

Response Systems Panel
Public Meeting - December 12, 2013

The Response Systems to Adult Sexual Assault Crimes Panel (RSP) is a federal advisory committee within the Department of Defense (DoD) operating pursuant to Section 576(a) of the National Defense Authorization Act for Fiscal Year 2013, the Federal Advisory Committee Act of 1972, The Government in Sunshine Act of 1976, and other appropriate federal regulations. The RSP held a public meeting on December 11-12, 2013.

The public meeting on December 12, 2013 began at 8:32 a.m. and concluded at 6:24 p.m. in the Multipurpose Room in the San Jacinto Residence Hall at the University of Texas at Austin, 309 East 21st Street, Austin, TX. These minutes reflect the substance of the meeting on December 12, 2013. The minutes for the December 11, 2013 portion of the public meeting are filed separately. The meeting was recorded and transcribed by a court reporter. A copy of the transcript is appended to these minutes and is incorporated by reference.

Participants:

Honorable Barbara S. Jones – Chair
Honorable Elizabeth Holtzman
Brigadier General (Ret.) Malinda Dunn
Colonel (Ret.) Holly Cook
Professor Elizabeth Hillman
Vice Admiral (Ret.) James Houck (by phone)
Brigadier General (Ret.) Colleen McGuire
Mr. Harvey Bryant

Response Systems Panel Staff:

Colonel Patricia Ham, USA, Staff Director
Mr. Dillon Fishman, Staff Attorney

Other Participants:

Mr. William Sprance, Designated Federal Officer

Presenters:

Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office
Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
Captain Jason Brown, Military Justice Officer, Military Justice Branch (JAM), Judge Advocate
Division, Headquarters Marine Corps, U.S. Marine Corps
Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, Air Force
Legal Operations Agency, U.S. Air Force
Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General
Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence
Section, U.S. Attorney's Office, District of Columbia
Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender

Response Systems Panel
Public Meeting - December 12, 2013

Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, U.S. Army Trial
Defense Service, U.S. Army
Lieutenant Colonel Michael Lewis, Chief, Military Justice Division, U.S. Air Force
Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S.
Army
Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast
Guard
Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program, U.S. Army
Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate
General, U.S. Army
Anne Munch, Owner; Anne Munch Consulting, Inc.
Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County
District Attorney's Office
Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
Commander Aaron Rugh, Director, U.S. Navy Trial Counsel Assistance Program, U.S. Navy
Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine
Corps Defense Services Organization, U.S. Marine Corps
Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of
Criminology and Criminal Justice, Arizona State University
James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District
of Columbia
Lieutenant Colonel Devin Winklosky, Vice Chair and Professor, Criminal Law Department, The
U.S. Army Judge Advocate General's Legal Center and School, U.S. Marine Corps

PANEL MEETING

Introductory Remarks

At 8:32 a.m., Mr. William Sprance, the Designated Federal Officer, opened the meeting. Colonel Patricia Ham, RSP Staff Director, and the Hon. Barbara Jones, RSP Chair, provided opening comments. Chairwoman Jones introduced the first speaker.

The Unnamed Conspirator in Sexual Assault Cases: Prosecuting Sexual Assault Cases

Ms. Anne Munch, Esq., Owner, Anne Munch Consulting, Inc.

Ms. Munch discussed the “Unnamed Conspirator” in sexual assault cases. As an inexperienced prosecutor she thought there were two parties to a sexual assault, the victim and the perpetrator, and that justice was determined based on what happened between those two parties. Ms. Munch realized she was wrong. She informed the Panel that personal and societal perceptions and

Response Systems Panel
Public Meeting - December 12, 2013

beliefs about sexual behaviors can create an environment that influences how juries decide sexual assault cases. She stated that jurors will discount the evidence and acquit a perpetrator, blaming the victim for the assault; and victims continue to blame themselves.

Question and Answer from the RSP Members to Ms. Munch

The Panel members asked questions about male on male assaults and prevention efforts aimed at alcohol use.

Overview of Article 120, Uniform Code of Military Justice

Lieutenant Colonel Devin Winklosky, U.S. Marine Corps, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School

Lieutenant Colonel Winklosky provided an overview of the evolution and history of Article 120, Uniform Code of Military Justice (UCMJ), the statute that criminalizes sexual assault offenses within the military. He stated that over the last few years, Article 120, UCMJ, has undergone significant revision twice, in 2007 and in 2012. He informed the Panel that one of the major issues is that there are times when all three versions of Art 120 apply in one case. Major differences between the three versions of the statute include issues of consent and the capacity to consent. Lieutenant Colonel Winklosky stated that the law has changed, as have cultural norms regarding acceptable behavior.

