting, 496-505* (Dec. 11, 2013) (testimony of Major MB, Texas National Guard); *Letter with Enclosures 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/fm-nov-16>.

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.²⁷ 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.²⁸ 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."²⁹

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.³⁰ A restricted report remains confidential and will not result in notification of law enforcement or the victim's chain of command.³¹ 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.³² 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 60 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).

³⁰ *Transcript of RSP Public Meeting 421-22* (Dec. 11, 2013) (testimony of Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations).

³¹ U.S. DEP'T OF DEF. INSTR. [hereinafter DODI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 4, § 1.b (Mar. 28, 2013).

³² *Id.*; *see also* Military Rape Crisis Center, <http://militaryrapecrisiscenter.org/for-active-duty/reporting-option/>.

commander,³³ but the report will not contain personally identifiable information and may not be used for investigative purposes.³⁴ Accordingly, the victim's identity remains confidential in a restricted report.³⁵ 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.³⁶

Victims can make unrestricted reports of sexual assault to SARCs, SAPR VAs, and healthcare personnel, as well as chaplains,³⁷ judge advocates, and military or civilian law enforcement personnel.³⁸ 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:

Unrestricted Reporting Options	Restricted Reporting Options ³⁹
<ul style="list-style-type: none"> • Sexual Assault Response Coordinators (SARCs) • Victim Advocates (VAs) • Health Care Professionals or Personnel • <i>Chaplains</i> • <i>Legal Personnel</i> • <i>Chain of Command</i>⁴¹ • <i>Law Enforcement – Military Police or Military Criminal Investigative Organizations</i> 	<ul style="list-style-type: none"> • Sexual Assault Response Coordinators (SARCs) • Victim Advocates (VAs) • Health Care Professionals or Personnel • <i>Chaplains</i>⁴⁰ • <i>Legal Assistance Attorneys</i>

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

³³ 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.

³⁴ DoDI 6495.02 encl. 4, ¶ 1.b.

³⁵ *Id.*

³⁶ DoDI 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (May 1, 2013). See *infra* note 39.

³⁷ 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(3).

³⁸ Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. See *id.*

³⁹ See also DoDI 6495.02 encl. 4, ¶ 1.e(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.")

⁴⁰ 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(3).

⁴¹ Members of the chain of command and supervisory chain do not intake reports. Supervisors and leaders are trained to immediately contact their servicing SARC or VA, who will advise the victim of available services and options.

leadership development training, before and after deployments, and prior to filling a command position.⁴² 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.⁴³

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.⁴⁴ A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.⁴⁵ 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.⁴⁶

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.⁴⁷ Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and access to services for the victim.⁴⁸

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.⁴⁹ 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.⁵⁰

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(6, 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(3).

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.

accused serves as the "initial disposition authority" for all sexual assault allegations.⁵¹ 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.⁵² If a court-martial is warranted, charges alleging the offense(s) are preferred against the accused.⁵³ For any offense committed after June 24, 2014, the FY14 NDAA amends Article 18 of the UCMJ, to restrict jurisdiction for sexual assault offenses to general courts-martial.⁵⁴ In other words, if an offense warrants trial by court-martial, the case cannot be referred to a special court-martial. Instead, the offense may only be referred 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.⁵⁵

When charges are preferred for a sexual offense and forwarded to the GCMCA with a recommendation that the case be tried by general court-martial, the GCMCA must comply with prerequisite requirements prior to referring the case to trial. The GCMCA must ensure a thorough and impartial investigation was conducted in accordance with Article 32 of the UCMJ,⁵⁶ and he or she must refer the charges to his or her staff judge advocate for advice and consideration.⁵⁷

A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command.⁵⁸ Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6.⁵⁹ 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, there is probable cause to believe an offense was committed and the accused committed it, and there is jurisdiction over the person and offense; and a recommendation as to the disposition of the offenses.⁶⁰ Once the staff judge advocate has provided written advice and a disposition

⁵¹ DoDI 6495.02 encl. 5, ¶ 7.b (referring to Secretary of Defense Memorandum, "Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases" (Apr. 20, 2012) (hereinafter SecDef Withhold Memo), available at http://www.dod.gov/dodgc/images/withhold_authority.pdf).

⁵² SecDef Withhold Memo; see also *Transcript of RSP Public Meeting 210-11* (June 27, 2013) (testimony of Mr. Borch that "commanders do not make decisions in a vacuum . . . and their [j]udge [a]dvocates are involved at every step of the way"). Disposition may include no action, non-judicial punishment, administrative action such as administrative separation from the service, referral to a summary or special court-martial, or directing a pretrial investigation pursuant to Article 32 of the UCMJ, if the disposition authority determines a general court-martial may be warranted. See MCM, *supra* note 3, R.C.M. 306.

⁵³ 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 3, R.C.M. 307(a). Often, however, charges are preferred by unit-level commanders.

⁵⁴ As such, the SPCMCA will not have jurisdiction to refer any sexual assault offense to special court-martial, and any allegation warranting trial must be forwarded to the GCMCA for referral.

⁵⁵ See 10 U.S.C. § 806(b) (UCMJ art. 6(b)); see also *Transcript of RSP Public Meeting 239* (Sept. 25, 2013) (testimony of Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force); *id.* at 271-72 (testimony of Flora D. Darlino, The Judge Advocate General, U.S. Army).

⁵⁶ 10 U.S.C. § 832; MCM, *supra* note 3, R.C.M. 405. The FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 27, 2014.

⁵⁷ 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 3, R.C.M. 406.

⁵⁸ MCM, *supra* note 3, R.C.M. 103(17).

⁵⁹ See *Transcript of RSP Public Meeting 244* (June 27, 2013) (testimony of Captain Crow).

⁶⁰ 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 3, 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.

recommendation, the GCMCA may decide whether to refer the case to court-martial or send it to a lesser forum for adjudication.

To ensure more rigorous scrutiny of the decision to or not to refer charges for court martial, Section 1744 of the FY14 NDAA newly requires review of 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 decides not refer the charges, 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.⁶¹

Information presented to the Subcommittee indicates that convening authorities and staff judge advocates agree on the appropriate disposition of an allegation in the overwhelming majority of cases, but, a staff judge advocate's recommendation is not binding on the convening authority's decision. The convening authority may refer charges to court-martial, contrary to the staff judge advocate's recommendation, or he or she may otherwise dispose of charges contrary to the staff judge advocate's recommendation to proceed to trial.⁶² The staff judge advocate may communicate directly with the staff judge advocate of the superior commander or with The Judge Advocate General of their Service if he or she disagrees with the convening authority's decision.⁶³ Superior convening authorities also have authority to withdraw a decision from a subordinate commander and make their own determination on appropriate action.

VI. ADDITIONAL LEGISLATIVE AND POLICY CHANGES

a. National Defense Authorization Acts for Fiscal Year 2012, 2013 and 2014

Increased scrutiny over the U.S. military's handling of sexual assault cases has been the impetus for numerous statutory changes to the role of the commander in sexual assault cases.

