Report of the Comparative Systems Subcommittee

to the Response Systems to Adult Sexual Assault Crimes Panel

May 2014

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

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
COMPARATIVE SYSTEMS SUBCOMMITTEE
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ARLINGTON, VA 22203-1995

MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Report of the Comparative Systems Subcommittee

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

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TABLE OF CONTENTS

EXECUTIVE SUMMARY 1

I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS 11

II. LEGISLATION AND POLICY RELATING TO THE INVESTIGATION, PROSECUTION AND DEFENSE OF SEXUAL ASSAULT CASES 39

A. RECENT LEGISLATION 39

B. PROPOSED LEGISLATION 42

III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS 45

A. Survey Types and Methodologies 45

B. Public Health vs. Crime Victimization Surveys 55

C. Best Practices for Meaningful Comparison 58

D. Studying Recent Trends in Military Reporting 63

IV. OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT 65

A. The Victim Centric Multidisciplinary Approach 65

B. The Special Victim Capability in the Military 66

C. The Personnel who Participate in the Response Systems to Sexual Assault 67

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

V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS 71

A. Introduction 71

B. Organizational Structure of MCIOs and Special Victim Units 72

C. Selection and Experience 75

D. Investigator Training 76

E. Collateral Misconduct and Victim Reporting 83

F. Comparing Procedures, Policies, Protocols & Oversight 90

G. Sexual Assault Forensic Examinations 102

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

A. Overview – Basic Military Lawyer Training, Selection, and Certification Standards 110

B. Specialized Sexual Assault Training for Civilian and Military Prosecutors 113

C. Training for Civilian and Military Defense Counsel 126

D. Military Judge Training and Assessment of Counsel's Advocacy Skills 139

VII. PROSECUTION AND DEFENSE 141

A. Organization of Prosecution Offices and the Multidisciplinary Approach 141

B. Defense Counsel Organizational Structure & Resource Requirements 153

C. Victims' Rights and Special Victim Counsel Impact on the Judicial Process 159

D. Initial Disposition and Charging Decisions 163

E. The Military Judge's Role in the Military Justice System 180

F. Referral of Sexual Assault Cases in the Military 188

G. Plea Negotiations 192

H. Military Panel Selection and *Voir Dire* 195

I. Character Evidence 196

J. Prosecution and Conviction Rates 200

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

VIII. ADJUDICATION OF SEXUAL ASSAULT CASES 213

A. Overview of Civilian and Military Sentencing 213

B. Sentencing by Judge or Jury/Panel Members 219

C. Unitary Sentencing Practice 228

D. Sentencing Guidelines 229

E. Mandatory Minimum Sentences 232

F. Clemency Opportunities and Changes to Article 60 235

IX. SEPARATE STATEMENT 239

Colonel, U.S. Army (Retired) Lawrence J. Morris and Colonel, U.S. Air Force (Retired) Dawn Scholz

APPENDIX A: TERMS OF REFERENCE 247

APPENDIX B: MEMBERS AND STAFF OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE 251

APPENDIX C: GLOSSARY OF ACRONYMS AND TERMS. 255

APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL. 267

APPENDIX E: SOURCES CONSULTED. 279

APPENDIX F: EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS 295

APPENDIX G: ATTORNEY TRAINING 503

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

REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE EXECUTIVE SUMMARY

The Secretary of Defense established the Comparative Systems Subcommittee (CSS or Subcommittee) to compare the investigation, prosecution, defense, and adjudication of sexual assault cases in the military and civilian systems and to make recommendations to the Response Systems to Adult Sexual Assault Crimes Panel (RSP). The Subcommittee included four members of the RSP as well as six experts with extensive knowledge of military or civilian criminal justice.[1] Collectively, the Subcommittee had more than 188 years of military service and 326 years of criminal justice experience; it was supported by a staff with current knowledge of military justice and experience in investigation, training, prosecution, and defense.

SUBCOMMITTEE MISSION STATEMENT

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

Responsibility of the Subcommittee

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the Secretary of Defense to establish the RSP "to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under Section 920 of Title 10, United States Code (Article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems."[2] The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) included several additional requirements for the RSP study.[3] The Secretary of Defense also requested the RSP to consider the impact of imposing mandatory minimums for sexual assault offenses.[4]

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

2 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632 (2013) (hereinafter FY13 NDAA).

3 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(a)(1)(A), 127 Stat. 672 (2013) (hereinafter FY14 NDAA).

4 Letter from the Acting General Counsel of the Department of Defense to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), *currently available at* http://responsesystemspanel.whs.mil.

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

On September 23, 2013, the Secretary of Defense established three subcommittees—Role of the Commander, Comparative Systems, and Victim Services to assist the RSP in accomplishing the many areas Congress directed it to assess in twelve months. He established several objectives for the Subcommittee, such as comparing military and civilian justice systems, assessing the effectiveness of the investigation, prosecution, and adjudication of adult sexual assault crimes, and considering other matters, as appropriate.[5] The FY14 NDAA included additional requirements for RSP study that were assigned to the Subcommittee.[6] Although the original legislation required the analysis to span from 2007-2011, the Subcommittee members expanded their review through April 2014, because Congress passed and the President has approved numerous legislative changes to the military justice system and the Secretary of Defense imposed several initiatives to respond to sexual assault in the military in the last three years. The Subcommittee's terms of reference were updated to reflect all of the comparative systems taskings.[7]

In total, the Subcommittee was tasked with nine objectives for analysis in support of the RSP mission:[8]

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

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5 "Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel: Terms of Reference," *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/Terms_of_Reference_CSS_FINAL.pdf.

6 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(a)(1)(A), 127 Stat. 672 (2013); *see also* Appendix A, CSS Revised Terms of Reference, *infra*.

7 Appendix A, CSS Revised Terms of Reference, *infra*.

8 Response Systems to Adult Sexual Assault Crimes Panel Charter (Apr. 19, 2013), *currently available at* http://responsesystemspanel.whs.mil/public/docs/Response_Systems_Panel_Charter_(2013-2015).pdf.

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

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

Assessment Methodology

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

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

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

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

11 The Requests for Information and Service Responses are currently available at http://responsesystemspanel.whs.mil/index.php/rfis.

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The Subcommittee collected and analyzed existing studies of military and civilian sexual assault, and assessed legislation as it was adopted or proposed.[12] The Subcommittee used the data collected by the Joint Services Committee Sexual Assault Subcommittee (JSC-SAS) as a reference for recent information about investigation, prosecution, defense, and adjudication in civilian jurisdictions.[13] The JSC-SAS traveled to more than twenty civilian jurisdictions in 2013, gathering information and conducting interviews of law enforcement, prosecutors, public defenders, victims' attorneys, and victim advocates for an independent panel to complete a comparative analysis.[14] In addition, the Subcommittee considered: publicly available information, documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids, videos, and planning documents, and information submitted by the public.

During the RSP and Subcommittee meetings, the Subcommittee engaged in fact-finding and deliberation sessions to craft recommendations that integrate the data it collected with the Subcommittee members' insight and experiences. Using transcripts of RSP and Subcommittee hearings and prior deliberation sessions and relying on the information collected during this study, members engaged in extensive deliberation before endorsing these recommendations.[15]

Overview

The scope of this study was broad. The information the Subcommittee gathered addressed a wide range of issues and topics, occasionally overlapping with the other two RSP subcommittees, the Role of the Commander and Victim Services Subcommittees.[16] The Subcommittee's task was particularly difficult because there is no universal effective civilian response to sexual assault.

Our task was made more difficult by the absence of any single set of effective civilian responses to sexual assault. In the civilian sector, dozens of federal, state, and county authorities, and legions of non-governmental organizations, work together to meet the needs of victims and bring offenders to justice. Likewise, there is no single military response system, despite the existence of a uniform criminal code (the UCMJ) and a coordinated effort under the leadership of DoD Sexual Assault Prevention and Response Office (SAPRO). Each branch of Service—Army, Navy, Air Force, Marine Corps, and Coast Guard—relies on its own personnel infrastructure, training programs, disciplinary strategies, and criminal justice system in responding to sexual assault.[17] Four different Service-specific military courts hear courts-martial appeals.[18] There are one and a half million active-duty Service members subject to the UCMJ, and the approximately 1.1 million members of the Reserve and Guard who also serve, live and work at a wide variety of military installations located within and

12 Appendix D, Presentations before the Subcommittee and RSP, *infra.*

13 *See generally* JSC-SAS Report, Appendices (Sept. 2013) (on file at RSP).

14 *Id.* at 2.

15 The agendas, minutes, and transcripts of RSP and Subcommittee meetings are available at http://responsesystemspanel.whs.mil/.

16 *See* Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (May 2014), *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf; Report of the Victim Services Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (May 2014), *available at* http://responsesystemspanel.whs.mil/Public/docs/Reports/02_RoC/ROC_Report_Final.pdf.

17 The Services responded to 154 Requests for Information detailing each Service's capabilities and response to sexual assault.

18 The U.S. Court of Criminal Appeals for the Armed Forces reviews decisions from the intermediate appellate courts of the Services: the Army Court of Criminal Appeals, Navy-Marine Corps Court of Criminal Appeals, Air Force Court of Criminal Appeals, and the Coast Guard Court of Criminal Appeals.

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without the United States, in rural and urban communities, with populations that range from a few hundred to tens of thousands.[19] Since no single structure of victim advocacy or criminal justice can meet the needs of such diverse populations and institutions, we followed the lead of other experts and focused on assessing the core principles of effective response to sexual assault rather than describing an optimal structure for that response.

The Subcommittee found both commonalities and wide disparities in the ways that civilian and military justice systems define and reckon with sexual assault. The very acts that constitute "sexual assault" vary across civilian and military jurisdictions; however, the military definition is more all-encompassing than most.[20] The unique requirements and mission of the Armed Forces result in distinct differences in how military and civilian institutions and jurisdictions investigate and prosecute crime. For instance, mission requirements, career paths, and the length of tours of duty lead to greater personnel turnover in military positions than among many civil sector equivalents. Similarly, the imperative for good order and discipline leads the military to criminalize a much broader range of acts for Service members than for civilians.[21] In many instances, the Subcommittee deemed such structural differences sufficient to justify military, and even Service-specific, practices that do not correspond closely to civilian practices, recognizing that commanding officers need flexibility to fulfill the demand for responses across the full range of military units and installations.[22] In other instances, the Subcommittee recommended changes where the gap between current civilian and military practices is too large, and the impact on effectiveness too great.

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

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

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19 Defense Manpower Data Center, "Active Duty Military Strength by Service: Service Totals - current month" ("Armed Forces Strength Figures for March 31, 2014"), *at* https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg; Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy, 2012 Demographics: Profile of the Military Community 59 (Exhibit 3.02., Number of Ready Reserve Officers and Enlisted Members by Ready Reserve Program and Reserve Component), *available at* http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf.

20 For the full text of Article 120, UCMJ, *see* Part VII, Section D, Table 12, *infra.*

21 *See, e.g.,* 10 U.S.C. § 892 (UCMJ art. 92) (Failure to obey order or regulation); *see also* 10 U.S.C. § 934 (UCMJ art. 134) (Fraternization).

22 *See* Part VII, Section A, *infra.*

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The analysis, findings, and recommendations are divided into chapters in this report. The Subcommittee's recommendations are characterized briefly in this executive summary and set forth in detail, with related discussion and findings, in the report text.

Victimization Surveys and the Use of Statistics

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

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

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

Special Investigators and Sexual Assault Investigations

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

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

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

24 *Id.*

25 *See* DoD SAPRO, "2014 DoD Workplace and Gender Relations Survey (WGRS)" (Apr. 9, 2014), *currently available at* http://responsesystemspanel.whs.mil/.

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

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

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

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

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

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

26 Federal Bureau of Investigation, Uniform Crime Reporting Handbook (2004).

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which are helpful in evaluating the effectiveness of sexual assault training for attorneys and provide a unique perspective of counsels' advocacy skills in the courtroom.

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

Prosecuting and Defending Sexual Assault Cases

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

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

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

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

27 *See* Part IX, *infra* for COL(R) Morris and COL(R) Scholz's separate statement which recommends further study rather than recommending this change at this time.

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police officer or a detective can unfound and close a case before a prosecutor ever receives it, so the civilian prosecution rate does not account for of all reported sexual assaults. In contrast, the Military Services are required to track every reported sexual assault through disposition, although the Services measure prosecution rates differently.