Question and Answer from the RSP Members to the Lt. Col. Winklosky

The Panel members asked questions about various defenses, to include the Good Soldier Defense, consent, and incapacitation issues.

Disposition of Military Sexual Assault Cases ("Waterfall Slides")

Each of the uniformed services provided a statistical analysis of the disposition of sexual assault subjects under jurisdiction of the Department of Defense. Only substantiated reports based on unrestricted reports investigated by each service's criminal investigative service were included in the information provided.

Captain Jason Brown, Captain Robert Crow, Lieutenant Colonel Michael Lewis, Lieutenant Colonel Erik Coyne, and Captain Stephen McCleary presented data collected based on Department of Defense Sexual Assault Prevention and Response Office (DoD SAPRO) collection criteria. Colonel Mulligan and Ms. Janet Mansfield presented additional information on behalf of the U.S. Army for several sexual offenses defined by the 2007-2012 version of Article 120, UCMJ.

Each of the presenters explained Service-specific nuances of definitions and categories used in capturing and evaluating the relevant data. The Service representatives pointed out that information on action taken would not capture the results of cases prosecuted in other civilian

Response Systems Panel
Public Meeting - December 12, 2013

jurisdictions and any subsequent military action. Further, once a case is categorized, that classification is not changed even if the charges are subsequently modified.

Question and Answer from the RSP Members to the Military Presenters

RSP members asked whether the Services keep records of any disagreement between the recommendation by the Article 32 Investigating Officer and the recommendation of the commander and the supporting SJA. Questions were asked concerning who has the authority to determine that the evidence is insufficient and that allegations are unfounded. The Panel members also asked about the difference between “insufficient evidence” and “unfounded.”

Statistical Analysis of the Military Services’ “Waterfall Slides”

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

Dr. Spohn assessed the Services’ methodology in presenting sexual assault disposition data and she tried to compare civilian and military disposition data. Dr. Spohn addressed challenges of comparing civilian and military outcomes, including differences in definitions, use of restricted and unrestricted report data, concurrent and overlapping jurisdictional authorities for military offenders, and that the military data is more comprehensive and in depth than that which is normally collected in civilian jurisdictions. Dr. Spohn noted that comparison is difficult in part because prosecution rates are calculated differently from civilian jurisdictions and across services. She made recommendations to establish consistency in definitions and data collection for increased accuracy.

Dr. Spohn also addressed that civilian jurisdictions previously faced problems with patrol officers unfounding reports if they did not believe that the victim was credible; those cases were never counted in the sexual assault statistics. Dr. Spohn noted that in 2012 the unfounding rate in the military increased; she recommended that this be studied to determine the cause.

Question and Answer from the RSP Members to Dr. Spohn

RSP members asked questions about those cases in which no action was taken because of insufficient evidence, and if there was a correlation with a victim’s refusal to cooperate.

The Panel recessed for lunch.

Training, Experience and Best Practices: Comparison of Military and Civilian Defense Counsel

Commander Don King, U.S. Navy, Director, Defense Counsel Assistance Program.

Commander King provided an overview of Naval legal training for defense counsel. After graduating from the basic legal course, Navy JAGs must work for 24 months in advocacy before they are eligible to be a defense counsel. They must attend the Defense Counsel Orientation and

Response Systems Panel
Public Meeting - December 12, 2013

Trial Advocacy training. They also attend a one-week Defending Sexual Assault Cases class and attend civilian course when time and funds are available.

Lieutenant Colonel Fansu Ku, U.S. Army, Chief, Defense Counsel Assistance Program, U.S. Army Trial Defense Service.

LTC Ku discussed the work being done through the Defense Counsel Assistance Program (DCAP) to assist and train defense counsel. DCAP has five experienced practitioners assigned along with two highly qualified experts (HQEs). Attorneys must have prior military justice experience. She stated that Army defense lawyers provide independent, competent, and ethical legal assistance to their clients.

Lieutenant Colonel Julie Pitvorec, U.S. Air Force, Chief Senior Defense Counsel.

Lt Col Pitvorec advised that the Air Force does not currently have a DCAP, but creating that capability is a priority. Selection to be defense counsel in the Air Force is competitive, and attorneys must have two to five years of trial counsel experience before becoming a defense attorney. The Air Force JAG School is responsible for training defense counsel. She stated that one challenge is that these officers are only in the position for 18-24 months. They do attend a Sexual Assault Litigations course, with both an intermediate and advanced class.

Captain Scott (Russ) Shinn, U.S. Marine Corps, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization.