Section 582 of the National Defense Authorization Act for Fiscal Year 2012 included a provision requiring commanding officers to consider applications for change of station or unit transfer for members on active duty who are the victim of a sexual assault or a related offense.⁶⁴ This law codified the expedited transfer policy implemented by the Department of Defense in December 2011.⁶⁵ Notably, from policy implementation through the end of calendar year 2012, commanders approved 334 of 336 transfer requests.⁶⁶

⁶¹ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1744(c),(d), 127 Stat. 672 (2013).

⁶² A review of criminal cases between 1 January 2010 and 23 April 2013 showed that Air Force commanders and their staff judge advocates agreed on appropriate disposition in more than 99 percent of cases where the staff judge advocate recommended trial by court-martial. *Written Statement of Lieutenant General Richard C. Harding 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 Role of the Commander Subcommittee Meeting 278-79* (Jan. 8, 2014).

⁶³ See 10 U.S.C. § 806 (UCMJ art. 6).

⁶⁴ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 582, 125 Stat. 1298 (2011).

⁶⁵ U.S. DEP'T OF DEF. DIRECTIVE-TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF MILITARY SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT (Dec. 16, 2011), available at <http://www.afpc.af.mil/shared/media/document/AFD-130416-051.pdf>.

⁶⁶ U.S. Dep't of Def., DoD Sexual Assault Prevention and Response Initiatives as of April 2013, available at <http://www.defense.gov/news/DoDSexualAssaultPreventionandResponseInitiatives.pdf>.

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.⁶⁷ 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.⁶⁸

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.⁶⁹ 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.⁷⁰ A number of other provisions in the FY14 NDAA also impact the role of the commander and courts-martial for sexual assault offenses.⁷¹

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.⁷² 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.⁷³ 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.⁷⁴

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

⁶⁷ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013).

⁶⁸ *Id.* at § 578.

⁶⁹ FY14 NDAA, *supra* note 61, at § 1702(b).

⁷⁰ *Id.*

⁷¹ *Id.* at §§ 1702, 1705, 1708, 1713, 1721, 1742, 1744, 1751.

⁷² Press Release, Sec'y of Def. Leon E. Panetta (Apr. 17, 2012), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013>.

⁷³ SecDef Withhold Memo, *supra* note 51.

⁷⁴ *Id.*

enhanced training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters.⁷⁵

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.⁷⁶ The initiative requires enhanced SAPR training for commanders and senior enlisted leaders.⁷⁷

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCMJ.⁷⁸ 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 "requir[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."⁷⁹

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.⁸⁰

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.⁸¹

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

⁷⁵ 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>.

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), available at http://www.sapr.mil/public/docs/news/Evaluation_of_Training.pdf.

⁷⁷ *Id.*

⁷⁸ Press Release, Secretary Chuck Hagel (Apr. 8, 2013), available at <http://www.defense.gov/releases/release.aspx?releaseid=15917>.

⁷⁹ *Id.* The FY14 NDAA codifies this requirement. See FY14 NDAA § 1702(b).

⁸⁰ U.S. Dep't of Def., 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), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5233>; see also U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013), available at http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf.

⁸¹ U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013), available at http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

President and leaders in Congress for the initiatives included in the FY14 NDAA, and affirmed DoD's commitment to effectively implement those initiatives.⁸²

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.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, 2013.⁸⁴ 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.⁸⁵ While the STOP Act was not incorporated into law, the bill was supported by 148 co-sponsors during the 113th Congress.⁸⁶

Expanding the STOP Act, the Military Justice Improvement Act of 2013 (MJIA), first introduced by Senator Kirsten Gillibrand (D-NY) on May 16, 2013, would divest convening authority from commanders for most serious crimes, not just sexual assault crimes.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.⁸⁸ On November 20, 2013, Senator Gillibrand filed a stand-alone version of this amendment, which is currently pending in the Senate.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.⁹⁰ The bill does not alter the role of the commander in referring sexual assault cases for prosecution.

⁸² U.S. Dep't of Def., Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), available at http://www.defense.gov/home/features/messages/secdef_hagel.aspx.

⁸³ See H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2011); H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevention Act (2013); S. 967, 113th Cong., Military Justice Improvement Act of 2013 (2013); S. 1197, § 552, amend. no. 2099 (2013); S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013).

⁸⁴ H.R. 3435, 112th Cong. (2011); H.R. 1593, 113th Cong. (2013).

⁸⁵ *Id.*

⁸⁶ H.R. 1593, 113th Cong. (2013).

⁸⁷ S. 967, 113th Cong. (2013).

⁸⁸ S. 1197, § 552, amend. no. 2099 (2013).

⁸⁹ S. 1752, 113th Cong. (2013).

⁹⁰ S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).

VII. RECENT SEXUAL ASSAULT REPORTING AND PROSECUTION TRENDS

The DoD Sexual Assault Prevention and Response Office (SAPRO) oversees DoD policy for the SAPR program and is responsible for oversight activities assessing SAPR program effectiveness. Pursuant to reporting requirements levied by Congress, DoD SAPRO maintains statistical data by fiscal year on restricted and unrestricted reports of sexual assault.

In Fiscal Year 2012 (FY12), DoD SAPRO reported the Services received 3,374 reports of sexual assault involving Service members as either victims or subjects.⁹¹ This number includes both restricted and unrestricted reports. The number of reports received in FY12 increased by 6 percent from Fiscal Year 2011 (FY11), and FY12 represented the highest number of reports received since DoD began tracking reports in 2004.⁹² FY12 reports increased for every Service,⁹³ and the number of service members making reports of sexual assault increased by 8 percent from FY11 and 33 percent compared to Fiscal Year 2007 (FY07).⁹⁴ Unrestricted reporting increased by 5 percent in FY12, and restricted reporting increased by 8 percent.⁹⁵ Restricted report conversions to unrestricted reports increased from 14.1 percent in FY11 to 16.8 percent in FY12.⁹⁶

In FY12, courts-martial charges were preferred in 68 percent of cases under military jurisdiction where sexual assault allegations were substantiated by investigation, up from 30 percent in FY07.⁹⁷ Cases resolved through nonjudicial punishment dropped from 34 percent to 18 percent over the same year comparison, and 157 of the 158 cases resolved in FY12 through nonjudicial punishment were for non-penetrating crimes.⁹⁸ According to DoD SAPRO, the differences in case resolution data from FY07 to FY12 indicate a "large change in how commanders are choosing to address the sexual assault charges brought to them by criminal investigators."⁹⁹

VIII. INITIAL ASSESSMENT CONCLUSIONS

The Subcommittee heard many perspectives and reviewed considerable information about the commander's role in the military justice system as the prosecutorial disposition authority for sexual assault allegations. Proponents advocating for system change and those defending the UCMJ's current convening authority framework offered differing opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what

⁹¹ DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 at 57 (May 3, 2013) [hereinafter FY12 SAPRO REPORT]. DoD SAPRO's sexual assault reporting data does not necessarily reflect the number of sexual assaults that occurred in a fiscal year, since a report may be made at any time.

