



**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL**  
**ROLE OF THE COMMANDER SUBCOMMITTEE**  
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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

organization or any member of their chain of command. These alternative reporting channels are well and broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.

6. Under current law and practice, sexual assault allegations must be referred to, and investigated by, military criminal investigative organizations that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.
7. Under current law and practice, the authority to resolve sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.
8. None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.
9. It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.
10. Congress has recently enacted significant reforms addressing sexual assault in the military, and the Department of Defense has implemented numerous changes to policies and programs to improve oversight and response. These reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.
11. Prosecution of sexual misconduct contributes to the overall effort to address this problem. Commanders must play a central role in preventing sexual assault by establishing command climates that ensure subordinates are trained in and embrace their moral and legal obligations, and by emphasizing the role of accountability at all levels of the organization.

The full report of the Subcommittee will provide additional information and analysis on this issue, but the following represents our initial assessment.



Barbara S. Jones

Chair

Role of the Commander Subcommittee

1. Subcommittee Assessment
2. Separate Statement of Subcommittee Member Elizabeth L. Hillman

**ROLE OF THE COMMANDER SUBCOMMITTEE**  
**Initial Assessment of Whether Senior Commanders Should Retain  
Authority to Refer Cases of Sexual Assault to Courts-Martial**

**I. ASSESSMENT SUMMARY**

The issue of sexual assault crimes in the U.S. military has been the subject of significant public, legislative, and administrative scrutiny. Some individuals and groups assert commanders should lose the authority to convene courts-martial for sexual assault offenses. Accordingly, they propose amending the Uniform Code of Military Justice (UCMJ) to strip convening authority from commanders and vest authority in legal officers whose function will be independent of the military command in which the alleged misconduct occurs. Others contend senior military commanders are essential to resolving the pernicious issues of sexual assault in military organizations and divesting senior commanders of their role as courts-martial convening authorities will dilute their capacity to lead and impair their ability to maintain good order and discipline, resulting in damage to the efficiency and effectiveness of the Armed Forces.

Over the past three years, Congress made significant changes to the UCMJ and enacted substantial mandates on the Department of Defense (DoD) to address the issue of sexual assault in the military. Additionally, DoD implemented considerable changes to its processes and systems for preventing, assessing, and responding to sexual assault crimes. Reporting of alleged sexual assaults, including assaults that occurred before the person entered the military, significantly increased during Fiscal Year 2013, suggesting increased confidence of sexual assault victims in the sympathetic and effective response they could receive from the military.

**a. Responsibility of the Subcommittee**

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.”<sup>1</sup> 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.”<sup>2</sup>

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2013, PUB. L. NO. 112-239, § 576(a)(1), 126 Stat. 1632 (2013).

<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup>

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

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

<sup>4</sup> MCM, *supra* note 3, pt. I, ¶ 3.

“Don’t Ask, Don’t Tell,”<sup>5</sup> the Services relied on commanders to set the appropriate tone and effect change among subordinates under their command.<sup>6</sup>

A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command<sup>7</sup> in achieving change in the attitudes and behaviors of service members.<sup>8</sup> 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.”<sup>9</sup> Stated directly, commanders—the leaders of military organizations—set and enforce standards and drive cultural change in the military.<sup>10</sup>

#### **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.<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup> Enactment of the UCMJ, as well as its significant amendments in 1968 and 1983,

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<sup>5</sup> 10 U.S.C. § 654 (repealed Dec. 22, 2010).

<sup>6</sup> *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.”).

<sup>7</sup> 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.

<sup>8</sup> *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).

<sup>9</sup> *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* 4 (June 4, 2013).

<sup>10</sup> *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.”).

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

<sup>12</sup> *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).

<sup>13</sup> 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.<sup>14</sup>

With limited statutory exceptions,<sup>15</sup> 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.<sup>16</sup> 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.”<sup>17</sup> GCMCA are normally two-star flag officers and higher.

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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).

<sup>14</sup> 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).

<sup>15</sup> 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)).

<sup>16</sup> 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(c), dated Nov. 21, 2013.

<sup>17</sup> *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:<sup>18</sup>

	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.”<sup>19</sup> Further, they expressed concern that commanders may be unduly influenced<sup>20</sup> 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

<sup>18</sup> 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.

<sup>19</sup> *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).

<sup>20</sup> 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.<sup>21</sup>

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.”<sup>22</sup> 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.<sup>23</sup>

#### **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

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<sup>21</sup> 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](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](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).

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

<sup>23</sup> *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/frn-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.”<sup>24</sup> 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.<sup>25</sup>

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.<sup>26</sup>

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

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

<sup>26</sup> *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.<sup>27</sup> 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.<sup>28</sup> 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.”<sup>29</sup>

### 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.<sup>30</sup> A restricted report remains confidential and will not result in notification of law enforcement or the victim’s chain of command.<sup>31</sup> 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.<sup>32</sup> A SARC or SAPR VA is required to report the fact of the assault to the installation

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<sup>27</sup> *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.

<sup>28</sup> 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.

<sup>29</sup> *Transcript of RSP Public Meeting 108-09* (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

<sup>30</sup> *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).

<sup>31</sup> 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).

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

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

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

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

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

<sup>33</sup> 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.

<sup>34</sup> DoDI 6495.02 encl. 4, ¶ 1.b.

<sup>35</sup> *Id.*

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

<sup>37</sup> 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).

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

<sup>39</sup> *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.”).

<sup>40</sup> 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).

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

#### **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.<sup>44</sup> A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.<sup>45</sup> 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.<sup>46</sup>

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

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.<sup>49</sup> 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.<sup>50</sup>

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

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<sup>42</sup> 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.

<sup>43</sup> *Id.* at ¶ 2.d(6, 11).