Captain Shinn explained some issues in defending sexual assault cases. He believes some Marines are falsely accused. A Marine defense counsel assignment is normally only for 18 months. He stated that defense attorneys do not enjoy the same resources as the prosecution and have to fight for access to witnesses and other resources. He recommends creation of a billet for Criminal Investigations Division (CID) agents in each defense office to provide the defense with an independent investigator. The Marine Corps defense attorneys attend many of the courses provided by sister services, but have to rely on other agencies for training support. The Marine Corps has been able to locate money, but it is not "fenced," meaning set aside specifically for sexual assault training, and therefore not guaranteed.

Mr. Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, OR.

Mr. Borg explained their attorneys do not specialize in sexual assault, but handle a variety of cases. They have a staff of 60 attorneys and 20 in-house investigators. Mr. Borg explained recent developments in use of risk assessments to inform plea negotiations and sentencing considerations.

Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender.

Ms. Kepros briefly explained the scope of Colorado sexual assault caseloads prior to describing training programs and continuing education for public defenders in the State of Colorado. She stated there is a need for consistent, specialized training relating to consequences of sexual assault allegations and convictions. Adequate resourcing of relevant training is required to maintain competence in an evolving defense practice.

Response Systems Panel
Public Meeting - December 12, 2013

Ms. Amy Muth, Esq., Attorney-at-Law, The Law Office of Amy Muth.

Ms. Amy Muth emphasized the need for experienced counsel to work in criminal defense and stated that defense counsel have a duty to investigate independently serious crimes; resourcing those investigations is crucial to an attorney's zealous representation.

Mr. Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department.

Mr. Porter described the scope of the New Mexico Public Defender program. Sex offenses are among the most challenging cases, and should be defended by experienced counsel. Relevant, in-depth training in criminal forensics and evidence specific to sex offenses are important in these cases. Mr. Porter recommended training of both prosecutors and defense counsel on vicarious trauma, and how it may have a lasting impact on counsel working in sex crimes. He opined that if the prosecution has special teams for sexual assaults, defense should also have special teams.

Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia.

Mr. Whitehead explained that the D.C. Public Defender Service office receives a lot of training, and they provide training to others. New attorneys are assigned to juvenile cases for the first year and must attend a ten-week course which includes skills training and a mock trial. Major crimes such as sex offenses, aggravated assaults, and homicide cases are only assigned to the most experienced counsel. He was surprised to hear that military defense attorneys do not have their own investigators.

Question and Answer from the RSP Members to the Military and Civilian Defense Counsel

RSP members asked questions about defense access to expert witnesses and limitations in access because a judge cannot step in until the case is referred to trial.

Training, Experience and Best Practices: Comparison of Military and Civilian Prosecutors

Colonel Don Christensen, U.S. Air Force, Chief, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency

Colonel Christensen stated that the Air Force Government Trial and Appellate Counsel Division has ensured that resources have been available to reach out to civilian agencies to see what works and what can be incorporated into the military system. He believes the greatest strength in the civilian system is continuity.

Captain Stephen McCleary, U.S. Coast Guard, Chief, Office of Legal Policy and Program Development

Captain McCleary explained that the Coast Guard is like a small rural jurisdiction. They rely on the Navy and the Army for training and assistance. Coast Guard attorneys are also expected to serve in line assignments, as well as legal assignments, which limits their ability to obtain trial experience.

Response Systems Panel
Public Meeting - December 12, 2013

Lieutenant Colonel Jay Morse, U.S. Army, Chief, U.S. Army Trial Counsel Assistance Program. LTC Morse described the Army's Trial Counsel Assistance Program (TCAP). LTC Morse provided the following information and opinions: TCAP provides focused instruction within an attorney's first six months with a five-day course. TCAP provides assistance 24/7 and are responsive to the needs of the field. They provide training opportunities and outreach. Trial counsel receive training through legal center instruction which is augmented by civilian experts. The Special Victim Prosecutors (SVPs) are experienced litigators who are hand-selected. The Army's SVP program has been in place since 2009. There are currently 23 SVPs who may cover more than one installation. SVPs can be sent where they are needed. SVPs are also tasked to do training for investigators, junior counsel, commanders, and all first responders. Litigation experience is essential, but they must also have advanced interpersonal skills.