⁹² *Id.* at 57-58. At the November 7, 2013, RSP public meeting, the DoD SAPRO Director provided initial estimates of Fiscal Year 2013 (FY13) reporting statistics. Preliminary data indicated receipt of more than 4,600 reports in FY13, a 46-percent increase over FY12. *Transcript of RSP Public Meeting 37-38* (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

⁹³ *Transcript of RSP Role of the Commander Subcommittee Meeting 174-75* (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); see also slide 6 of accompanying presentation, currently available at http://response.systemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131023_ROC/03_DoD_SAPR_Ovrw_20131023.pdf.

⁹⁴ FY12 SAPRO REPORT, *supra* note 91, at 59.

⁹⁵ *Id.* at 58.

⁹⁶ *Transcript of RSP Role of the Commander Subcommittee Meeting 166* (Oct. 23, 2013) (testimony of Dr. Galbreath); see also slide 6 of accompanying presentation.

⁹⁷ *Id.* at 177-78; see also slide 20 of accompanying presentation. Substantiated allegations also included lesser offenses that were resolved through nonjudicial punishment, other administrative actions, or administrative discharge.

⁹⁸ *Id.*

⁹⁹ *Id.* at 178.

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.

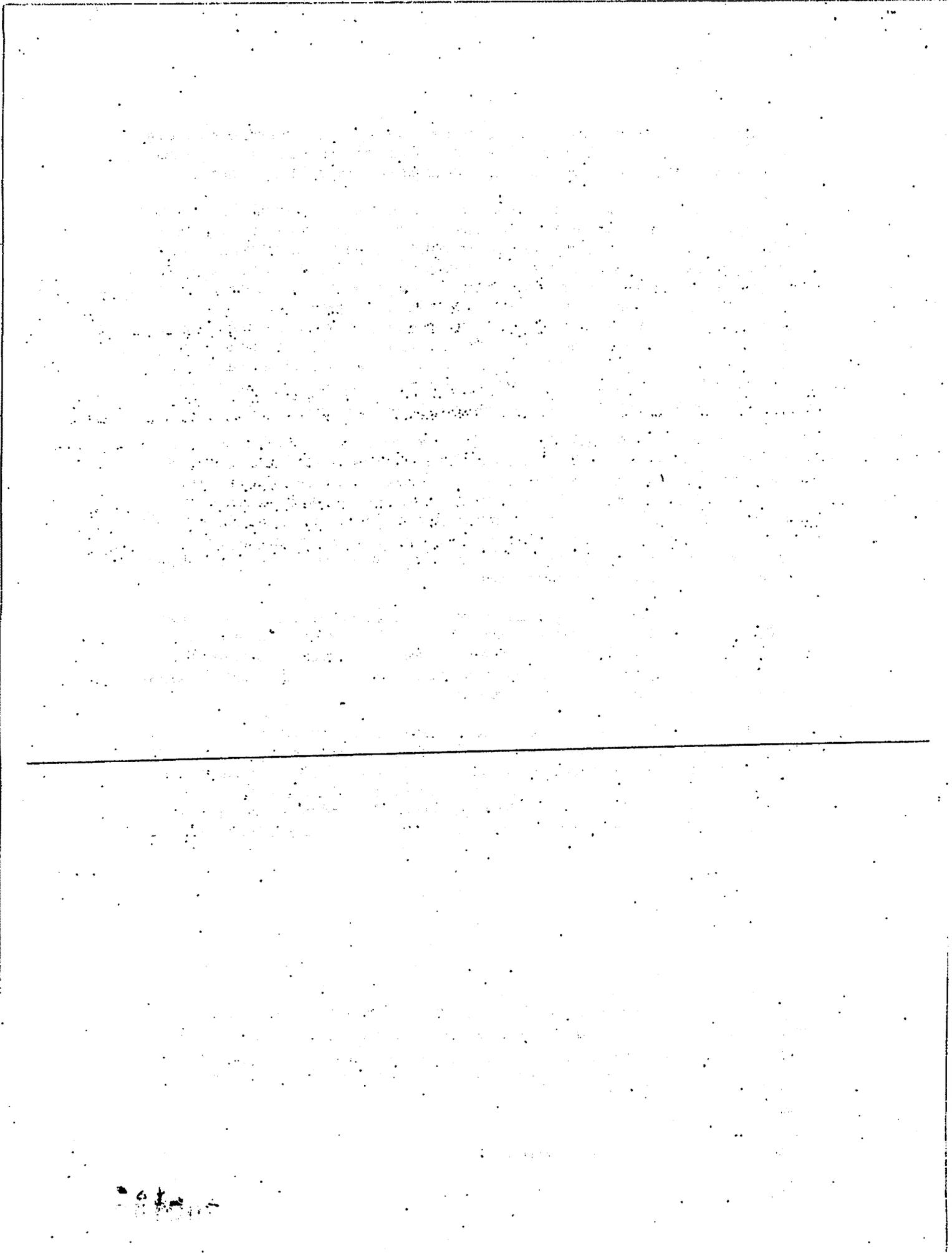
Irrespective of changes to senior commander authority in the military justice system, commanders and leaders at all levels must continue their focused efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and 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.

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.*



Response Systems Panel on Military Sexual Assault
Subcommittee on the Role of the Commander

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Provost & Academic Dean and Professor of Law
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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.¹ 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.² 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.³ We heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault.⁴ 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.

¹ See, e.g., U.S. COMMISSION ON CIV. RTS., *SEXUAL ASSAULT IN THE MILITARY: 2013 STATUTORY ENFORCEMENT REP. 2* (Sept. 2013), available at http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf; CENTER FOR AM. PROGRESS, *TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY'S SEXUAL ASSAULT PROBLEM 7-10* (Nov. 2013), available at <http://www.americanprogress.org/wpcontent/uploads/2013/11/MilitarySexualAssaults.pdf>.

² See, e.g., *Transcript of RSP Public Meeting 34-35, 50* (Sept. 25, 2013) (testimony of Major General Steven Busby, U.S. Marine Corps).

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/AS00/20130123/100231/HHRG-113-AS00-Wstate-WelshG-20130123.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.

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.⁵ 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.⁶ Commanders must overcome this by leading a cultural shift toward greater respect for gender 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.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.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.⁹ It will be further limited through recently enacted

⁵ DEF. MIL. DATA CENTER, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: TABULATIONS OF RESPONSES 18, available at http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/WGRA1201_TabVolume.pdf.

⁶ Written Statement of Elizabeth L. Hillman to the U.S. Commission on Civil Rights at 5 (Jan. 11, 2013) (quoting Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 POL. & SOC'Y 101 (2009)), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

⁷ See, e.g., *Transcript of RSP Public Meeting 31-32*, 50 (Nov. 7, 2013) (testimony of Major General Patton, noting recent Service directives that commands with more than 50 members be assessed on command climate, including sexual assault prevention and response, within 120 days of assumption of command, and annually thereafter); *Transcript of Role of the Commander Subcommittee Meeting 209-20* (Nov. 20, 2013) (testimony of Lieutenant General Howard Bromberg, U.S. Army, as to new requirements of reviews of command climate survey results and of sexual assault criteria on Officer Evaluation Reports); H.R. 3304, § 1721, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (requiring tracking of compliance of commanding officers in conducting organizational climate surveys); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 2 (Jan. 23, 2013) (discussing discipline of commanders at Joint Base San Antonio-Lackland following recent leadership failures). *But see* Craig Whitlock, *Behavior by Brass Vexes Military*, WASH. POST, Jan. 27, 2014, at A1.