<sup>44</sup> DoDI 5505.18. Section 1742 of the FY14 NDAA codifies this requirement.

<sup>45</sup> 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.

<sup>46</sup> *Transcript of RSP Public Meeting 222-23* (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

<sup>47</sup> DoDI 5505.18 encl. 2, ¶ 6.

<sup>48</sup> *Id.* at encl. 2, ¶ 1.

<sup>49</sup> *Id.* at ¶ 3.c(3).

<sup>50</sup> *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.<sup>51</sup> 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.<sup>52</sup> If a court-martial is warranted, charges alleging the offense(s) are preferred against the accused.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup>

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,<sup>56</sup> and he or she must refer the charges to his or her staff judge advocate for advice and consideration.<sup>57</sup>

A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command.<sup>58</sup> Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6.<sup>59</sup> 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.<sup>60</sup> Once the staff judge advocate has provided written advice and a disposition

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<sup>51</sup> 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](http://www.dod.gov/dodgc/images/withhold_authority.pdf)).

<sup>52</sup> 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.

<sup>53</sup> 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.

<sup>54</sup> 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.

<sup>55</sup> 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. Darpino, The Judge Advocate General, U.S. Army).

<sup>56</sup> 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.

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

<sup>58</sup> MCM, *supra* note 3, R.C.M. 103(17).

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

<sup>60</sup> 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.<sup>61</sup>

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.<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> This law codified the expedited transfer policy implemented by the Department of Defense in December 2011.<sup>65</sup> Notably, from policy implementation through the end of calendar year 2012, commanders approved 334 of 336 transfer requests.<sup>66</sup>

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<sup>61</sup> National Defense Authorization Act for Fiscal Year 2014, PUB. L. NO. 113-66 [hereinafter FY14 NDAA], § 1744(c),(d), 127 Stat. 672 (2013).

<sup>62</sup> 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).

<sup>63</sup> See 10 U.S.C. § 806 (UCMJ art. 6).

<sup>64</sup> National Defense Authorization Act for Fiscal Year 2012, PUB. L. NO. 112-81, § 582, 125 Stat. 1298 (2011).

<sup>65</sup> 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>.

<sup>66</sup> 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.<sup>67</sup> 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.<sup>68</sup>

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

#### **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.<sup>72</sup> 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.<sup>73</sup> 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.<sup>74</sup>

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

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

<sup>68</sup> *Id.* at § 578.

<sup>69</sup> FY14 NDAA, *supra* note 61, at § 1702(b).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at §§ 1702, 1705, 1708, 1713, 1721, 1742, 1744, 1751.

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

<sup>73</sup> SecDef Withhold Memo, *supra* note 51.

<sup>74</sup> *Id.*

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

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.<sup>76</sup> The initiative requires enhanced SAPR training for commanders and senior enlisted leaders.<sup>77</sup>

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCMJ.<sup>78</sup> 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.”<sup>79</sup>

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.<sup>80</sup>

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.<sup>81</sup>

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

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<sup>75</sup> 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>.

<sup>76</sup> 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](http://www.sapr.mil/public/docs/news/Evaluation_of_Training.pdf).

<sup>77</sup> *Id.*

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

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

<sup>80</sup> 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](http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf).

<sup>81</sup> 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](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.<sup>82</sup>

### 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.<sup>83</sup>

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.<sup>84</sup> 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.<sup>85</sup> While the STOP Act was not incorporated into law, the bill was supported by 148 co-sponsors during the 113th Congress.<sup>86</sup>

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.<sup>87</sup> 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.<sup>88</sup> On November 20, 2013, Senator Gillibrand filed a stand-alone version of this amendment, which is currently pending in the Senate.<sup>89</sup> 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.<sup>90</sup> The bill does not alter the role of the commander in referring sexual assault cases for prosecution.

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<sup>82</sup> 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](http://www.defense.gov/home/features/messages/secdef_hagel.aspx).

<sup>83</sup> 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).

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

<sup>85</sup> *Id.*

<sup>86</sup> H.R. 1593, 113th Cong. (2013).

<sup>87</sup> S. 967, 113th Cong. (2013).

<sup>88</sup> S. 1197, § 552, amend. no. 2099 (2013).

<sup>89</sup> S. 1752, 113th Cong. (2013).

<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> FY12 reports increased for every Service,<sup>93</sup> 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).<sup>94</sup> Unrestricted reporting increased by 5 percent in FY12, and restricted reporting increased by 8 percent.<sup>95</sup> Restricted report conversions to unrestricted reports increased from 14.1 percent in FY11 to 16.8 percent in FY12.<sup>96</sup>

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.<sup>97</sup> 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.<sup>98</sup> 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.”<sup>99</sup>

## **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

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<sup>91</sup> 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.

<sup>92</sup> *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).

<sup>93</sup> *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\\_Ovrvw\\_20131023.pdf](http://response.systemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131023_ROC/03_DoD_SAPR_Ovrvw_20131023.pdf).

<sup>94</sup> FY12 SAPRO REPORT, *supra* note 91, at 59.

<sup>95</sup> *Id.* at 58.

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

<sup>97</sup> *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.

<sup>98</sup> *Id.*

<sup>99</sup> *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.”<sup>100</sup> 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.”<sup>101</sup>

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors.<sup>102</sup> 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.”<sup>103</sup> Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of changes to senior commander authority in the military justice system, commanders and leaders at all levels must continue their focused efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility. The full report of the Subcommittee will provide additional information and analysis on this issue.

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<sup>100</sup> *Transcript of RSP Public Meeting 90* (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).

<sup>101</sup> THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 5 (Jan. 2014).

<sup>102</sup> *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.”).

<sup>103</sup> *Id.*