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

The Subcommittee also recommends that military judges should be the sole sentencing authority in sexual assault and other non-capital cases.[28] Forty-four states and the federal criminal justice system all require judges, not juries, to impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. This change has the potential to improve sentencing consistency and fairness without the imposition of sentencing guidelines because of the advantage in experience and expertise that military judges have over panel members. It will also reduce the administrative burden of panel member sentencing and help to minimize the perception of command influence. The Subcommittee also recommends eliminating the military's unitary sentencing practice which adjudges one aggregate sentence as a total for all offenses of which an accused is convicted, rather than enumerating a sentence for each specific offense.

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

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

28 This measure was not unanimously endorsed by the Subcommittee's members; two of the ten Subcommittee members voted against this recommendation. *See* Part IX, *infra* for COL(R) Morris and Col(R) Scholz's separate statement. BG(R) Dunn non-concurs in part; she believes there should be the option of panel members sentencing for military related crimes.

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

examine mandatory minimums over a number of years, which will enable it to analyze the potential impact on military sexual assault offenses more effectively.

The Subcommittee also reviewed clemency opportunities in the military. In light of recent changes to Article 60 of the Uniform Code of Military Justice and the convening authority's power to grant post-trial relief, one potential unintended consequence may be that the convening authority can no longer provide relief from forfeiture of pay to dependents of convicted Service members. Meaningful post-trial relief may also effectively be foreclosed for convicted Service members who do not receive a punitive discharge or confinement for more than one year.

Conclusion

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

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

I. ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

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

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

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

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

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

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

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

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

Using the WGRA Data for Public Health Assessment Purposes Only

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

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

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

Response Rates and Reliability of Survey Data

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

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

Survey Data Transparency

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

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

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

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

Improving the 2014 WGRA Surveys

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

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

SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

Organizational Structure of MCIOs and Special Victim Units

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

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

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

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

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

Investigator Selection and Training

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

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

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

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

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

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

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

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

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

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

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

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

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

Collateral Misconduct

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

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

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

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

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

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

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

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

Finding 10-5: For the last ten years, DoD policy documents use the following list of offenses to illustrate the most common collateral misconduct in many reported sexual assaults: "underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders."

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

Gleaning Information from Restricted Reports

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

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

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

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

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

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

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

Milestones in the Investigative Process Including Case Determinations and Reports

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

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

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

Recommendation 14-A: The Secretary of Defense direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file, that the trial counsel agrees all appropriate investigation has taken place, before providing a report to the appropriate commander for a disposition decision.

Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.

Recommendation 14-B: To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until either final disposition of the case or a determination that the allegations are unfounded.

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

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

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

MCIO Caseload

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

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

Pretext Phone Calls and Text Messages

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

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

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

Forensic Evidence & Examinations

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

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

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

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

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

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

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

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

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

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

Oversight and Review of Sexual Assault Investigations

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

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

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

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

TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

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

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

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

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

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

Sexual Assault Training for JAGs

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

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

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

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

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

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

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

Military Defense Counsel

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

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

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

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

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

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

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

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

Civilian Experts to Assist Military Counsel

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

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

Sustaining Funding of Training for Military Judges

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

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

Measuring the Effectiveness of Attorney Training

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

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

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

PROSECUTION & DEFENSE OF SEXUAL ASSAULT CASES

Organizational Structure of Prosecutor Offices and Co-location Models

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

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

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

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

Special Victim Capability

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

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

Recommendation 32-C: The Secretary of Defense should direct the Directive-Type Memorandum (DTM) 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of "covered offenses" accurately reflect specific offenses currently listed in Article 120 of the UCMJ.

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

Recommendation 32-D: The Secretary of Defense require standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service's organizational structure.

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

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

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

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

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

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

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

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

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

Prosecutors' Initial Involvement in Sexual Assault Cases

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

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

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

Defense Counsel for Sexual Assault Cases

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

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

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

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

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

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

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

Independent Investigators for the Defense in Sexual Assault Cases

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

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

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

Metrics for Defense Counsel

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

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

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

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

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

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

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

Finding 40-1: Military trial and defense counsel, SARCs, and victim advocate personnel reported to the Subcommittee that they have positive working relationships with Special Victim Counsel. However, some counsel foresee potential issues such as privilege, confidentiality, or delays when the government and victim's interests do not align.

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

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

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

The Scope of Article 120 of the UCMJ

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

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

Charging Discretion in Sexual Assault Cases

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

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

Factors Considered in Disposition Decisions for Sexual Assault Cases

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

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

Alternate Disposition Options in the Military Compared to the Civilian Sector

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

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

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

Making the Military Judge Available at Preferral or Pretrial Confinement

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

29 *See* Part V, Section F, Recommendation 14-A, *supra*. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.

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

The Secretary of Defense recommend the Congress enact legislation to amend the UCMJ, the President enact changes to the Manual for Courts-Martial, and Service Secretaries implement appropriate regulations to increase the authority of military judges over the pre-trial process to enhance fairness, efficiency, and public confidence.

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

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

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

Defense Requests for Witnesses, Evidence or Other Matters

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

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

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

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

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

Subpoena Power

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

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

Article 32 Preliminary Hearing

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

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

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

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

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

Review of Referral Decisions

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

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

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

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

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

Written Declination Procedures

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

Finding 45-1: If a victim makes an allegation of rape, sexual assault, forcible sodomy, or attempts of those offenses, and the convening authority decides not to refer the allegation to court-martial, Section 1744(e)(6) of the FY14 NDAA requires a superior authority review of the non-referral decision by examining the case file, which must include a written statement explaining the convening authority's decision not to refer any charges for trial by court-martial. DoD has not published any guidance to date as to what that declination memorandum must contain or what entity must write the letter.

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

Finding 45-2: Civilian offices vary in their practices for recording decisions to decline cases. If prior to indictment, the common procedure is for the prosecutor to send the case back to the investigator to be closed. If the prosecutor declines a case after indictment, some offices informally include a note in the file, others complete a standard form, but none provide lengthy written justifications. When civilian government offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect.

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

Plea Negotiations

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

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

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

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

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

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

Military Panel Selection & Voir Dire

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

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

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

Character Evidence

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

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

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

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

Finding 48-4: Section 3(g) of the VPA proposes to modify Military Rule of Evidence 404(a), regarding the character of the accused. The provision attempts to prevent the use of the accused's general military character from being admissible to show the probability of the accused's innocence. However, the proposal exempts evidence of military character when relevant to an element of an offense for which the accused has been charged, and relevant character evidence will continue to be admissible as long as the attorneys lay the proper foundation. While Section 3(g) of the VPA may increase victim confidence by attempting to eliminate the

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

"Good Soldier Defense," the Subcommittee does not anticipate that it will result in any significant change to current practice at trial.

Prosecution and Conviction Rates

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

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

The Secretary of Defense direct the study to assess the following:

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

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

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

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

Change Congressional Reporting Requirements

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

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

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

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

Caution when Comparing Prosecution Rate and Conviction Rate Statistics

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

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

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

ADJUDICATION OF SEXUAL ASSAULT CASES

The Need for Viable Sentencing Data and Transparency

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

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

Recommendation 53: The Secretary of Defense direct the Military Services to release sentencing outcomes on a monthly basis to increase transparency and promote confidence in the system.

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

Finding 53-1: The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all Special and General Courts-Martial to the Navy Times on a monthly basis.

Judge Alone vs. Panel Members Sentencing

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

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

Unitary Sentencing Practice

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

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

Sentencing Guidelines

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

Finding 56-1: There are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President, exercising his authority under the UCMJ, establishes a maximum punishment for each offense. In contrast, the federal system, twenty states, and the District of Columbia use some form of a sentencing guideline system.

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

Finding 56-2: Sentencing guidelines are often complex and may require substantial infrastructure to support them, including sentencing commissions which study, develop, implement and amend the guidelines over time. For instance, to formulate baseline recommendations for federal sentencing guidelines, the United States Sentencing Commission collected and examined data from 100,000 cases that had been sentenced in federal courts—10,000 of which it studied in "great detail." Twenty-four states and the District of Columbia currently have sentencing commissions.

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

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

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

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

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

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

Mandatory Minimum Sentences

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

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

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

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

Clemency Opportunities and Changes to Article 60

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

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

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

Finding 58-3: Post-trial relief may be effectively foreclosed for convicted Service members who do not receive punitive discharges or confinement for more than one year. Those Service members have limited access to appellate review, with the only avenue a review by the Office of The Judge Advocate General pursuant to Article 69 of the UCMJ.

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

II. LEGISLATION AND POLICY RELATING TO THE INVESTIGATION, PROSECUTION AND DEFENSE OF SEXUAL ASSAULT CASES

A. RECENT LEGISLATION

1. National Defense Authorization Act for Fiscal Year 2012 (FY12 NDAA)

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

Table 1

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

2. National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA)

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

Table 2

Section	Report Discussion
Section 570. Armed Forces Workplace and Gender Relations Surveys. • *Added additional content to the survey and set out required timeframe for administering the surveys.*	Part III. See recommendations 1 – 6.

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

2 FY13 NDAA, Pub. L. No. 112-239, 126 Stat. 1632 (2013).

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

Section 572(a)(2). Requires administrative discharge if convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged. • *Effective June 2, 2013 (180 days after enactment of the Act).*	Part VIII. See recommendation 57.
Section 573. Establishment of special victim capabilities within the Military Departments to respond to allegations of certain special victim offenses. • *Effective December 2, 2013 (one year after enactment of the Act).*	Part V, Section B, and Part VI, Section A. See recommendation 8.

3. National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA)

The FY14 NDAA included 36 provisions intended to improve sexual assault prevention and response in the Armed Forces, including many changes to the processes and systems for investigating, prosecuting, and adjudicating adult sexual assault crimes.[3] The Subcommittee considered 17 statutory requirements. Unless otherwise noted, the provisions were effective immediately:

Table 3

Section	Report Discussion
Section 1701. Extension of crime victims' rights to victims of offenses under the Uniform Code of Military Justice. • *No later than December 26, 2014 (one year after enactment of the Act), the Secretary of Defense and Secretary of Homeland Security prescribe regulations for implementation; and Secretary of Defense recommend to the President changes to MCM to implement.*	Part VII, Section C. See recommendation 39.
Section 1702 (a). Revision of Article 32, Uniform Code of Military Justice. • *Effective December 26, 2014 (one year after enactment of the Act).*	Part V, Section F, See recommendation 14-A. Part VII, Section E. See recommendation 43-E, 43-F, and related discussion.
Section 1702 (b). Revision of Article 60, Uniform Code of Military Justice. • *Effective June 26, 2014 (180 days after enactment of the Act).*	Part VIII, Section F. See recommendation 58.

3 *Id.* at §§ 1701–1709, 1711–1716, 1721–1726, 1731–1735, 1741–1747, 1751–1753.

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

Section 1705. Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial. • *Effective June 26, 2014 (180 days after enactment of the Act):* • *For offenses committed on or after effective date, limits court-martial jurisdiction for offenses of rape or sexual assault (under Article 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts thereof (under Article 80) to general courts-martial.* • *Amends Article 56 of the Uniform Code of Military Justice to impose the mandatory minimum punishment of dismissal or dishonorable discharge for anyone convicted of rape or sexual assault (under Article 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts to commit those offenses (under Article 80).*	Part VIII, Section E. See recommendation 57.
Section 1708. Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in discussion of rule on initial disposition of offenses. • *Effective June 26, 2014 (180 days after enactment of the Act).*	Part VII, Section D. See finding 42-3. Part VII, Section I, See finding 48-3.
Section 1716. Requires Special Victims' Counsel be made available to sexual assault victims. • *Effective June 26, 2014 (180 days after enactment of the Act).*	Part VII, Section C, 2. See recommendation 40.
Section 1725. Qualifications and Selection of SAPR Personnel and SANEs. • *Requires the Department of Defense to standardize the qualification requirements for SARCs, VAs, and others, and provide a report on the adequacy of their training and qualifications.*	Part V, Section G. See recommendation 18 and 20.
Section 1731(a)(D). Additional duties for RSP – Assessment of offender database from restricted reports.	Part V, Section E, 2. See recommendation 11.
Section 1731(a)(E). Additional duties for RSP – Assessment of Clemency opportunities in the military justice system.	Part VIII, Section F. See recommendation 58.
Section 1731(b)(C). Additional duties for Judicial Proceedings Panel – Implementation and effect of mandatory minimums.	Part VIII, Section E. See recommendation 57.
Section 1732. Review of Investigative Practices of MCIOs, including recommending founding/unfounded. • *Requires the Department of Defense to conduct a review of investigative techniques of the various Services, including whether the investigative organization makes a "founded/unfounded" determination at the conclusion of the investigation. The Department of Defense must standardize its investigative practices based on the results of this review.*	Part V, Section F. See recommendations 13, 14-A, and 14-B.