⁸ The report of the Victim Services Subcommittee will help us assess the best ways to address these issues.

⁹ See, e.g., Press Release, "Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) (announcing elevation of convening authority in sexual assault cases), available at

changes.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."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 will order courts-martial to go forward regardless of the strength of the evidence.¹² 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.¹³ Whether there is sufficient

http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013; Transcript of RSP Public Meeting 194-97 (June 27, 2013) (testimony of testimony of Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps, describing judicialization of military justice system); United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994) (extending prohibition of unlawful command influence of Article 37, UCMJ, to anyone acting with "mantle of command authority").

¹⁰ 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).

¹¹ *United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986); see also 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).

¹² See, e.g., *Transcript of RSP Public Meeting 276-77 (Sept. 25, 2013) (testimony of Major General Vaughn Ary, U.S. Marine Corps); id.* at 277-78 (testimony of Rear Admiral Frederick Kenney, U.S. Coast Guard).

¹³ See, e.g., *Transcript of RSP Public Meeting 117-25 (Sept. 25, 2013) (testimony of senior staff judge advocates describing ethics rules to which staff judge advocates are bound and on which they are trained); see also Robert H. Jackson, The Federal Prosecutor, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).*

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.¹⁴ Yet no country with independent prosecutors has reported any such dire consequences.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.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.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.¹⁸ That goal is consistent with the procedural fairness that both

¹⁴ See *Transcript of RSP Public Meeting 41* (Sept. 24, 2013) (testimony of Lord Martin Thomas of Gresford, QC, describing opposition of British commanders prior to reforms); *id.* at 240-41 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service, describing sense of uncertainty prior to reforms among Australian commanders).

¹⁵ See *Transcript of RSP Public Meeting 71-73* (Sept. 24, 2013) (testimony of Lord Thomas); *id.* at 73-74 (testimony of Professor Michel Drapeau); *id.* at 181-82 (testimony of Major General Blaise Cathcart, Judge Advocate General of Canadian Armed Forces); *id.* at 226-28, 236 (testimony of Air Commodore Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).

¹⁶ See, e.g., *Transcript of RSP Public Meeting 19* (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis, Protect Our Defenders) ("[P]ossibly the biggest hurdle facing survivors of military sexual trauma is the continued involvement of the chain of command in prosecuting these crimes."); *id.* at 52-54 (testimony of Ms. Sarah Plummer that "when you're raped by a fellow service member, it's like being raped by your brother and having your father decide the case"); see also *id.* at 44 (testimony of Ms. Ayana Harrell); *Transcript of RSP Public Meeting 324* (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders); *id.* at 333-36, 407-08 (testimony of Mr. Greg Jacob, Policy Director, Service Women's Action Network); *Transcript of RSP Public Meeting 346-50* (Sept. 25, 2013) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders).

¹⁷ *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997); see also *Cooper v. United Kingdom*, 39 Eur. Ct. H.R. 8 (2003); *Martin v. United Kingdom*, 44 Eur. Ct. H.R. 31 (2006); DEF. L. POL'Y BD., REP. OF THE SUBCOMM. ON MIL. J. IN COMBAT ZONES 187 ((separate statement of Board Member Eugene R. Fidell).

¹⁸ See L. LIBR. OF CONG., MIL. J.: ADJUDICATION OF SEXUAL OFFENSES 4-5, 55-58 (July 2013); *Transcript of RSP Public Meeting 38-42* (testimony of Lord Thomas); *id.* at 223 (testimony of Air Commodore Cronan); *id.* at 156-58 (testimony of Major General Cathcart), see also L. LIBR. OF CONG., *supra*, at 42-43 (noting that Israel adopted Military Justice Law in 1955, which vested prosecutorial discretion in independent Military Advocate General). Many other countries subject to the European Court of Human Rights have either 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

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.¹⁹ 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.

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/PReleases/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>.

¹⁹ 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.").

OVERVIEW OF MENTAL HEALTH RECORD CONFIDENTIALITY
IN THE MILITARY JUSTICE SYSTEM

Military justice system protects psychotherapist-patient communications in three important ways:

1. Military Rule of Evidence (MRE) 513, Psychotherapist-patient privilege;
2. Department of Defense (DoD) Policy: DOD Instruction (DODI) 6490.04, *Mental Health Evaluations of Members of the Military Services* and DODI 6490.08, *Command Notification Requirements to Dispel Stigma in Providing Mental Health Care to Service Members*; and
3. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub.L. 104-191.

MRE 513 prevents the release of a patient's mental health records in a court-martial unless a military judge specifically rules they are necessary, and then only following a private review by the judge

-- Judges will first review records privately ("*in camera*") and order the records sealed prior to making any ruling on release. While there are other exceptions, generally records are not released unless the judge finds that a constitutional requirement exists, e.g., Confrontation Clause issues

-- There is no uniform federal or state rule with which to compare MRE 513; the federal system continues to rely on developing case law to define this privilege (also known as common law)

DoD Policy, implemented through DoD Instructions, seeks to foster a culture of support in the provision of mental health care in order to dispel the stigma of seeking mental health care.

-- Mental health providers do not notify commanders when a servicemember seeks mental health counseling unless a safety or operational necessity exists, for example:

- The servicemember presents a harm to self, others, or mission
- Special personnel, such as those overseeing nuclear weapons
- Inpatient care or acute medical conditions interfering with ability to perform duties
- Substance abuse treatment program (may impact ability to perform duties)
- Other special circumstances in which proper execution of the military mission outweighs the interests served by avoiding notifications.

-- Providers are cautioned to keep any disclosure to the minimum amount of information to satisfy the purpose of the disclosure, and when applicable, will advise how the commander or supervisor can assist the Servicemember's treatment.

HIPAA rules when combined with DoD rules, protect personally identifiable health information (PHI) in any form with limited exceptions. Medical and mental health records may not be used or disclosed without the patient's consent unless ordered by court order or subpoena, or to assure proper execution of the military mission and determine the member's fitness for duty.

-- When seeking any PHI without an individual's consent for law enforcement purposes, the same rules apply to military as civilians; victims also receive additional protections on how PHI is used

DETAILED BACKGROUND INFORMATION ON
MENTAL HEALTH RECORD CONFIDENTIALITY
IN THE MILITARY JUSTICE SYSTEM

M.R.E. Military Rule of Evidence (MRE) 513, Psychotherapist-patient privilege

- MRE 513 represents the balance of protecting confidential communications between a psychotherapist and a patient, the military's need to know the fitness of its members, and the interests of justice
- *General rule of privilege.* 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 (UCMJ), if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition. The words "under the UCMJ" in this rule mean Rule 513 applies only to UCMJ proceedings
- MRE 513(d)(8) allows admission or disclosure of a communication only when constitutionally required
 - "Constitutionally required" means the communication may be released only in narrow circumstances where the accused could show harm of a constitutional magnitude if such communication was not disclosed
 - Special care is taken to narrowly tailor the release of privileged communications to only those statements which are relevant and whose probative value outweighs the danger of unfair prejudice
 - MRE 513(e) sets the procedure for determining the admissibility of patient records or communications, which include the records of victims
 - A party must 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
 - The patient/victim must be notified that the motion has been filed and that the victim has the reasonable right to attend and be heard through counsel at a hearing that may be closed
 - The military judge shall examine the evidence *in camera* if such examination is necessary to rule on the motion
 - 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
 - The motion, related papers, and the record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise
- MRE 513 was based in part on proposed Federal Rule of Evidence (FRE) 504, which was never adopted.