Commander Aaron Rugh, U.S. Navy, Director, U.S. Navy Trial Counsel Assistance Program

Commander (CDR) Rugh noted that the Navy has a litigation career track. He thinks military attorneys are like those in a young law firm, and it takes training and experience to build good litigators. CDR Rugh provided the following information and opinions: Most military lawyers are in the first 10 years of their lives as lawyers. The military makes up for the lack of experience with training, doing more training than any other firm. It costs money to train. The Navy tries to send their lawyers to get LLMs at civilian schools. It is worth the value. Unfortunately, Navy TCAP does not have its own budget. Funds come from various sources. Some funds come from the JAG school, and some from SAPRO. There are no "fenced" funds. The importance of training to offset the lack of experience should be considered.

Major Mark Sameit, U.S. Marine Corps, Branch Head, Trial Counsel Assistance Program

The Marines have two HQEs who act as a reach-back resource for the field. They train at the Navy's JAG school. Prior to being assigned to a sexual assault case, the trial counsel must have attended the Prosecuting Sexual Assault course. The Marines work with the National District Attorneys' Association and fellow TCAPs to share best practices and resources.

Ms. Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office

Ms. Bashford pointed out that the Manhattan office was the nation's first dedicated sex crimes unit. She explained that they have a rigorous, experience-based selection process for attorneys prior to assignment in sex crimes. Ms. Bashford also described some best practices, and noted that continued training and education, even for seasoned attorneys, is necessary to continue improving.

Ms. Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia

Ms. Higashi offered the following information and opinions: Sexual assault prosecution is a highly specialized field of law, and that progressively complex and tailored domestic violence

Response Systems Panel
Public Meeting - December 12, 2013

and sexual assault prosecution training is necessary for success. The co-location of victim advocates is critical to the success of the District of Columbia's program. Counsel assigned in the D.C. office have to express an interest in prosecuting domestic violence and sexual assault crimes in order to be assigned to that unit. The D.C. U.S. Attorney's Office has an interview and selection process for counsel prior to assignment as senior sexual offense and child exploitation prosecutors, similar to that described by Ms. Bashford for Manhattan.

Mr. Bill Montgomery, Maricopa County Attorney, Maricopa County, AZ.

Mr. Montgomery briefly described the population and geographic scope of Maricopa County. He emphasized the importance of programs that encourage reporting and ensure adequate scope and thoroughness of investigations. He further described the experience and caseload of prosecutors in Maricopa County, and discussed charging, prosecution, and conviction rates in Maricopa County. Mr. Montgomery noted that victims' rights are protected by the Arizona state constitution, and that protection of those rights was the shared job of prosecutors, victim advocates, and victims' counsel.

Ms. Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office

Ms. Patrick briefly explained some unique features of San Diego County, including the large number of visitors to San Diego each year, proximity to an international border, and a large collegiate population. Crime investigation and prosecution are victim-focused, and are supported by victim advocates. Ms. Patrick stated that in San Diego, balancing thorough, deliberate investigative practices with speed and efficiency is paramount to the success of both investigations and prosecutions.

Response Systems Panel
Public Meeting - December 12, 2013

Review of Meeting Summary

The Panel members reviewed a summary of the day's discussions for release to the public.

The Designated Federal Officer closed the public meeting at 6:24 p.m.

I hereby certify, to the best of my knowledge, the foregoing minutes are accurate and complete.



Barbara Jones

Chair

Response Systems to Adult Sexual Assault Crimes Panel

Attachments

The following documents were provided as part of the days discussions:

Agenda

Biographies

- Martha Bashford
- Lane Borg
- Colonel Don Christensen
- Lieutenant Colonel Erik Coyne
- Kelly Higashi
- Laurie Rose Kepros
- Bill Montgomery
- Lieutenant Colonel Jay Morse
- Anne Munch
- Amy Muth
- Wendy Patrick
- Lieutenant Colonel Julie Pitvorec
- Barry G. Porter
- Commander Aaron Rugh
- Major Mark Sameit
- Captain Scott (Russ) Shinn
- Dr. Cassia Spohn
- James Whitehead

Presentations and statements

- The Unnamed Conspirator-Ms. Munch
 - Bibliography of References
- Overview of Article 120-LtCol Winklosky
- Comparison Charts
- Waterfall Slides
 - Army
 - Air Force
 - Navy
 - Marine Corps
 - Coast Guard with statement
- Statistical Analysis-Dr. Spohn
- Statement of Commander King with attachments
- Statement of LTC Ku with attachments
- Statement of Lt Col Pitvorec
- Statement of Capt Shinn with attachments
- Senior Defense Counsel Leadership Course schedule
- Defense Orientation Course Narrative
- Statement of Mr. Montgomery
- Maricopa County Attorney's Office Organizational Chart
- Victim-Survivor-Educator by Kim Hedrick