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

Section 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial. • *Requires the Secretaries of the Military Departments to review all cases under Articles 120(a), 120(b), 125, and attempts thereof, where the staff judge advocate (SJA) recommends referral and the convening authority declines to refer charges to court-martial. Requires review by the next superior commander authorized to exercise general court-martial convening authority when both the SJA recommends not referring charges and the convening authority does not refer charges.* • *Requires written statement explaining the reasons for convening authority's decision not to refer such charges for trial by court-martial.*	Part VII, Section F. See recommendations 44-A and 45.
Section 1752. Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the UCMJ through courts-martial.	Part VII, Section D. See findings 42-1, 42-2, 42-4, 42-5, and related discussion.
Section 1753. Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.	Part VII, Section D. See finding 42-1, 42-2, 42-4, 42-5, and related discussion.

B. PROPOSED LEGISLATION

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

1. Victims Protection Act of 2014

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

4 The White House, "Statement by the President on Eliminating Sexual Assault in the Armed Forces" (Dec. 20, 2013).

5 *Id.*

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

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

Table 4

Section 2. Inclusion of senior trial counsel determinations on referral of cases to trial by courts-martial in cases reviewed by Secretaries of Military Departments.	Part VII, Section F. See recommendation 44-B.
Section 3(b). Consultation with victims regarding preference in prosecution of certain sexual offenses. • *This provision was incorporated into the FY15 NDAA as passed by the HASC.*[7]	Part VI, Section C, 3. See recommendation 41.
Section 3(g). Modification of Military Rules of Evidence relating to admissibility of general military character toward probability of innocence. • *This provision is mirrored in Section 4 of the FAIR Military Act*[8] *as well as the FY15 NDAA as passed by the HASC.*[9]	Part VII, Section I. See recommendation 48.

The VPA passed the Senate during the same time period that Senator Kirsten Gillibrand (D-NY) sought a vote on the Military Justice Improvement Act of 2013 (MJIA),[10] which would remove commanders from prosecutorial decisions for most major offenses under the UCMJ. While the MJIA was unable to overcome the 60 vote threshold to proceed to a vote, the proposal was supported by a majority of Senators (55). This level of support demonstrates the seriousness with which lawmakers take the issue of sexual assault in the Armed Forces.

2. FAIR Military Act

Attention on the military's handling of sex-related offenses is under comparable scrutiny in the House of Representatives. On April 10, 2014, Congressman Mike Turner (R-OH) and Congresswoman Niki Tsongas (D-MA) filed the FAIR Military Act.[11] This proposal includes four provisions from the VPA as well as an additional duty for the Judicial Proceedings Panel to assess the use of mental health records by defense during preliminary hearings and courts-martial proceedings.[12]

Even as this report is being written, members of Congress continue to offer legislation to improve the military's handling of sexual assault offenses and hold the military accountable.[13]

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7 National Defense Authorization Act for Fiscal Year 2015 [hereinafter FY15 NDAA], H.R. 4435, 113th Cong., § 534 (2014).

8 Furthering Accountability and Individual Rights within the Military Act of 2014, H.R. 4485, 113th Cong., § 4 (2014) [hereinafter FAIR Military Act].

9 FY15 NDAA, H.R. 4435, 113th Cong., § 535 (2014).

10 Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013)

11 FAIR Military Act, H.R. 4485, 113th Cong., § 4 (2014).

12 *Id.* at §§ 2-6.

13 On May 7, 2014, the House Armed Services conducted its mark-up of the FY15 NDAA. During this debate, many amendments were filed relating to the issue of sexual assault in the military. For example, Congresswoman Jackie Speier (R-CA) filed two amendments that would have removed commanders from prosecutorial decisions. The first amendment was akin to the MJIA and would have taken all major non-military crimes outside the chain of command; the measure failed by a vote of 13-49. The second amendment would have removed commanders for only sexual assault-related offenses and failed on a closer vote, 28-34. In addition, Congressman Mike Turner (R-OH) filed an amendment to require a mandatory minimum sentence of dismissal or dishonorable discharge and confinement for two years for a member of the military convicted by court-martial of a sex-related offense. This amendment was adopted into the HASC bill. Other items included in the HASC-passed FY15 NDAA include: Inspector General to review all members of the Armed Forces who were discharged after making unrestricted report of sexual assault; Secretary of Defense brief to the HASC on implementation of sexual assault provisions included in FY12, 13 and 14 NDAAs; Secretaries of Military

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Departments must consider the attitudes toward handling sexual assault allegations when evaluating a commanding officer's job performance; consultation with victims of sexual assault regarding victims' preference for prosecution of offense by court-martial or civilian court; modification of Military Rules of Evidence relating to admissibility of general military character toward probability of innocence; confidential review of characterization of terms of discharge of members of the Armed Forces who are victims of sexual offenses; permit interlocutory appeal of Military Rule of Evidence 513 (psychotherapy-patient privilege) and Military Rule of Evidence 412 (rape shield) rulings, in line with the rights of civilian victims under the Crime Victims' Rights Act; and elimination of exception to psychotherapist-patient privilege under subparagraph (d)(8) of Military Rule of Evidence 513.

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

III. SURVEYING SEXUAL VIOLENCE AND THE USE OF THOSE STATISTICS

A. SURVEY TYPES AND METHODOLOGIES

The Subcommittee studied crime reporting and crime survey statistics from both the DoD and civilian jurisdictions. In doing so, the Subcommittee reviewed three major victim surveys and two crime reports: the DoD Workplace and Gender Relations Survey of Active Duty Members (WGRA); the National Intimate Partner and Sexual Violence Survey (NISVS); the National Crime Victimization Survey (NCVS); the Uniform Crime Report (UCR); and the DoD Annual Report to Congress.[43] Some criminal acts are more difficult to assess in surveys, and rape and sexual assault are among the most challenging.[44] Sexual offenses are often more difficult to assess because the personal nature of the crime lends itself to various issues, including divergent opinions of criminal behavior, reluctance to disclose personal experiences, inaccurate recollection, or respondent sensitivity.[45] Crime victimization surveys, particularly with regard to rape and sexual assault, are also extremely difficult to validate because they are created to uncover events never reported to law enforcement.[46] As a result, sources of information about prevalence and incident rates require careful attention before relying on their conclusions to assess the extent of sexual assault, whether among military or civilian populations.

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

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43 Department of Defense 2012 Workplace and Gender Relations Survey of Active Duty Members Survey Instrument (2012) [hereinafter 2012 WGRA Survey], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140411_CSS/03d_DMDC_WorkPlace_PublicRelations_Survey_2012.pdf; National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey 2010 Summary Report (Nov. 2011), [hereinafter NISVS 2010 Summary Report], *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; Bureau of Justice Statistics, National Crime Victimization Survey Basic Screen Questionnaire, *available at* http://www.bjs.gov/content/pub/pdf/ncvs1_2012.pdf; U.S. Dep't of Justice, Federal Bureau of Investigation, Criminal Justice Information Services Division, Uniform Crime Reports [hereinafter CJIS], *available at* http://www.fbi.gov/about-us/cjis/ucr/ucr-publications#Crime; Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2012, Annex A, at 141 (May 2013) [hereinafter FY12 SAPRO Annual Report], *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

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

45 *See generally id.* at 5-115.

46 *Id.* at 25.

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

Table 5

Survey or Report[47]	Population	Survey Design	Measures	Definition of Rape/ Sexual Assault
Workplace and Gender Relations Survey (WGRS)	Active Duty (WGRA) and Reserve (WGRR) Service Members in the Department of Defense.[48] Conducted as web-based self-reporting computer survey, confidential but not anonymous.	Public Health	Prevalence[49]	Unwanted Sexual Contact defined as intentional sexual contact that was against a person's will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body.
National Intimate Partner and Sexual Violence Survey (NISVS)	National survey of non-institutionalized men and women age 18 and over in the United States. Conducted random telephone dialing.	Public Health	Prevalence	Five types of sexual violence were measured in NISVS. These include acts of rape (forced penetration), and types of sexual violence other than rape.
National Crime Victimization Survey (NCVS)	In-person interviews with a nationally representative sample of U.S. households, conducted by U.S. Census Bureau at six-month intervals for three years. All household members age 12 and older are interviewed.	Criminal Justice	Incidence	Forced sexual intercourse including both psychological coercion as well as physical force. Forced sexual intercourse means penetration by the offender(s). [Rape] includes attempted rapes, male as well as female victims, and both heterosexual and homosexual rape. Attempted rape includes verbal threats of rape.

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

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

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

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

Uniform Crime Report (UCR)	Launched in 1929, collects information reported to law enforcement agencies on the following crimes: murder and non-negligent manslaughter, rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. Covers all victims of crime (age immaterial).	Non-Survey Data Actual criminal justice statistical reporting	Incidence	(Old Definition): The carnal knowledge of a female forcibly and against her will. Rapes by force and attempts or assaults to rape, regardless of the age of the victim, are included. Statutory offenses (no force used—victim under age of consent) are excluded. (New Definition): Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.[50]
DoD Annual Report to Congress (DoD SAPRO Report)	Each fiscal year, the Department of Defense Sexual Assault Prevention and Response Office submits a data call to the Military Departments for statistical and case synopsis information on sexual assault crimes. SAPRO reports information obtained through restricted and unrestricted reports to Sexual Assault Response Coordinators and MCIOs across the Services.	Non-Survey Data Actual sexual assault reports collected through Defense Sexual Assault Incident Database (DSAID) and Law Enforcement Reports	Incidence	Sexual assault is an overarching term that encompasses a range of contact sexual offenses between adults, prohibited by the UCMJ and characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Includes rape, sexual assault, aggravated sexual contact, abusive sexual contact, which are all terms which only came into effect in the latest version of Article 120, effective June 28, 2012, forcible sodomy, and attempts to commit these offenses.

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

The Defense Manpower Data Center (DMDC) administers the Workplace and Gender Relations Survey to both active and Reserve members of the Armed Forces every two years, as established in Title 10 of the U.S. Code.[51] The Coast Guard is not included in the survey population.[52] DMDC administered the WGRA in 1995,

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

51 *See* 10 U.S.C. § 481 (2013).

52 *See id.*

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

2002, 2006, 2010, and 2012, and included questions about "unwanted sexual contact" in 2006, 2010, and 2012,[53] which were designed to "calculate annual prevalence rates . . . of unwanted sexual contact, unwanted gender-related behaviors (i.e., sexual harassment and sexist behavior), and gender discriminatory behaviors and sex discrimination" over the course of twelve months.[54] The WGRA is a Web-based, self-report survey.

DMDC began including questions about "unwanted sexual contact" in the WGRA in 2006 in order to assess the overall prevalence of sexual assault in the military.[55] Prevalence is a measure of "the number of people in a population who experienced at least one event of interest."[56] The purpose of the 2012 WRGA was stated as:

> Information collected in this survey will be used to research attitudes and perceptions about gender-related issues, estimate the level of sexual harassment and unwanted sexual contact, and identify areas where improvements are needed. This information will assist in the formulation of policies which may be needed to improve the working environment.[57]

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

The WGRA included a total of 94 questions on all facets of job satisfaction and gender relations, including a number of questions regarding unwanted gender-related behaviors, gender discriminatory behaviors, and "unwanted sexual contact" the respondents experienced during the preceding 12 months. DoD SAPRO defined "unwanted sexual contact" in the 2012 WGRA as "intentional sexual contact that was against a person's will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body."[58] The behavior surveyed ranged from unwanted touching to rape. While intended to capture certain acts prohibited by the Uniform Code of Military Justice (UCMJ), this definition does not specifically track any particular criminal conduct.[59]

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53 Defense Manpower Data Center, Survey Note: 2012 Workplace and Gender Relations Survey of Active Duty Members 1 (Mar. 2013) [hereinafter 2012 Survey Note], *available at* http://www.sapr.mil/public/docs/research/2012_workplace_and_gender_relations_survey_of_active_duty_members-survey_note_and_briefing.pdf.