-- *Jaffee v. Redmond*, 518 U.S. 1 (1996) established the psychotherapist-patient privilege in civil proceedings under FRE 501. This general privilege refers federal courts to the Constitution, Acts of Congress, Supreme Court rules, and the common law. In civil cases, state privilege laws also apply under FRE 501.

-- Some states have implemented Psychologist-Client Privileged Communications Statutes. While some of the statutes are explicitly modeled on attorney-client privilege, implementation varies. Virginia's statute, by contrast, is not modeled on attorney-client privilege but uses a "judicial discretion exception" in all court cases involving doctor-patient and therapist-client privilege. "...disclosure may be ordered when a court, in the exercise of sound discretion, deems it necessary to the proper administration of justice." (Code of VA § 8.01-399.)

Department of Defense Instruction (DoDI) 6490.08, August 17, 2011 & DoDI 6490.04, March 4, 2013

- It is DoD policy that:

-- The DoD shall foster a culture of support in the provision of mental health care in order to dispel the stigma of seeking mental health care

-- Healthcare providers shall follow a presumption that they are not to notify a Service member's commander when the Service member obtains mental health care

-- Healthcare providers shall notify the commander concerned when a Service member meets the criteria for one of the following mental health or related circumstances related to fitness and suitability for service (harm to self, harm to others, harm to mission, special personnel, inpatient care, acute medical conditions interfering with duty, substance abuse treatment program, command-directed mental health evaluation, other special circumstances in which proper execution of the military mission outweighs the interests served by avoiding notifications)

-- In making a disclosure, healthcare providers shall provide the minimum amount of information to satisfy the purpose of the disclosure, and when applicable, will advise how the commander or supervisor can assist the Service member's treatment

The Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub.L. 104-191

- The Department of Defense implemented specific rules to provide protection for personally identifiable health information or protected health information (PHI) under HIPAA with limited exceptions consistent with HIPAA's Privacy Rule. PHI includes medical and mental health records.

- PHI may be used or disclosed with the patient's consent

- PHI may be released as ordered by and only to the extent authorized by court order or administrative subpoena

- PHI of military members may be released to the appropriate military command authority to assure proper execution of the military mission and determine the member's fitness for duty

- PHI may be released for a law enforcement purpose to a law enforcement official, in compliance with and as limited by relevant requirements of a subpoena, summons or investigative demand, if the information sought is relevant and material to a legitimate law enforcement inquiry; the request is in writing, specific and limited in scope to the information that is sought; and information that does not identify the individual could not reasonably be used.

- PHI may be released in response to a law enforcement official's request for such information regarding a crime victim only if the victim consents; or, if the victim is unable to consent or there is some other emergency circumstance. If the victim is unable to consent, law enforcement must represent that the information won't be used against the victim and the information is necessary to investigate a crime committed by someone other than the victim.



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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IN REPLY REFER TO:

February 10, 2014

The Honorable Lindsey O. Graham
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Senator Graham:

Thank you for inviting me to provide my professional opinion on legislative proposals to remove commanders from the decision-making process for sexual assault crimes. While my comments of July 24, 2013 on the critical role of commanders in the military justice system are no less pertinent today, it is important to consider the meaningful changes made since then and the efforts underway to improve the military justice system and eliminate sexual assault from our ranks.

As you know, the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) includes more than thirty provisions related to military justice matters, ranging from statutory implementation of existing policy to significant changes to a commander's clemency authority and the nature of the Article 32 proceeding. Additionally, new programs, such as the Victims' Legal Counsel Program and the Deployed Resiliency Counselor program, and procedural changes requiring initial disposition decisions for sexual assault to be made by officers in the grade of O-6 or above who are designated as special court-martial convening authorities, represent important developments in military justice and in our care and support for victims.

Several comprehensive studies are underway that will assess the military justice system as a whole and measure the effectiveness of DoD efforts to prevent and respond to sexual assault. In October, the Secretary of Defense directed the General Counsel of the Department of Defense to conduct a broad review of the Uniform Code of Military Justice (UCMJ). This is the most substantial and comprehensive study of the military justice system by military justice experts and practitioners since 1983. Another critical assessment, directed by President Obama on December 20, 2013, will report on DoD progress in the area of sexual assault prevention and response and assess the need for any further changes to the military justice system. Additionally, the Navy, in cooperation with the other Services, continues to support the Joint Service Committee on Military Justice in its review of the changes mandated by the FY14 NDAA and in drafting implementing directives and regulations. Together, these reviews are poised to introduce fundamental reforms that ensure our justice system continues to hold offenders appropriately accountable, protects the due process rights of the accused, provides victim care and support, and maintains the highest standards of discipline.

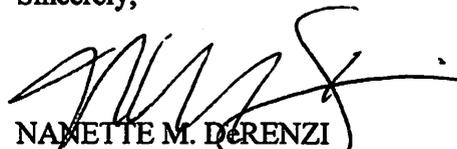
Finally, the Response Systems to Adult Sexual Assault Crimes Panel (RSP) continues its review and is expected later this year to provide a comprehensive assessment that will include thorough analysis on the role of the commander in the military justice system. Of note, after over six months of intense focus, the RSP recently found that the evidence does not support a conclusion that removing the authority of senior commanders to convene courts-martial will reduce the incidence of sexual assault, increase reporting, improve investigations and prosecutions, increase

conviction rates, or increase victim confidence in the fairness of the military justice system. It would be counterproductive to remove or curtail the role of the commander in military justice without the benefit of the Panel's complete insight and analysis.

In sum, I have continuing concerns about enacting of further legislation before we can assess the impact of recent legislation, policy changes, and new programs, and before the above-described efforts are complete.

Once again, thank you for the opportunity to offer my opinion as Congress weighs proposals to eliminate or diminish the authority of the commander in the military justice system. I am willing and ready to assist Members of Congress in understanding the potential second and third-order effects of proposed legislation and the possible adverse impact it may have on our shared goals.

Sincerely,



NAMETTE M. DERENZI
Vice Admiral, JAGC, U.S. Navy
Judge Advocate General



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IN REPLY REFER TO:

January 10, 2014

The Honorable Kirsten E. Gillibrand
United States Senate
Washington, DC 20515

Dear Senator Gillibrand:

On behalf of the Chief of Naval Operations, the following is provided in response to your letter of December 9, 2013, requesting data related to the administration of military justice within the Navy. I have listed each of your seven questions followed by the Navy's responses from available data we have collected.

1. How many active duty officers in the Navy currently serve in a command position? Of those commanders, how many have UCMJ authority over the members of their command?

There are currently 1,422 active duty Navy officers serving in command positions. Of those officers, all 1,422 have the authority to impose nonjudicial punishment (NJP) pursuant to Article 15 of the Uniform Code of Military Justice (UCMJ); however, not all have authority to convene courts-martial.

2. Of the commanders with UCMJ authority, how many are Summary Court Martial Convening Authorities? How many are Special Court Martial Convening Authorities? How many are General Court Martial Convening Authorities?

Of the 1,422 officers with authority to impose NJP, approximately 90%, or 1,280 officers, are Special Court-Martial Convening Authorities (SPCMCA). These SPCMCA's are also Summary Court-Martial Convening Authorities (SCMCA), as SCMCA is inherent in SPCMCA. The remaining 10% (approximately 142 officers) have NJP authority, but do not have court-martial convening authority (e.g., an admiral granting authority, in accordance with U.S. Navy Regulations, to an O-6 chief of staff to impose NJP on enlisted personnel within the command).

Of the 1,422 officers with authority to impose NJP, 200 (14%) are General Court-Martial Convening Authorities (GCMCA). All Flag officers in command of units or activities of the Navy are GCMCA's, as are certain O-6 commanding officers designated by the Secretary of the Navy. These officers are also SPCMCA's and are included in the figures above.

3. How many officers with command authority have their convening authority privileges withheld, particularly by the General Court Martial Convening Authority? For example, the first flag officer in the chain of command might withhold the authority to punish certain offenses.

In accordance with Secretary of Defense direction on April 12, 2012, the Navy withheld initial disposition authority (to include NJP, SCMCA, and SPCMCA) from all O-5 and below commanding officers for specified sexual assault and collateral offenses. Aside from this

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specific action, withholding of convening authority is rare. For example, in the USS Enterprise "XO Movie Night" cases in 2011, convening authority was withheld from individual commanders and consolidated under one disposition authority in order to ensure appropriate investigation and accountability for multiple officers that had transferred to different commands.

4. *What percentage of Article 15 punishments are offered by active duty officers in a command position who are not Convening Authorities?*

In fiscal years 2012 and 2013, 305 of 17,097 NJPs (1.8%) were imposed by active duty officers in a command position who are not Convening Authorities. Additionally, 763 NJPs (4.5% of the total) were imposed by Officers-in-Charge (OICs) who are also not Convening Authorities. Your question requested information over the past four years; however, pursuant to the Department of the Navy's Record Management Manual (SECNAV M-5210.1) implementing 44 U.S.C. Chapter 33 (Records Disposal), the Navy only retains NJP records at the command level for two years.

5. *What percentage of commanders who have the ability to administer Article 15 punishments do not also have the authority to convene a General Court Martial? Please specify the data used to obtain this percentage.*

Approximately 86% of officers with authority to impose NJP do not also have GCMCA. This percentage reflects that there are currently 1,422 officers in command with authority to impose NJP, including 200 O-6 and above officers with GCMCA and 1,222 O-6 and below officers who do not have GCMCA.

6. *What percentage of Article 15 punishments are administered by General Court Martial Convening Authorities?*

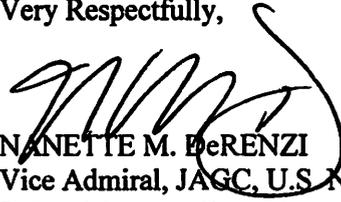
Approximately 6.5% of Article 15 punishments were imposed by GCMCAs over the past two fiscal years. This percentage reflects that there was a total of 17,097 NJPs, with 1,110 of those NJPs imposed by GCMCAs.

7. *What percentage of Article 15 punishments are administered for one of the offenses that are excluded from the Military Justice Improvement Act? A complete list of the excluded offenses is attached.*

The Navy does not compile and report the requested information.

If I may be of any additional assistance, please let me know.

Very Respectfully,


NANETTE M. BERENZI
Vice Admiral, JAGC, U.S. Navy
Judge Advocate General

2

I would welcome the opportunity to discuss our mutual desire and commitment to eliminate sexual assault in the military.

402831



DEPARTMENT OF THE NAVY
 HEADQUARTERS UNITED STATES MARINE CORPS
 3000 MARINE CORPS PENTAGON
 WASHINGTON, DC 20350-3000

IN REPLY REFER TO:
 5800
 JAM

10 FEB 2014

The Honorable Lindsey Graham
 Committee on Armed Services
 United States Senate
 Washington, DC 20510

Dear Senator Graham,

I am writing in response to your letter of February 10, 2014. Thank you for the opportunity to comment on proposed legislation regarding a commander's decision-making authority in certain military justice actions, including sexual assaults. The Marine Corps takes the crime of sexual assault very seriously, and is working hard to prevent sexual assaults from occurring, and if they do occur, to have world-class response systems in place. Marine commanders at all levels are successfully leading our efforts, and are the key to future continued success. I believe that an essential aspect of our commanders' ability to win the fight against sexual assault is their ability to convene courts-martial for Marines accused of sexual assault. I will briefly address three areas in support of my position: (1) Marine Corps' efforts and successes in fighting sexual assault; (2) commandership and discipline in general; and (3) current studies and changes of military justice.

Marine Corps' efforts to fight sexual assault

Over the last two years, the Marine Corps has aggressively attacked sexual assault, with commanders leading the way. Beginning in the summer of 2012, the Commandant of the Marine Corps directed an operational planning team to come up with a comprehensive plan to eliminate sexual assault and encourage victims to trust that their reports of sexual assault were taken seriously. The result of the planning team was the Commandant's Sexual Assault Campaign Plan, which he signed in June 2012. The Commandant also traveled around the world in 2012, bringing the message to his Marines that our heritage and behavior as individual Marines, not just as combat technicians, is what makes us successful on the battlefield. The Campaign Plan, with its accompanying overhaul of sexual assault and response training, has been tremendously successful in increasing victim trust in the chain of command. In FY 2013, the Marine Corps experienced over an 80% increase in total sexual assault reporting. A significant portion of this reporting related to alleged offenses that occurred prior to their entry into the Marine Corps, or over one year before the date of the report. This increased reporting tells us two very important things. First, direct and engaged leadership by commanders can increase victim confidence in the chain of command and the military justice system. This increased reporting is an important bridge to both victim care and offender accountability. Second, increased reporting will require an appropriate increase in the resources available to deal with the effects of increased reporting.

The Commandant anticipated that his Campaign Plan would increase reporting, and therefore restructured the Marine Corps legal community to ensure that it was equipped to handle a corresponding increase in sexual assault cases. In October 2012, the Marine Corps completely restructured its legal community into a regional model with Regional Trial Counsel offices that contain an ability to assemble Complex Trial Teams for all types of complex prosecutions, including sexual assaults. This restructuring enabled the Marine Corps to successfully handle the corresponding increase in courts-martial that naturally follows an increase in reporting. Between FY 2012 and FY 2013, Marine Corps adult and child

sex offense prosecutions increased from 59 to 119. Separate from the expected increase in reporting and prosecutions, the Marine Corps' Victims' Legal Counsel Organization (VLCO) was created and became fully operational on January 1, 2014. The USMC VLCO provides legal representation by uniformed judge advocates to victims of all crimes, in addition to the FY14 NDAA requirement for victims of sexual assault. The new VLCO contains 15 new judge advocate billets that require military justice experience.