54 *Id.*

55 FY12 SAPRO Annual Report, *supra* note 42, Annex A, at 1.

56 William J. Sabol & Allen Beck, "Appearance before the Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel (RSP)," at 13 (Apr. 11, 2014) (PowerPoint Presentation to Comparative Systems Subcommittee) [hereinafter BJS PowerPoint Presentation].

57 2012 WGRA Survey at 2.

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

59 2012 WGRA Survey, *supra* note 42, at 12 (Question 32). The specific question asked of survey recipients was as follows:
In the past 12 months, have you experienced any of the following intentional sexual contacts that were against your will or occurred when you did not or could not consent where someone…
- Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
- Attempted to make you have sexual intercourse, but was not successful?
- Made you have sexual intercourse?

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

Following a positive response to whether a survey participant experienced unwanted sexual contact in the previous twelve months, subsequent questions in the 2012 WGRA ask respondents about why they did or did not report the crime to a military authority. The 2012 WGRA estimated that 66 percent of women who indicated they experienced unwanted sexual contact in the previous year did not report to military authorities, while 76 percent of men did not report.[60] The top reasons selected by women for not reporting were: not wanting anyone to know (70%), feeling uncomfortable making a report (66%), and thinking the report would not be kept confidential (67%).[61] The top reasons selected by men were: fear of punishment for infractions/violations (22%), feeling report would not be believed (17%), and thinking performance evaluation or chance for promotion would suffer (16%).[62]

Since the introduction of sexual assault questions in 2006, the WGRA has been both widely cited and widely criticized as DoD continues to combat the military sexual assault problem.[63] The Subcommittee heard from a number of national experts who specialize in developing surveys to assess and analyze crime reporting trends, as well as DoD personnel who continue to refine the WGRA and study and analyze the resulting data. In order to understand the extent of the crime problem, researchers must find a way to measure sexual violence incidence and prevalence in the most accurate way possible.[64] Experts have conducted studies on survey purpose, design, methodology, phraseology in survey questions, and other variables in an effort to explain "why such widely diverging estimates of the level of rape occur."[65] Ultimately, there is no precise way of knowing whether the survey results are an accurate representation of the reality of criminal behavior.[66] In fact, one expert testified that survey approach alone could result in reporting rates that are ten times higher than would be found through alternate survey approaches.[67]

- Attempted to make you perform or receive oral sex, anal sex, or penetration by a finger or object, but was not successful?
- Made you perform or receive oral sex, anal sex, or penetration by a finger or object?

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

61 *Id.*

62 *Id.*

63 *See*, e.g., Lisa M. Schenck, *Informing the Debate about Sexual Assault in the Military Services: Is the DoD Its own Worst Enemy?*, 11 Ohio St. J. Crim. L. __ (forthcoming Spring 2014); *see also* Captain Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault*, Wall St. J. (May 19, 2013). *See generally, e.g.*, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2013 (May 2014) [hereinafter FY13 SAPRO Annual Report], *available at* http://www.sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

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

65 Bonnie S. Fisher, *Measuring Rape Against Women: The Significance of Survey Questions* I-4-4 (2004) (citing Ronet Bachman, *A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-Partner Violence Against Women From the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)*, 6(8) Violence Against Women 839-67 (2000)), *available at* https://www.ncjrs.gov/pdffiles1/nij/199705.pdf; James P. Lynch, *Clarifying Divergent Estimates of Rape From Two National Surveys*, 60(3) Public Opinion Quarterly, 410-30 (1996); James P. Lynch, *Understanding Differences in the Estimates of Rape from Self-Report Surveys*, in From Data to Public Policy: Affirmative Action, Sexual Harassment, and Domestic Violence, and Social Welfare (Rita J. Simon ed., 1996); Martin D. Schwartz, *Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women*, 6(8) Violence Against Women 815 (2000).

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

67 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 157 (Apr. 11, 2014) (testimony of Dr. Allen Beck, Bureau of

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The WGRA data also aggregates data that would be useful if differentiated, including which offenders in unreported offenses are subject to military jurisdiction. Of 6.1 percent of women who reported experiencing unwanted sexual contact in the 2012 survey, 18 percent indicated that the offender was not a DoD member.[68] Nine percent indicated the offender was affiliated with DoD, but was not a military member.[69] Another seven percent indicated the offender was a spouse or significant other, but the report did not note whether any of those seven percent were military or DoD affiliated.[70] Of one point two percent of men who reported experiencing unwanted sexual contact, twenty-two percent indicated that the offender was not a DoD member. Twenty-five percent indicated the offender was DoD affiliated, but was not another military member.[71] Another 13 percent of men who reported experiencing unwanted sexual contact indicated the offender was a spouse or significant other, but again, the report did not note whether any of those 13 percent were military or DoD affiliated.[72]

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

2. National Intimate Partner and Sexual Violence Survey

Also designed to capture prevalence of sexual violence, the Centers for Disease Control and Prevention (CDC) began conducting the NISVS in 2010.[75] The NISVS is an ongoing, national telephone survey conducted by random digit dial (RDD)[76] that collects information on experiences of sexual violence, stalking, and intimate partner violence for men and women over age 18 in the United States.[77] The NISVS is intended to assess the prevalence and characteristics of sexual violence, stalking, and intimate partner violence, risk factors for experiencing these forms of violence, patterns displayed by certain perpetrators, and the health consequences

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Justice Statistics).

68 FY12 SAPRO Annual Report, *supra* note 42, Annex A, at 37 (noting that "10% indicated the offender was an unknown person, 8% indicated the offender was a person(s) in the local community").

69 *Id.* (noting that "5% indicated the offender was a DoD/Service civilian employee(s); 4% indicated the offender was a DoD/Service civilian contractor(s)").

70 *Id.* Similarly, of 1.2% of men who reported experiencing unwanted sexual contact, 22% indicated that the offender was not a DoD member. *Id.*, Annex A, at Slide 38 (noting that "13% indicated the offender was an unknown person, 9% indicated the offender was a person(s) in the local community").

71 *Id.*, Annex A, at Slide 38 (noting that "13% indicated the offender was a DoD/Service civilian employee(s); 12% indicated the offender was a DoD/Service civilian contractor(s)").

72 *Id.*

73 DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 59, at 4.

74 *See generally* BJS PowerPoint Presentation, *supra* note 55, at 2.

75 NISVS 2010 Summary Report, *supra* note 42.

76 A survey method in which telephone numbers are generated at random.

77 NISVS 2010 Summary Report, *supra* note 42, at 1.

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associated with these forms of violence.[78] The CDC uses a broad definition of sexual violence that includes rape, sexual coercion, unwanted sexual contact, and non-contact unwanted sexual experiences.[79]

3. National Crime Victimization Survey

The NCVS, administered continuously since 1972, is conducted by the U.S. Census Bureau for the Department of Justice Bureau of Justice Statistics (BJS).[80] The NCVS is a national survey of randomly selected households which is administered to all members age 12 and older residing in a selected household. Once selecting a household, the Census Bureau surveys the residents every six months for a period of three years, and the BJS reports incidence of crime victimization on an annual basis. The NCVS is not limited to sexual violence, but surveys "nonfatal personal crimes (rape or sexual assault, robbery, aggravated and simple assault, and personal larceny) and household property crimes (burglary, motor vehicle theft, and other theft) both reported and not reported to police."[81] The sexual violence surveyed includes rape and sexual assault.[82]

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78 *Id.*

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

- Among women, rape includes vaginal, oral, or anal penetration by a male using his penis. It also includes vaginal or anal penetration by a male or female using their fingers or an object.
- Among men, rape includes oral or anal penetration by a male using his penis. It also includes anal penetration by a male or female using their fingers or an object.
- **Being made to penetrate someone else** includes times when the victim was made to, or there was an attempt to make them, sexually penetrate someone without the victim's consent because the victim was physically forced (such as being pinned or held down, or by the use of violence) or threatened with physical harm, or when the victim was drunk, high, drugged, or passed out and unable to consent.
  - Among women, this behavior reflects a female being made to orally penetrate another female's vagina or anus.
  - Among men, being made to penetrate someone else could have occurred in multiple ways: being made to vaginally penetrate a female using one's own penis; orally penetrating a female's vagina or anus; anally penetrating a male or female; or being made to receive oral sex from a male or female. It also includes female perpetrators attempting to force male victims to penetrate them, though it did not happen.
- **Sexual coercion** is defined as unwanted sexual penetration that occurs after a person is pressured in a nonphysical way. In NISVS, sexual coercion refers to unwanted vaginal, oral, or anal sex after being pressured in ways that included being worn down by someone who repeatedly asked for sex or showed they were unhappy; feeling pressured by being lied to, being told promises that were untrue, having someone threaten to end a relationship or spread rumors; and sexual pressure due to someone using their influence or authority.
- **Unwanted sexual contact** is defined as unwanted sexual experiences involving touch but not sexual penetration, such as being kissed in a sexual way, or having sexual body parts fondled or grabbed.
- **Non-contact unwanted sexual experiences** are those unwanted experiences that do not involve any touching or penetration, including someone exposing their sexual body parts, flashing, or masturbating in front of the victim, someone making a victim show his or her body parts, someone making a victim look at or participate in sexual photos or movies, or someone harassing the victim in a public place in a way that made the victim feel unsafe.

Id.

80 Bureau of Justice Statistics, "Data Collection: National Crime Victimization Survey (NCVS): Methodology," *at* http://www.bjs.gov/index.cfm?ty=dcdetail&tiid=245#Methodology.

81 *Id.*

82 The BJS defines rape as, "forced sexual intercourse including both psychological coercion as well as physical force. Forced sexual intercourse means penetration by the offender(s). [Rape] includes attempted rapes, male as well as female victims, and both heterosexual and homosexual rape. Attempted rape includes verbal threats of rape." Sexual assault is defined by the BJS as, "A wide range of victimizations, separate from rape or attempted rape. These crimes include attacks or attempted attacks generally involving unwanted sexual contact between victim and offender. Sexual assaults may or may not involve force and include such things as

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In contrast to prevalence surveys like the WGRA and the NISVS, incidence surveys such as the NCVS capture the number of criminal events, rather than the number of people affected by crime.[83] By conducting survey interviews every six months, the BJS can isolate criminal events and determine whether or not those events were reported to the police. In doing so, the NCVS attempts to get at the "dark figure" of crime; that is, underreporting of crime not captured in law enforcement statistics.[84] In 2011, the response rate for the NCVS was 88%.[85]

4. Uniform Crime Report

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

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

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grabbing or fondling. It also includes verbal threats." Bureau of Justice Statistics, "Rape and Sexual Assault: About this Topic," *at* http://www.bjs.gov/index.cfm?ty=tp&tid=317.

83 BJS PowerPoint Presentation, *supra* note 55, at 13.

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

85 NAS Report, *supra* note 48, at 4 .

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

87 U.S. Dep't of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Statistics: About the Uniform Crime Reporting Program," *at* http://www.bjs.gov/ucrdata/abouttheucr.cfm.

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

89 U.S. Dep't of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Statistics: UCR Offense Definitions," *at* http://www.bjs.gov/ucrdata/offenses.cfm.

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enforcement authorities."[90] The NCVS also summarizes the reasons that victims give for reporting or not reporting.[91]

5. DoD Annual Report to Congress (SAPRO Report)

Each fiscal year, DoD SAPRO submits a data call to the Military Departments for statistical and case synopsis information on sexual assault crimes, and compiles the information in an annual report to Congress.[92] SAPRO reports information obtained through restricted and unrestricted sexual assault reports to SARCs and MCIOs across the Services. Restricted reporting allows a victim to confidentially access medical care and victim advocacy services without initiating an official investigation or command notification. Unrestricted reporting grants similar access, but the report is also referred to an MCIO and the command is notified.[93] SAPRO released its latest annual report to Congress, covering information for fiscal year 2013, on May 1, 2014.[94]

The term "sexual assault," as used by DoD SAPRO,[95] is "[i]ntentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority when the victim does not or cannot consent. The term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: rape, sexual assault, aggravated sexual contact, abusive sexual contact, nonconsensual sodomy (forced oral or anal sex), or attempts to commit these acts."[96] This definition differs from the offense of "sexual assault" defined in the current version of Article 120 of the UCMJ in effect since June 28, 2012.[97]

Crime Victimization Surveys

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

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90 U.S. Dep't of Justice, Federal Bureau of Investigation, "Uniform Crime Reporting Statistics: The Nation's Two Crime Measures," *at* http://www.bjs.gov/ucrdata/twomeasures.cfm.