My main focus as the senior uniformed lawyer in the Marine Corps is to ensure I have the right judge advocates in the right billets, with the right supervisors, to handle the changing nature of our military justice practice. This includes not only the prosecutors and VLCO counsel I have already mentioned, but defense counsel to zealously represent our Marines accused of Uniform Code of Military Justice (UCMJ) violations. With this in mind I must note that separate from our increase in sex offense-related prosecutions, between 2012 and 2013, we experienced approximately an 8% increase in general courts-martial, and approximately a 12% increase in contested courts-martial, with nearly 50% of all of our courts-martial being contested. These more serious, and resource-heavy, cases represent the types of cases that would be removed from the commander under the proposed legislation you asked me to comment on. The proposed legislation directs that the Services implement it in a resource-neutral fashion. However, I believe the legislation will require a significant increase in experienced judge advocate billets in addition to our currently existing requirements. If directed to implement the legislation with current resources, I would have to remove experienced judge advocates from key billets in the areas of staff judge advocates, military judges, prosecutors, defense counsel, and VLCO counsel. I believe personnel assignments of this nature would critically hurt the fair and efficient administration of military justice. I do not believe this an acceptable risk of the proposed legislation, especially considering the lack any potential improvement to our current convening authority-based military justice system.

Commandership and Discipline

While commanding the Continental Army, George Washington stated: "Nothing is more harmful to the service than the neglect of discipline; for that discipline, more than numbers, gives one army superiority over another." This statement is still true today, but I believe that in current discussions about the "role of the commander in military justice," the definition or concept of "discipline" has been distorted. Discipline is more than following orders and being on time to a military function. The profession of arms is more than a "job" and our responsibility to be ethical, lawful, and disciplined warriors exists in both peace and during the chaos of combat. Commanders must therefore hold Marines responsible for their full range of behavior, not just their ability to perform military tasks. Marines must know that any offense against the greater societal good—whether a "military society" offense or a "civilian society" common-law criminal offense—is an offense against "good order and discipline" a commander will address. If we do not continue to trust our commanders to handle this full spectrum of discipline, we will lose our superiority as a fighting force that General Washington described. I firmly believe we can and should trust our commanders in this role, but I also believe that evolutionary, vice revolutionary, changes in our military justice system can make our system even better, especially in the area of sexual assault.

Current studies and changes in military justice

I have closely followed the work of the Congressionally-created Response Systems Panel (RSP), and I completely agree with the RSP's Role of the Commander Subcommittee's January 29, 2014 "Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial." The Subcommittee found, and the full RSP preliminarily agreed by a 7-2 vote, that:

[T]he 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

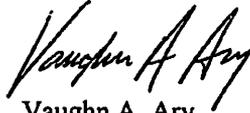
reporting of sexual assaults in the Armed Forces. Nor does the evidence indicate it will improve the quality of investigations and prosecutions or increase the conviction rate in these cases. Further, the evidence does not support a conclusion that removing such authority will increase confidence of 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.

Taking the RSP's findings and the Marine Corps' commander-led successes in the fight against sexual assault, I find no reason to implement the proposed legislation. As I stated earlier in this letter, I do support evolutionary change, and I think it is important to note that the FY14 NDAA will greatly change not only sexual assault prevention and response programs, but the overall practice of military justice. Significant changes have been made to every phase of the military justice process, with the main goal of increasing victim confidence in the military justice system. I have attached a chart that depicts the comprehensive nature of the NDAA changes. Keeping in mind that a criminal justice system should be relatively stable and predictable, and that major changes to it should be implemented, executed, and measured for success before undertaking revolutionary change, I strongly caution against removing the commander's central authority under the UCMJ.

I believe the Department of Defense should be given time to implement the FY14 NDAA and measure its impact. While that is happening, I eagerly await the final recommendations of the Response Systems Panel, the formation and findings of the RSP's follow-on Judicial Proceedings Panel, and the Secretary of Defense-directed comprehensive review of the UCMJ. As an indicator of my support for evolutionary and deliberate changes to our military justice system, I have assigned three judge advocates to the Secretary of Defense's study, including an experienced military justice practitioner who is coming straight from a trial judge's billet.

I look forward to continued engagements with Congress as we share the same goals of fighting sexual assault and ensuring the United States military remains the most disciplined and effective fighting force in the world.

Sincerely,



Vaughn A. Ary
Major General, U.S. Marine Corps
Staff Judge Advocate to the
Commandant of the Marine Corps

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Prevention & Response	§1711 – Prevention of entry into service of convicted sex offenders	§1722 – Shortened RSP deadline	§1725 – Min. requirements for SAPR personnel		
	§1746 – Service Academy initial SAPR training	§1731 – Additional RSP duties	§1725 – SANE availability at MTFs		
	§1741 – Report to Congress on need for specific UCMJ article regarding prohibited relationships with recruits and trainees		§1733 – Review of SAPR training		
	§1741 – Regs on inappropriate conduct with recruits and trainees (mandatory separation processing)		§1726 – Added DOD SAPRO responsibilities		
	§1734 – SecDef review of retention of, and access to, evidence and records relating to sexual assault	§1721 – Verification of command climate surveys	§1735 – SecDef review of how sexual harassment is handled (EO vs. SAPRO?)		
All phases of a court-martial	§1701 – Add Crime Victims’ Rights Act to UCMJ	§1704 – DC must go through TC to interview victim	§1716 – Special Victims Counsel requirement		
	§1701 – Crime Victims’ Rights Act implementing regulations	§1703 – Eliminate SOL for sexual assault and sexual assault of a child	§1707 – Repeal of consensual sodomy		
Reporting	§1724 – NG & Reserve access to SARCs	§1751 – Sense of Congress on command climate free of retaliation for allegations of sexual assault			
	§1712 – Expedited transfer for USCG	§1715 – IG investigation of retaliation claims in sexual assault and sexual harassment cases			
	§1743 – SecDef policy on use of 8-day incident report for alleged sexual assaults	§1714 – Expanded whistleblower protection (e.g., broadens unfavorable personnel actions and covered communications)			
	§1713 – Guidance on transfer of an accused following an allegation of sexual assault	§1709 – Service regulations to prohibit retaliation against members who report a criminal offense			
	§1723 – 50 year retention of restricted reports	§1709 – Report due on establishing a new punitive article for retaliation offenses			
	Investigation	§1732 – SecDef review of MCIO investigative practices	§1742 – Immediate referral of sexual assault allegations to MCIO		
Pre-Trial	§1752 – Sense of Congress on disposition of sex offenses via court-martial	§1753 – Sense of Congress on discharge in lieu of court-martial			
	§1708 – Elimination of “character and military service of accused” as a factor in disposition decision	§1702 – Complete revision of Article 32 (now a probable cause “preliminary hearing”)	§1744 – Review of decisions not to refer sexual assaults		
Trial	§1705 – Mandatory GCM jurisdiction for penetration offenses	§1705 – Mandatory dismissal for DD for penetration offense convictions			
Post-trial	§1702 – Complete revision to commander’s authority to take post-trial action	§1706 – Victim participation in clemency phase	§1745 – Inclusion and command review of records of sex-related offenses		
Effective dates	Immediate	25 Apr 14 (120 days)	24 Jun14 (180 days)	June 2014	26 Dec 14 (1 year)



Military Justice Overview

United States Marine Corps

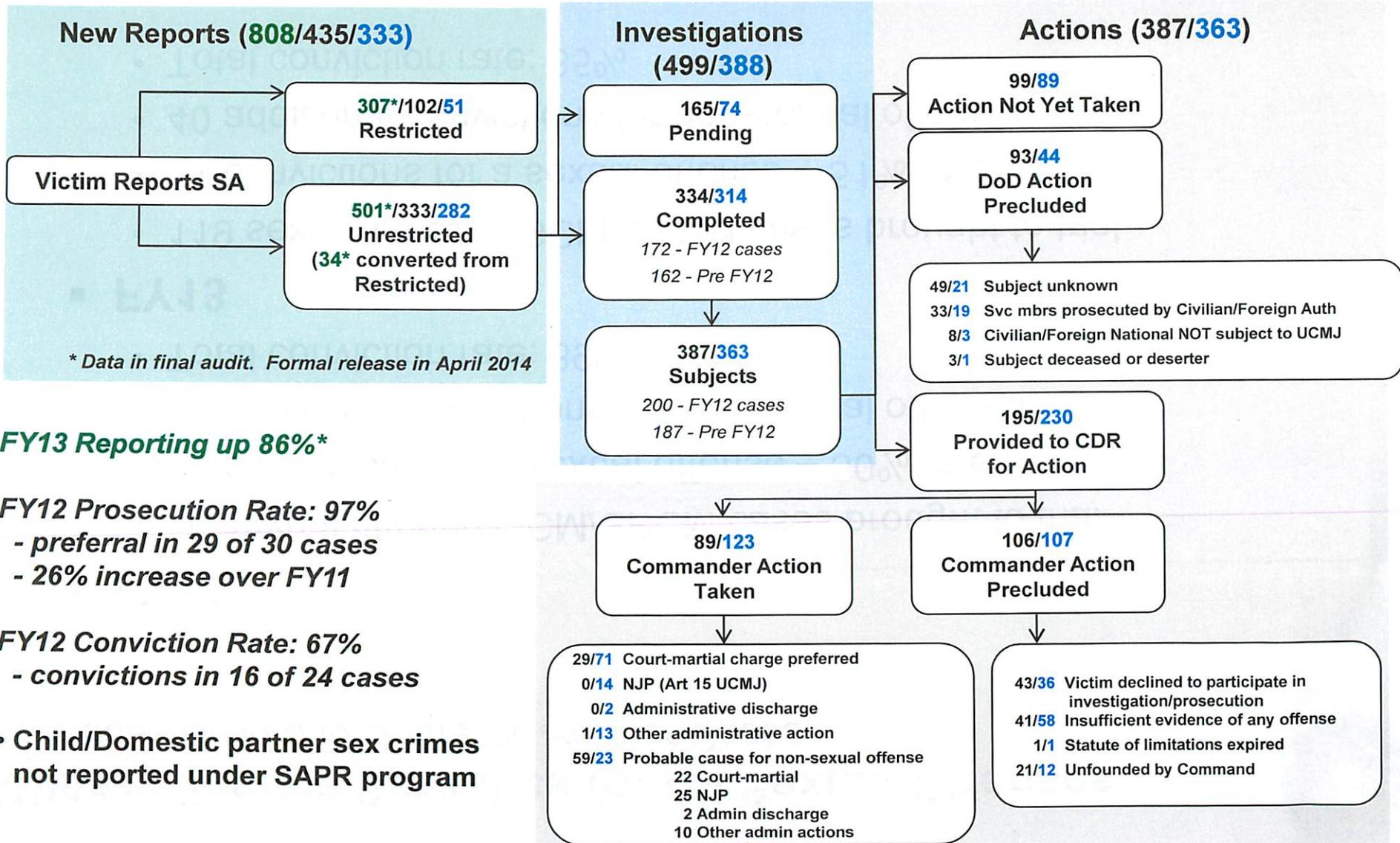
Overview



- **Sexual assault reporting FY11-FY13 and FY12 “waterfall”**
- **Military justice statistics for all sexual offenses**
- **2012 legal community restructuring**
 - **Complex Trial Teams**
- **Victims’ Legal Counsel Organization (VLCO)**
 - **Supports victims of all offenses**
- **CMC-directed judge advocate personnel review**

USMC Annual Report Data

FY13/FY12/FY11 Results



* Data in final audit. Formal release in April 2014

FY13 Reporting up 86%*

FY12 Prosecution Rate: 97%

- preferral in 29 of 30 cases
- 26% increase over FY11

FY12 Conviction Rate: 67%

- convictions in 16 of 24 cases

- Child/Domestic partner sex crimes not reported under SAPR program



Military Justice Statistics for All Sexual Offenses

** Includes Child and Domestic Partner Cases*

■ FY12

- 56 sexual offense GCM/SPCM cases brought to trial
- 28 convictions for a sexual offense – 50% rate
- 22 additional convictions for non-sexual offenses
- Total conviction rate: 89%

■ FY13

- 119 sexual offense GCM/SPCM cases brought to trial
- 61 convictions for a sexual offense – 51% rate
- 40 additional convictions for non-sexual offenses
- Total conviction rate: 85%

- From FY12-FY13, 160% increase in contested sex offense cases.



Judge Advocate-related structure changes

FY12 legal community restructuring

- Regional Complex Trial Teams (CTT) are task-organized for specific cases with embedded support by experienced prosecutors, criminal investigators, admin, and civilian Highly Qualified Experts (HQEs).
- The Trial Counsel Assistance Program (TCAP) ensures the availability of advanced training for counsel across the Marine Corps, including courses on Prosecuting Alcohol-Facilitated Sexual Assault, Advanced Litigation and Trial Advocacy, and others.
- These and other capabilities have allowed the Marine Corps to maintain high quality of practice while prosecuting an increased quantity of sex offense cases arising from the increase in reporting of sex offenses.

USMC Victims' Legal Counsel Organization (VLCO)

- 15 active duty, full-time judge advocates organized in a regional model that mirrors prosecution and defense organizations.
- Provides legal advice and representation to eligible victims of crime.
 - Eligibility: Active duty members, reservists on active duty, and their dependents who are victims of sexual assault or other crimes.
- Between 1 Nov 13 and 21 Feb 14, 247 victims have used VLCO services.
 - 60% were victims of sexual assault.

2014 – CMC-directed review of judge advocate personnel policies

- Reinforce and ensure success of 2012 restructuring and VLCO.
- Ensure we have properly trained and qualified judge advocates to serve as military judges and supervisors in our prosecution, defense, and VLCO sections.