91 *Id.*

92 FY12 SAPRO Annual Report, *supra* note 42, Vol. I, at 56.

93 *Id.* at 17-18.

94 See FY13 SAPRO Annual Report, *supra* note 63.

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

96 U.S. Dep't of Def., Directive [hereinafter DoDD] 6495.01, Sexual Assault Prevention and Response (SAPR) Program, Glossary at 18 (Jan. 23, 2012); FY13 SAPRO Annual Report, *supra* note 63, at 109.

97 Article 120 defines sexual assault as follows: (1) "commit[ting] a sexual act upon another person by—(A) threatening or placing that other person in fear; (B) causing bodily harm to that other person; (C) making a fraudulent representation that the sexual act serves a professional purpose; or (D) inducing a belief by any artifice, pretense, or concealment that the person is another person; (2) commit[ting] a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or (3) commit[ting] a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—(A) impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of sexual assault and shall be punished as a court-martial may direct." Manual for Courts-Martial, United States pt. IV, ¶ 45.a.(b) (2012) [hereinafter MCM], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf.

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health" approach, and the "criminal justice" approach.[98] Prevalence surveys are typically used in a public health approach to surveying a certain population, whereas incidence surveys are more often used when analyzing the criminal justice response.[99] Public health surveys, such as the NISVS conducted by the CDC, evaluate the characterization of physical and mental health damage to the victim. They normally have little fidelity regarding the accuracy of events, because there is little or no follow-up to distinguish timeline, definitions, or whether the reported behavior actually falls within the intended survey parameters.[100] Criminal justice surveys, like the NCVS, are designed to determine whether a well-defined, specified criminal event falls into the time period captured by the survey, and are normally used for comparison with actual arrest and conviction statistics.[101] There is not extensive research and development in the area of crime victimization survey methodology, but rather, surveys evolved over time through experimental survey techniques.[102]

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

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

99 *See id.*

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

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

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

103 Fisher, *supra* note 64.

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

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

106 *Id.* at 47.

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B. PUBLIC HEALTH VS. CRIME VICTIMIZATION SURVEYS

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

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

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

Discussion: The CDC conducted the first NISVS in 2010. Though spearheaded by the CDC, the National Institute of Justice and the DoD helped to design and launch the survey.[107] As a result, the NISVS included a random sample of active duty women and female spouses of active duty military members.[108] After adjusting NISVS data and other national studies on sexual assault prevalence, DoD concluded that "the risk of sexual contact, sexual violence, is about the same in the national population for women and also the female military population, whether you measure in the past year, the past three years or at the lifetime."[109] Data from other national studies support this conclusion.[110]

Campus Sexual Assault Study[111]

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

Drug-facilitated, Incapacitated, and Forcible Rape: A National Study[112]

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

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107 2010 NISVS Summary Report, *supra* note 42, at 1.

108 *Id.*

109 *Transcript of RSP Public Meeting* 124 (June 27, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO) (citing National Center for Injury Prevention and Control, Prevalence of Intimate Partner Violence, Stalking, and Sexual Violence Among Active Duty Women and Wives of Active Duty Men – Comparisons with Women in the U.S. General Population 2010: Technical Report 1 (Mar. 2010)) *available at* http://www.sapr.mil/public/docs/research/2010_National_Intimate_Partner_and_Sexual_Violence_Survey-Technical_Report.pdf); *see also* BJS PowerPoint Presentation, *supra* note 55, at 14.

110 Data provided by DoD SAPRO. *See, e.g.*, DoD SAPRO Powerpoint Presentation to RSP 60 (Jun. 27, 2013).

111 Christopher P. Krebs, et al., The Campus Sexual Assault (CSA) Study (Oct. 2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

112 Dean G. Kilpatrick, et al., Drug-facilitated, Incapacitated, and Forcible Rape: A National Study (July 2007), *available at* https://www.ncjrs.gov/

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- About 3.5% of active duty women experienced a sexual assault (attempted or completed oral, anal or vaginal penetration without consent) in the 12 months prior to the survey (DMDC, 2012)

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

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

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

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pdffiles1/nij/grants/219181.pdf.

113 *Transcript of RSP Role of the Commander Subcommittee Meeting* 22 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Director DoD SAPRO).

114 *Id.*

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

116 *Transcript of RSP Public Meeting* 13 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University); see *also Transcript of RSP Comparative Systems Subcommittee Meeting* 118 (Apr. 11, 2014) (testimony of Dr. William J. Sabol, Acting Director, Bureau of Justice Statistics).

117 *See Transcript of RSP Role of the Commander Subcommittee* 24-25 (Oct. 23, 2013) (testimony of Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center).

118 *See* Bureau of Justice Statistics, "Rape and Sexual Assault: About this Topic," *at* http://www.bjs.gov/index.cfm?ty=tp&tid=317; Centers for Disease Control, "Injury Prevention & Control: The National Intimate Partner and Sexual Violence Survey," *at* http://www.cdc.gov/violencePrevention/NISVS/index.html.

119 United States Commission on Civil Rights, Report on Sexual Assault in the Military 8-10 (Sept. 2013) (noting that "[t]he military environment is unlike college/university settings and even other civilian settings for a variety of reasons"), *available at* http://www.usccr.gov/

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survey methodology and approach, even surveys with similar approaches are not comparable.[120] Experts throughout the field agree that surveying and measuring sexual assault is extremely challenging.[121] In short, there is no consensus among researchers regarding how to develop an optimal measure for measuring sexual victimization, and the field of survey research continues to develop.[122]

A tailored crime victimization survey, carefully designed with best practices from the BJS, could improve the accuracy of DoD's estimates of sexual assault underreporting. The NCVS has been criticized in recent years for possibly underestimating rape and sexual assault because it is an omnibus crime survey which does not focus specifically on sexual assault, and other surveys report larger incidence of sexual violence.[123] Recently, the National Academy of Sciences (NAS) National Research Council studied the NCVS to determine how well it assessed national crime victimization in the areas of rape and sexual assault. "The NCVS is an omnibus victimization survey . . . it has a broad mandate and focus to include a wide array of different types of victimizations, including both crimes against people and crimes against property."[124] The NAS released its report in 2014, making several findings and recommendations for best practices to improve the NCVS.[125] The NAS concluded that "it is likely that the NCVS is undercounting rape and sexual assault victimization," but that the NCVS "as an omnibus crime survey is efficient in measuring the many types of criminal victimizations across the United States, but it does not measure the low incidence events of rape and sexual assault with the precision needed for policy and research purposes."[126] As a result, the NAS recommended the BJS "should develop an independent survey – separate from the [NCVS] - for measuring rape and sexual assault."[127] Likewise, DoD should develop an independent crime victimization survey – separate from the WGRA public health survey to measure the scope of the problem of sexual assault crimes in the military.

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pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

120 *Id.* (describing how variables in studies and surveys make comparison challenging, even among similar populations).

121 Bureau of Justice Statistics, Special Report on Female Victims of Sexual Violence, 1994-2010, at 2 (Mar. 2013), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4594; *see e.g., Transcript of RSP Public Meeting* 11-34 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University); *see generally Transcript of RSP Comparative Systems Subcommittee Meeting* (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland; and Dr. William J. Sabol, Acting Director, and Dr. Allen Beck, Bureau of Justice Statistics).

122 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 156 (Apr. 11, 2014) (testimony of Dr. Allen Beck, Bureau of Justice Statistics).

123 NAS Report, *supra* note 48, at 3.

124 *Id.* at 16.

125 NAS Report, *supra* note 48.

126 *Id.* at 4-5.

127 *Id.* at 162.

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

C. BEST PRACTICES FOR MEANINGFUL COMPARISON

Survey Design and Definitions for Meaningful Data Analysis

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

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

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

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

Discussion: In order to meaningfully analyze survey data, survey design should employ questions using consistent definitions of criminal activity. The definition of unwanted sexual contact DMDC used in the 2012 WGRA is "intentional sexual contact that was against a person's will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body."[128] The WGRA asks survey respondents to relate personal experiences in the twelve months prior to taking the survey, and those indicating an experience of unwanted sexual contact are then asked to provide details of the experience by selecting responses to multiple choices.[129]

In 2009, DTF-SAMS noted that the discrepancy in definitions was detrimental to any meaningful analysis, noting, "Unfortunately, survey definitions of unwanted sexual contact do not precisely match the legal definition of sexual assault and Service-wide surveys are conducted too infrequently to offer useful comparisons."[130] Yet the "terms, questions, and definitions of 'unwanted sexual contact' have been consistent throughout all of the

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

129 *Id.* at 1, 12.

130 Report of the Defense Task Force on Sexual Assault in the Military Services 19 n.45 (Dec. 2009) [hereinafter DTFSAMS], *available at* http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf.

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

WGRA surveys since 2006."[131] In June 2013, the Senate Armed Services Committee (SASC) Report on the FY14 NDAA noted that "[u]sing the imprecise terms 'sexual assault' and 'unwanted sexual contact' to refer to a range of sexual offenses creates confusion about the types of unwanted sexual acts that are being perpetrated against members of the military."[132] The SASC then directed the DoD to "modify language used in the annual SAPRO report and the WGRS to clearly report the number of instances of each type of unwanted sexual act, to include rape, sexual assault, forcible sodomy, and attempts to commit those acts."[133]

A 2014 report from the National Academy of Sciences (NAS) looked at the NCVS and how legal definitions and context may have impacted survey results. The report noted, "because the [BJS] focuses specifically on criminal victimization, these definitions need to conform as much as possible to existing legal definitions."[134] The NAS Report recommended that uniform definitions of rape and sexual assault for the national survey include certain commonalities. The commonalities the report developed are:

- The victimization is not restricted by gender: both males and females can be victimized, and the offender can be either male or female.
- "Rape" involves a broad range of penetrations, including penetration of the vagina, anus, or mouth, and with a penis, tongue, fingers, or another object.
- The purpose is for sexual arousal or degradation.
- The offender uses force or threat of force, against either the victim or another person.
- The victim does not consent to the sexual activity or does not have the capacity to consent.
- "Sexual assault" includes a fairly wide range of victimizations that involve unwanted non-penetration sexual contact.[135]

Data from the 2012 WGRA indicates that of the 1.2 percent of men and 6.1 percent of women who experienced unwanted sexual contact, 57 percent of women and 15 percent of men indicated experiencing attempted or completed sexual intercourse, anal, or oral sex.[136] Another 32 percent of women and 51 percent of men indicated experiencing non-penetrative, unwanted sexual touching, while 10 percent of women and 34 percent of men indicated experiencing some unspecified behavior. A crime victimization survey with questions specifically designed to capture certain behaviors would provide better fidelity in the breadth and depth of the military sexual assault problem.

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131 DoD SAPRO, "2012 Workplace and Gender Relations Survey of Active Duty Members Fact Sheet," at 2 (2013), *available at* http://www.sapr.mil/public/docs/research/WGRA_Survey_Fact_Sheet.pdf.

132 S. Rep. No. 113-44, at 119 (2013).

133 *Id.* at 120.

134 NAS Report, *supra* note 48, at 23.

135 *Id.* at 33.

136 FY12 SAPRO Annual Report, *supra* note 42, Annex A, at 141, *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

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

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

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

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

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

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

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137 *See* DoD SAPRO, 2012 Workplace and Gender Relations Survey of Active Duty Members: Statistical Methodology Report iii (Dec. 2012) (noting that "[t]he 2012 WGRA used a single-stage stratified sample design"), *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/2012WGRA_Statistical_Methodology_Report_Final.pdf; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 81-83 (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); *see generally* Schenck, *supra* note 62.

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

139 *See id.* at 58-59.

140 *See id.*

141 *See generally id.* at 27-28.

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

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

Discussion: The DoD has spent significant time, money, and manpower developing, administering, and analyzing data in efforts to combat sexual assault.[142] The data collected from the WGRA has been used, among other ways, to identify an underreporting gap between estimated *prevalence* of unwanted sexual contact and actual *incidence* of restricted and unrestricted sexual assault reports.[143] Several experts explained to the Subcommittee that while misuse of the WGRA data for incidence reporting comparisons is problematic, there is still a great deal of information that can be gleaned from the prevalence data collected.[144] One expert explained that the DoD could analyze data previously collected for additional patterns and information to inform crime victimization concerns.[145]

As the expert explained, there are three categories in which the data could be useful. The first involves breaking out the data by the "type" of unwanted sexual contact to determine whether any trends in behaviors emerge that might indicate how well the military is doing at combatting certain behaviors – from sexual harassment to unwanted touching and forcible rape.[146] Second, DoD should evaluate prevalence rates to determine who is at the greatest risk for unwanted sexual contact in order to more specifically target prevention and education efforts.[147] The last category of data would evaluate victim satisfaction or dissatisfaction with the system and how it contributes to actual reporting of events.[148]

Reliability Based on Response Rates

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

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

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

143 *See, e.g.,* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 59, at 7.

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

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

146 *Id.* at 29-30.

147 *Id.* at 31-32.

148 *Id.* at 32-33.

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

risk for bias in the sampling and, therefore, less reliable. One of the reasons for the low response rate may be survey fatigue.

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

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

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

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

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

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

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

153 *Id.* at 85.

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

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

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

157 *See id.*

158 *Id.* at 16 (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University).

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response rates.[159] While response rates are important, over-surveying a population with multiple or lengthy surveys will likely erode the overall response rate and reliability of the data. "I think ultimately it is about communicating respect to your respondents, and if you just kind of drill them on question after question after question, I think that's a real sign of disrespect, and respondents pick up on that."[160]

D. STUDYING RECENT TRENDS IN MILITARY REPORTING

Using Existing Data from Prior WGRA Reports

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

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

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

Discussion: Public health surveys and prevalence reporting is beneficial, as information from the WGRA survey is also used to estimate and assess the scope of sexual assault behaviors and concerns throughout DoD.[161] In the 2012 WGRA, DMDC received 22,792 completed surveys, which represented a weighted response rate of 24 percent.[162] Survey results from 2012 indicated 6.1 percent of female respondents and 1.2 percent of male respondents said they experienced "unwanted sexual contact" in 2012.[163] The rate for females in the 2012 WGRA was statistically significantly higher than results from the 2010 WGRA, when 4.4 percent of female

159 *See generally id.* at 122-123 (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO).

160 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 168 (Apr. 11, 2014) (testimony of Dr. Allen Beck, Bureau of Justice Statistics).

161 *Transcript of the RSP Role of the Commander Subcommittee Meeting* 55-56 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, DoD SAPRO).

162 FY12 SAPRO Annual Report, *supra* note 42, Annex A, at 1.

163 *Id.*, Annex A, at 2.

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respondents indicated unwanted sexual contact.[164] This estimate represented a 34 percent increase from the 2010 WGRA survey estimate of 19,300, but a 24 percent decrease from the 2006 WGRA survey estimate of 34,200.[165]

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

Suggested Improvements for the 2014 WGRA Survey

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

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

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

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164 *Id.*

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

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

167 *See* DoD SAPRO, "2014 DoD Workplace and Gender Relations Survey (WGRS)" (Apr. 9, 2014), *currently available at* http://responsesystemspanel.whs.mil/.

168 *See id.*

169 *See id.*

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

IV. OVERVIEW OF THE MULTIDISCIPLINARY APPROACH TO RESPOND TO REPORTS OF SEXUAL ASSAULT

A. THE VICTIM CENTRIC MULTIDISCIPLINARY APPROACH

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

Figure 1. The Multidisciplinary Approach to Victim Support[170]

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

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

B. THE SPECIAL VICTIM CAPABILITY IN THE MILITARY

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

While funding and requirements are legislated, implementation of Special Victim Capabilities is left for each Service to tailor programs to specific needs of their Service culture. "The Department's collective capability is presented uniquely in each Military Service," [174] as established in the table below:[175]

Table 6

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

171 U.S. Dep't of Def., Report to the Committees on Armed Services of the U.S. Senate and U.S. House of Representatives, Establishment of Special Victim Capabilities within the Military Departments to Respond to Allegations of Certain Special Victim Offenses 3 (Dec. 2013) [hereinafter DoD SVC Report], available at http://www.sapr.mil/public/docs/reports/DoD_SpecialVictimsCapabilities_Report_20131213.pdf

172 U.S. Dep't of Def. Directive-Type Memorandum [hereinafter DTM] 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support Attachments 3, 4 (Feb. 12, 2014).

173 *Id.*

174 DoD SVC Report, *supra* note 171, at 8-9.

175 Data for the chart was provided by the Services. See Services' Response to Request for Information 50 (Nov. 21, 2013).

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Navy	9 regional-based Senior Trial Counsel who collaborate with Naval Criminal Investigative Service (NCIS) special investigators to investigate, review, and prosecute special victim cases. The Navy has also created a Trial Counsel Assistance Program (TCAP) with case review and prosecution reach-back and support. TCAP attorneys can also be detailed to prosecute complex cases. The Navy also has several civilian and highly qualified expert positions, through which civilian attorneys with extensive prosecution experience provide assistance to trial counsel in complex and sexual assault cases and specialized training.
Marine Corps	Specially qualified, geographically-assigned Complex Trial Teams led by a seasoned Regional Trial Counsel providing the special victim prosecutorial expertise and support. The Marine Corps has also established HQE positions, through which civilian attorneys with extensive litigation and court-martial experience provide assistance to trial counsel in complex and sexual assault litigation. Marine Corps judge advocates will also team with NCIS special investigators in special victim cases. Furthermore, the Marine Corps recently increased the opportunity for its judge advocates to receive graduate-level education in criminal law.

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

1. The Need for Standardized Terminology

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

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

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

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

- **SANE –** Sexual Assault Nurse Examiner. SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform sexual assault exams.[176]

176 *See* U.S. Dep't of Justice, Office on Violence Against Women, A National Protocol For Sexual Assault Medical Forensic Examinations: Adults/Adolescents 59 (Apr. 2013) [hereinafter OVW], *available at* https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf. Forensic Nurse Examiners

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

- **SAMFE –** Sexual Assault Medical Forensic Examiner. SAMFEs are medical personnel who are clinically trained to perform a sexual assault exam, and who have obtained an additional forensic certification to collect forensic evidence from sexual assault victims. Often, the SAMFE is a SANE nurse who has completed the forensic certification.
- **Victim Advocate** – the initial advocate providing assistance to the victim whose only allegiance is to the victim. He/she is available to provide support throughout the process.
- **Victim Coordinator** – an individual providing victim support from the law enforcement agency through the investigative process.
- **Victim Witness Liaison** – an individual providing victim support from the prosecutor's office through the prosecution of the case.
- **Special Victim Counsel** – victim attorney.[177]
- **Special Victim Prosecutor** – the military prosecutor specifically trained for special victim crimes, to include adult sexual assault cases.[178]
- **Special Victim Unit Investigator** – military investigator specializing in special victim crimes, to include adult sexual assault cases.[179]
- **Detective** – Civilian Law enforcement based investigator, assigned to conduct investigations subsequent to a patrol officer's first response.
- **Investigator** – A trained criminal investigator employed by the prosecution or defense office to provide investigative support specifically for that office.

are able to collect forensic evidence for a variety of crimes.

177 The Navy and Marine Corps refer to this person as Victim Legal Counsel.

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

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

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

2. Comparing Civilian and Military Sexual Assault Response System Personnel

Figure 2

Primary Personnel Responsibilities in Civilian Sexual Assault Response

Primary Personnel Responsibilities in Military Sexual Assault Response

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

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

V. SPECIAL INVESTIGATORS AND SEXUAL ASSAULT INVESTIGATIONS

A. INTRODUCTION

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

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

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

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

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180 DoDI 5505.13, Initiation of Investigations by Defense Criminal Investigative Organizations ¶ 4 (Mar. 24, 2011).

181 *See, e.g.*, Report of the Defense Task Force on Sexual Harassment & Violence at the Military Service Academies (June 2005) [hereinafter DTFMSA], *available at* http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf; DTFSAMS, *supra* note 130.

182 DTFSAMS, *supra* note 130, at 88.

183 Colby T. Hauser, "Army Expert Receives National Recognition for Combating Sexual Assault," *at* http://www.army.mil/article/72055/ (Jan. 17, 2012) (quoting Joanne Archambault, the executive director of End Violence Against Women International (EVAWI) and a 23-year veteran of the San Diego Police Department).

184 DoDI 5505.18, Investigation of Adult Sexual Assault in the Department of Defense ¶ 3.a (Jan. 25, 2013).

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

conduct investigations of every unrestricted sexual assault reported.[185] A commander of a victim or alleged offender may not conduct an internal investigation or delay reporting to the MCIO in order to determine whether the report is credible and must report all allegations to an MCIO upon first learning of the allegation.[186] Investigators must further ensure a SARC is notified as soon as possible to ensure system accountability and the victim's access to services.[187]

Allegations of military sexual assault are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. For example, if a Service member is accused of committing a sexual assault in the civilian community, not on a military installation, civilian law enforcement authorities have primary jurisdiction over the investigation and the MCIO provides assistance, as requested.[188] In other cases, an alleged assault may occur in an area on a military installation where there is both federal and civilian criminal jurisdiction.[189] In these instances, the MCIO must inform the civilian jurisdiction, which may accept investigative responsibility if the MCIO declines, or the civilian agency and the MCIO may conduct the investigation jointly.[190]

B. ORGANIZATIONAL STRUCTURE OF MCIOS AND SPECIAL VICTIM UNITS

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

Finding 7-1: Large civilian police agencies and MCIOs have SVUs[191] comprised of specially trained investigators experienced in responding to sexual assaults.[192] Smaller locations without an SVU often have a specially trained detective to investigate sexual assaults and the ability to coordinate with larger offices for assistance and guidance.

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

185 *Id.* at encl. 2, ¶ 6.

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

187 *Id.* at encl. 2, ¶ 1.

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

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

190 DoDI 5505.18 ¶ 3.c(3).

191 Special Victim Unit (SVU) is used as a generic term for any unit designated to handle sexual assault and other crimes with a more vulnerable victim, police agencies use a variety of terms for these specialized units.

192 *See infra* Sections C and D.

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

incidents of sexual assault to the MCIO. The MCIO assigns cases to investigators who meet specified training requirements.

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

Discussion

In many large civilian jurisdictions,[193] SVUs are organized and detailed to investigate sexual assault.[194] The SVU is typically a specialized unit designated to investigate adult sexual assault crimes, and is normally a subdivision of the detective or major crimes division. These units typically also investigate domestic violence and child abuse cases. In smaller civilian police agencies, there may be too few investigators available to specialize.

Currently, there are SVUs throughout the Services at installations with the highest military populations. NCIS has used Family and Sexual Violence (F&SV) teams at locations with large populations for some time, starting in Norfolk, Virginia, in 1996.[195] Army CID was authorized to hire civilian investigators and began organizing SVUs in 2009, and now has 21 SVU civilian investigators at 19 locations.[196] AFOSI was given the authorization and funding to hire investigators to fill Sexual Assault Investigator positions in 2010, and has 24 investigators assigned to 18 locations.[197] NCIS has 104 investigators dedicated to F&SV at eight locations, recently authorizing the addition of 54 new investigators.[198] Within this cadre of investigators, NCIS has created Adult Sexual Assault Program (ASAP) teams to conduct sexual assault investigations at its four locations with the highest troop density.[199]

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

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

194 Report of the Joint Service Commission-Sexual Assault Subcommittee [hereinafter JSC-SAS Report] Appendices C-P (Sept. 2013) (on file at RSP).

195 DTFSAMS, *supra* note 130, at 88; *see also* Naval Criminal Investigative Service, "Family & Sexual Violence Program," *available at* http://www.ncis.navy.mil/CoreMissions/FI/Pages/FamilySexualViolenceProgram.aspx.

196 *See Transcript of RSP Public Meeting* 91-92 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command (CID)); Army's Response to Request for Information 50 (Nov. 21, 2013).

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

198 *See Minutes of RSP Preparatory Session, NCIS Headquarters* (Aug. 1, 2013) (on file at RSP) (interview of Ms. Maureen Evans). The 54 new hires will not routinely go to F&SV teams, but will allow for the reassignment of experienced investigators to those teams. Navy's Response to Request for Information 132 (Apr. 11, 2014).

199 *See Transcript of RSP Public Meeting* 184-88 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, Deputy Assistant Director, Naval Criminal Investigative Service (NCIS)).

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Investigators (FSVI), acting as specialists for reports of family and sexual violence. CGIS works closely with local law enforcement agencies, which may respond initially when a CGIS agent is unavailable.[200]

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

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

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

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

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200 *See id.* at 192-98 (testimony of Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Investigative Service).

201 *See id.* at 275 (testimony of Sergeant Liz Donegan, Austin Police Department).

202 Maryland Coalition Against Sexual Assault, Baltimore City Sexual Assault Response Team, Annual Report 2 (Oct. 2011) [hereinafter MCASA].

203 *Id.*; *see also* Joanna Walters, *Investigating Rape in Philadelphia: How One City's Crisis Stands to Help Others,* The Guardian (July 2, 2013).

204 Police Executive Research Forum, Critical Issues in Policing Series: Improving the Police Response to Sexual Assault iv (Mar. 2012) [hereinafter PERF], *available at* http://policeforum.org/library/critical-issues-in-policing-series/SexualAssaulttext_web.pdf

205 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview with Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish Country).

206 MCASA, *supra* note 202, at 8.

207 *See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC)* (Feb. 20, 2014) (on file at RSP).

208 DoDI 5505.18 ¶ 2.c. Section 1742 of the FY14 NDAA codifies this requirement.

209 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of law enforcement personnel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (JBSA)* (Dec. 13, 2013) (same).

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

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

C. SELECTION AND EXPERIENCE

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

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

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

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

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

Discussion

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

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

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

212 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 83 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, U.S. Army Military Police School (USAMPS)); *see also* note 215, *infra.*

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recognize detectives assigned to those units should have both the capability and commitment to investigate sexual assaults.[213]

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

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

D. INVESTIGATOR TRAINING

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

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

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

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213 *See, e.g., id.* at 342 (testimony of Major Martin Bartness, Baltimore Police Department).

214 *See, e.g., id.* at 343.

215 *See, e.g., id.* at 342.

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

217 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sensitive Position Screening in Support of Sexual Assault Prevention and Response (Apr. 17, 2014).

218 *Id.*

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

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

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

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

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

Discussion

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

A study by a police research group revealed that 85% of the civilian police agencies responding to a survey indicated they have sexual assault training curricula for investigators or detectives.[219] A few, like the Los Angeles Police Department (LAPD), also require specialized training for sexual assault detectives.[220] LAPD requires its sexual assault detectives to attend the Major Assault Crimes 40-hour school which has an 8-hour block dedicated to sexual assaults. Further, sexual assault detectives must attend a 40-hour Sexual Assault Investigations course. [221] Many civilian police agencies, however, rely instead on "on-the-job" training to teach SVU detectives how to investigate sexual assaults. A number of civilian agencies require new detectives to attend a class to transition them from patrol officers to investigations. These classes train the officers on the administrative requirements of being a detective with little, if any, specialized instruction. Some agencies send their investigators to classes on interviewing victims.[222] A number of the civilian agencies interviewed stated they utilize on-line training[223] or training events.[224]

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

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219 PERF, *supra* note 204, at 2.

220 See *Transcript of RSP Public Meeting* 264-65 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department).

221 *Id.*

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

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

224 The International Association of Chiefs of Police (IACP) offers Sexual Assault Training to police agencies throughout the United States and worldwide. The IACP offers 3.5-day training courses for senior leaders based and first line supervisors. *See* IACP, "Violence Against Women - VAW," *at* http://www.theiacp.org/Violence-Against-Women.

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from a police academy. Army and Marine Corps investigators complete the 15-week CID Special Agent course at the United States Army Military Police School as part of their training.[225] Navy, Air Force, and Coast Guard investigators attend the 11-week Criminal Investigator Training Program at the Federal Law Enforcement Training Center (FLETC).[226] After the general course, Navy and Coast Guard investigators attend the NCIS Special Agent Basic Training Program for an additional nine weeks. Similarly, Air Force investigators attend the AFOSI Specific Agent Basic Training Course for an additional eight weeks.[227]

These training programs include some sexual assault training in their curriculum. The CID Special Agent course contains 16 hours of training specifically addressing sexual assault.[228] The NCIS add-on course uses a sexual assault case in their "continuing case" practical application of skills scenario.[229] This practical exercise allows the students to apply their investigative skills in every aspect of an investigation. The AFOSI add-on course has a 30-hour sexual assault practical exercise.[230]

In 2009, the Army's Military Police School (USAMPS) developed a Special Victim Unit Investigations Course, which is now 80 hours. MCIO investigators and judge advocates from all of the Military Services attend the course, a major focus of which is the use of the Forensic Experiential Trauma Interview, which is a trauma informed interview technique based on neuroscience research designed specifically for trauma and high stress victims.[231] The students review real cases and participate in several videotaped interviews which are critiqued. All CID investigators assigned to an SVU must attend the course. It has been identified as a core requirement for all CID investigators; therefore, all investigators should be scheduled to attend this course at some time early in their career.[232] Investigators at offices with no SVU also attend this course so that trained investigators are available at all locations. Investigators who complete the course are given an identifier as an SVU agent.[233] CID requires Senior SVU investigators also attend the Domestic Violence Intervention Course, Child Abuse Prevention and Investigation Course, and the Advanced Crime Scene Course before being identified as Senior SVU investigators.[234]

NCIS Adult Sexual Assault Program team special investigators and first line supervisors must attend the Advanced Adult Sexual Violence Training Program, a two-week advanced course collaboratively created by NCIS and Army CID.[235]

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225 See *Transcript of RSP Comparative Systems Subcommittee Meeting* 75 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, USAMPS).

226 *See, e.g., id.* at 120 (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation (AFOSI)).

227 *See, e.g., id.*

228 *See id.* at 75 (testimony of Ms. Donna Ferguson, USAMPS).

229 *See id.* at 139-40 (testimony of Mr. Robert Vance, NCIS).

230 *See id.* at 120-22 (testimony of Mr. Kevin Poorman, AFOSI).

231 *See id.* at 86 (testimony of Ms. Donna Ferguson, USAMPS); *see also Transcript of RSP Public Meeting* 64-109 (Dec. 11, 2013) (testimony of Mr. Russell Strand, USAMPS). Mr. Strand explained that FETI is a trauma informed interview technique that allows the victim to discuss the incident as a three-dimensional event instead of reducing the narrative to a series of one-dimensional questions.

232 *See Transcript of RSP Public Meeting* 210 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

233 Army personnel with specialized training are given skill identifiers indicating their qualifications for assignments

234 *See Transcript of RSP Public Meeting* 210 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

235 DoD and Services' Responses to Request for Information 75 (Nov. 21, 2013).

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AFOSI developed an eight-day Sexual Crimes Investigations Training Program (SCITP) modeled on the Army's Special Victim Unit Investigator's Course.[236] AFOSI also sends its investigators to a ten-day Advanced General Crimes Investigations Course and the five-day Advanced Sexual Assault Litigation Course (ASALC) at the Air Force Judge Advocate General's School which they attend with judge advocates.

The Defense Forensic Science Center also provides training for investigators from all of the Services. It offers a one-week Special Agent Laboratory Training Course in which investigators come to the lab to learn firsthand the capabilities of the various lab divisions. Investigators also learn information to assist in crime scene processing and evidence collection.[237]

While advanced sexual assault training courses are available to MCIO investigators, resources are not always available to send a sufficient number of investigators to the training courses given the increased workload and agent turnover.[238] Additionally, Congress has not specifically set aside money for sexual assault investigator training, leading to concerns that with waning resources within the military, the Services may cut money for training.[239] Because this training is essential to the military responses to sexual assault, it is critical that funding be sustained for investigators, who are often the first responders to a report of sexual assault.

In 2012, the DoD Inspector General's Office (IG) conducted an evaluation of the MCIOs' sexual assault investigation training.[240] It found that although each MCIO provided initial baseline training, periodic refresher training, and advanced sexual assault investigation training, the training hours varied for each. At the time of the evaluation, AFOSI had not initiated its SCITP. The DoD IG recommended that the MCIOs form a working group to review its baseline, periodic refresher, and advanced training to leverage training resources and expertise. The MCIOs currently have an active working group on sexual assault training.[241]

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236 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 123-24 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI).

237 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) / U.S. Army Criminal Investigation Laboratory (USACIL)* (Nov. 14, 2013) (on file at RSP) (interview of Ms. Lauren Reed, Director, USACIL).

238 *See Transcript of RSP Public Meeting* 237 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID); *see also id.* at 245 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, NCIS).

239 *See id.* at 90 (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS).

240 DoD IG, Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigation Training (Feb. 2013), *available at* http://www.dodig.mil/pubs/documents/DODIG-2013-043.pdf.

241 See *Transcript of RSP Public Meeting* 98 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

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Table 7

AGENCY	Basic Agent Course Location	Follow-on Basic Agent Training*	Advanced SA Training Course	Additional Training for SVUI
Military Investigators				
Army CID	CIDSAC, USAMPS, Fort Leonard Wood, MO (16 weeks)	None	SVUIC, USAMPS (2 weeks)	DVIC, USAMPS CAPIT, USAMPS ACSC, USAMPS
NCIS	CITP, FLETC, Glynco, GA (11 weeks)	NCIS SABTP, FLETC, Glynco, GA (9 weeks)	AASVTP, FLETC (2 weeks)	
AFOSI	CITP, FLETC, Glynco, GA (11 weeks)	AFOSI SABTC FLETC, Glynco, GA (8 weeks)	SCITP, FLETC (8 days)	AGCSC 10 days ASALC, AFJAGS, 5 days
CGCIS	CITP, FLETC, Glynco, GA (11 weeks)	NCIS SABTP, FLETC, Glynco, GA (9 weeks)	SVUIC, USAMPS	
Marine CID	CIDSAC, USAMPS, Fort Leonard Wood, MO (16 weeks)	None, attend MPIC and OJTed before attending CIDSAC	SVUIC	
Civilian Law Enforcement Agencies (CSS Visits/Presentations)				
FBI [242]	FBI Academy, Quantico VA (20 weeks)	NA	NA	NA
Los Angeles, CA PD	Major Assault Crimes (40 hours) **	NA	*** Sexual Assault Investigations (40 hours)	Sexual assault conferences
Fairfax, VA PD	None **	NA	***Shadow experienced Detective	Interview course Webinars Conferences
Philadelphia, PA PD	Detective Course (3 weeks) **	NA	***On the job training (OJT), 2 weeks internal training	Share training opportunities

242 Federal Bureau of Investigation, "New Agent Training," *at* http://www.fbi.gov/about-us/training/sat.

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

Arlington, VA PD	**	NA	***	
Falls Church, VA PD	** Investigations training	NA		Interview techniques
Baltimore, MD PD	**Academy has a basic investigators course.	NA	40 hours from external providers. OJT	Brought in external trainers, national conferences, cross-train with partners. Interview schools
Virginia Beach, VA PD	**	NA	*** Check off sheet for OJT	Seek out training, interview techniques, on-line training
Austin, TX PD	**	NA	***OJT internal training	External training opportunities
Ashland, OR PD	**	NA	No info provided	No info provided
Snohomish County, WA Sheriff's Office	**	NA	***teamed with a senior investigator	Interview course
Civilian Law Enforcement Agencies (JSC-SA Visits)[243]				
Maricopa County, AZ	**	NA		Interview training
Washington, D.C.	**	NA	Special Training	
Athens, GA	**	NA		Forensic Interviewing, other training
Grand Rapids, MI	**	NA		Forensic Interviewing

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

Discussion

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

243 Only those agencies that commented on training of investigators are listed.

244 Cassia Spohn & Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74(2) Alb. L. Rev. 1381 (2011).

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(commonly referred to as "rape myths") held by their officers and investigators to ensure proper reporting and investigation of sexual assaults.[245] One of the primary ways to address this issue is through training.[246]

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

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

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

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

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

246 PERF, *supra* note 204, at 2.

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

248 End Violence Against Women International (EVAWI), "Effective Report Writing: Using the Language of Non-Consensual Sex," *at* http://olti.evawintl.org/Courses.aspx.

249 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 487 (Jan. 7, 2014) (testimony of Ms. Claudia Bayliff, Attorney at Law).

250 MCASA, *supra* note 202, at 2.

251 *Id., Appendix I.*

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

253 Army's Response to Request for Information 134 (Apr. 14, 2014).

254 Services' Responses to Request for Information 134 (Apr. 14, 2014).

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

E. COLLATERAL MISCONDUCT AND VICTIM REPORTING

1. Collateral Misconduct

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

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

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

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

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

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

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

255 *See, e.g., Transcript of RSP Public Meeting* 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Army CID).

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Finding 10-5: For the last ten years, DoD policy documents use the following list of offenses to illustrate the most common collateral misconduct in many reported sexual assaults: "underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders."[256]

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

Discussion

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

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

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256 DoDI 6495.02 encl. 5, ¶ 7.

257 *Id.* at encl. 5.

258 FY12 SAPRO Annual Report, *supra* note 43, Vol. I, Annex A, at 107.

259 U.S. Dep't of Def., Directive-type Memorandum 11-063, Collateral Misconduct in Sexual Assault Cases (Nov. 12, 2004) (cancelled by DoD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013)).

260 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (on file at RSP) (interviews of Victim Advocates).

261 *See Transcript of RSP Public Meeting* 325-326 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).

262 *See, e.g., Transcript of RSP Public Meeting* 68-71 (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, who explained that she was warned her report would result in a charge of dereliction of duty for leaving her weapon in a combat zone).

263 *See, e.g.,* DTFMSA, *supra* note 181, at 28; DTFSAMS, *supra* note 130, at 30; Task Force Report on Care for Victims of Sexual Assault 28 (Apr. 2004) [hereinafter TFRCV], *available at* http://www.sapr.mil/public/docs/research/Task-Force-Report-for-Care-of-Victims-of-SA-2004.pdf.

264 Article 31, UCMJ, states as follows:
(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation an advising him that he does not have to make any

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appears in some civilian jurisdictions for minor misconduct in sexual assault cases. Article 31 provides Service members a greater protection from self-incrimination than the U.S. Constitution and civilian case law provide. During an investigator's interview with Service member victims, if at any time the investigator reasonably suspects he or she committed an offense under the UCMJ, the investigator must stop the interview and advise the victim of his or her rights under Article 31(b). Civilian investigators, conversely, have greater discretion than MCIO investigators in deciding whether to advise any crime victim, particularly a sexual assault victim, of his or her rights under the Fifth Amendment.

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

Concerns about collateral misconduct are seen as a complication in the investigative process, as well as a barrier to reporting.[267] Interrupting an interview for a rights warning can have a negative impact on the investigator's ability to build trust and rapport with the victim and can cause victims to terminate the interview, although special victim counsel -- who are often present at the interviews -- did not report this occurred. NCIS investigators who spoke to the Subcommittee stated that NCIS has an unwritten policy that investigators will not read victims Article 31(b) rights for minor collateral misconduct, regardless of the law's requirements.[268] The NCIS investigators justify the policy by noting that minor offenses, such as drinking and fraternization,

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statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

10 U.S.C. § 831; *see also United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (applying *Miranda v. Arizona* to military interrogations which added right to counsel to warnings).

265 384 U.S. 436 (1966).

266 *Transcript of RSP Public Meeting* 212-13 (Dec. 11, 2013) (testimony of Mr. Guy Surian, U.S. Army CID); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 167 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, AFOSI); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (testimony of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP) (same).

267 DTFSAMS, *supra* note 130, at 31, 36.

268 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same); *see* Navy's Response to Request for Information 137 (Apr. 11, 2014).

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are outside the "felony-level" purview of NCIS.[269] However, the Navy provided no empirical evidence that this practice increases reporting; rather, investigators noted anecdotally that the practice improves their ability to establish a rapport and more thoroughly investigate cases from victims who have already chosen to report.

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

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

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

270 JSC-SAS Report, Appendix M, at 8 (Sept. 2013) (on file at RSP).

271 *See generally id.*

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

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

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

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

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

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

278 *See, e.g.*, DTFMSA, *supra* note 181, at 28 (June 2005); TFRCV, *supra* note 263, at 28.

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

2. Gleaning Information from Restricted Reports

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

Finding 11-1: DoD has a sexual assault case management database, DSAID, but does not currently input data on alleged offenders identified by the victim making a restricted report, as current policy prohibits collecting and storing that information. This database has the capability of obtaining information from restricted reports that could be used to identify allegations against repeat offenders.[279]

Discussion

The FY14 NDAA requires the RSP to make "an assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators."[280] There is a concern that incidents reported through the restricted reporting option may allow possible serial offenders to go undetected. The DoD uses the DSAID, a secure, web-based tool to gather information to compile sexual assault statistics for required reports to Congress and to support Service SAPR program management.[281] DSAID contains information input by SARCs about both restricted and unrestricted sexual assault reports involving members of the Armed Forces. However, current DoD policy prohibits inputting personal identifying information of the alleged offender in a restricted report.[282]

DoD recognizes that gathering criminal intelligence is a "fundamental and essential element" of the duties of law enforcement.[283] The MCIOs have existing databases which track criminal intelligence information not associated with an ongoing investigation. The information in these databases is only accessible to investigators and authorized personnel within the MCIO and may only be shared with authorized law enforcement agencies.[284] However, there is a concern that placing information from a restricted report into an MCIO's criminal intelligence database "could result in proactive or inadvertent actions by investigators searching that database that could jeopardize the confidentiality of a restricted report."[285]

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

279 DoDI 6495.02 encl. 4, ¶ 4.

280 FY14 NDAA, Pub. L. No. 113-66, § 1731, 127 Stat. 672 (2013).

281 DoDD 6495.01 encl. 2, ¶ 1.f(5).

282 DoDI 6495.02 encl. 4, ¶ 4.

283 DoDI 5525.18, Law Enforcement Criminal Intelligence (CRIMINT) in DoD ¶ 3 (Oct. 18, 2013).

284 *Id.*

285 Army's Response to Request for Information 135 (Apr. 14, 2014).

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example, multiple reports involving the same alleged suspect (repeat offender) could meet this criteria."[286] However, the Subcommittee has received no evidence on what, if any, impact this may have on victim confidence in the confidentiality associated with restricted reporting.

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

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

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

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

Discussion

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

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

286 DoDI 6495.02 encl. 4, ¶ 5.b(2).

287 *Id.* at encl. 4.

288 *Transcript of RSP Public Meeting* 25 (Dec. 11, 2013) (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, USAMPS); *see also* PERF, *supra* note 204, at 8.

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

290 *See Transcript of RSP Public Meeting* 320-21 (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department).

291 Vickie Aldous, *Police Want to Hear from Sexual Assault Victims,* Ashland Daily Tidings (Dec. 20, 2012). These reporting options were initiated as a pilot project on January 1, 2013. *See also Transcript of RSP Public Meeting* 327 (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department, that previous changes in reporting practices resulted in a forty percent increase in reported offenses from 2009-2012). Deputy Chief Falls provided anecdotal information that the changes from the pilot

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online anonymously; 2) participate in a partial investigation in which they provide a statement to the police and evidence is collected, but no interviews of witnesses or potential suspect would be accomplished without the victim's consent; or 3) participate in a complete investigation.[292] Only in a full investigation would the case be coordinated with the District Attorney's Office or an arrest made.[293]

In another model, used in Grand Rapids, Michigan, a sexual assault victim has reporting options in addition to a fully restricted report and a fully unrestricted report. The victim has the following additional options:[294]

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

Under current DoD policy, a military member or adult dependent of a military member has two options in reporting a sexual assault.[295] The victim can file a restricted report, which allows him or her to confidentially disclose the assault to a SARC, VA, or healthcare personnel, and receive healthcare treatment, counseling services, the assignment of a SARC and VA, the assignment of a Special Victim Counsel, and the option to have a SAFE performed. This option maximizes support services available to the victim without requiring him or her to choose between accessing support services or retaining privacy.[296] The victim can also file an unrestricted report, which still allows the victim to access all of these services, but triggers a criminal investigation by MCIO investigators and command notification.[297] A victim who chooses to file a restricted report may convert his or her report to an unrestricted report at any time; however, a victim who files an unrestricted report may not convert to a restricted report.[298]

Allowing victims, on a voluntary basis, to talk to investigators without committing to participating in an investigation would give the victim "time to build trust with the law enforcement officer and to consider all of the implications of participating in reporting, investigating, or prosecuting the case *before* making a decision whether to proceed. For the law enforcement agency, this type of reporting can help gain intelligence about the local incidence and perpetration of all sexual violence in the community, as well as build trust and credibility with populations vulnerable to assault."[299] The victim should be offered the opportunity to have his or her SARC, VA, or Special Victim Counsel present during any conversation with the investigator to guard against real or perceived coercion to file or not file an unrestricted report.

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program have increased reporting and assisted in identifying serial offenders.

292 *See id.*

293 *See id.*

294 JSC-SAS Report, Appendix J, at 7 (Sept. 2013) (on file at RSP).

295 DoDI 6495.02 encl. 4.

296 *Id.*

297 *Id.*

298 *Id.*

299 Sabrina Garcia & Margaret Henderson, *Options for Reporting Sexual Violence, Developments Over the Past Decade,* FBI Law Enforcement Bulletin (May 2010).

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F. COMPARING PROCEDURES, POLICIES, PROTOCOLS & OVERSIGHT

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

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

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

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

Discussion

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

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

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

301 DoD Manual [hereinafter DoDM] 7730.47-M-Volume 1, Defense Incident-Based System (DIBRS): Data Segments and Elements 20 (Dec. 7, 2010), *available at* https://www.dmdc.osd.mil/dwp/docs/DIBRS.pdf.

302 *Id.*

303 U.S. Department of Justice, Federal Bureau of Investigation, Uniform Crime Reporting Handbook 77-78 (2004).

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DoD does not use a standard definition for "founded" or "unfounded" as those terms specifically relate to sexual assault offenses.[304] DoD policy defines an unfounded case, for purposes of DIBRS, as

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

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

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

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304 *See* DoD Response to Request for Information 59, dated Nov. 21, 2013.

305 DoDM 7730.47-M-V1 at 83.

306 FY13 SAPRO Annual Report, *supra* note 63, at 66. This report also defines unfounded as "false or baseless."

307 *Transcript of RSP Public Meeting* 268-69 (Dec. 11, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University); *see also* Air Force Response to Request for Information 39 (at attached Powerpoint slides) (Nov. 21, 2013); Services' Responses to Request for Information 59 (Nov. 21, 2013).

308 Navy and Marine Corps' Responses to Request for Information 59 (Nov. 21, 2013).

309 Army's Response to Request for Information 58 (Nov. 21, 2013).

310 The Subcommittee notes that as a matter of law, the Army's process of "founding" an offense through a probable cause determination made by a member subject to the Code prior to even preferral of charges may invade the independent discretion and legal province of both the accuser and the Article 32 investigating officer. When preferring charges, an accuser must swear that he or she has personal knowledge of, or has investigated, the matters set forth, and that they are true to the best of his or her knowledge. *See* 10 U.S.C. § 832 (UCMJ art. 30). Once charges are preferred and an investigation under Article 32, UCMJ, is ordered, it is the duty of the investigating officer to, in part, determine whether "reasonable grounds exist to believe that the accused committed the offenses alleged." *See* MCM, *supra* note 97, R.C.M. 405(j)(2)(H). The Article 32 investigating officer's conclusion, by definition, is also a probable cause determination. *See* Black's Law Dictionary (9th ed. 2009) (defining *probable cause).* In civilian practice, a similar probable cause determination is used for issuance of an arrest warrant incident to a prosecutor's charging decision. While it is unlikely that a "founding" determination has ever influenced the conclusion of an Article 32 investigating officer, the probable cause determination made prior to preferral of charges is, at the very least, premature.

311 Army Response to Request for Information 58, 59, and 66, dated Nov. 21, 2013; *See also Transcript of RSP Public Meeting* 221-

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

One of the reasons for unfounding military cases may be that the MCIOs must initiate an investigation in all reported sexual assaults. It may not be evident that a case is false or baseless at the time of the report; however, investigation may subsequently reveal the wrong suspect was named, the allegations were fabricated, or the incident does not constitute a criminal offense.[312]

Recommendation 14-A: The Secretary of Defense direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file, that the trial counsel agrees all appropriate investigation has taken place, before providing a report to the appropriate commander for a disposition decision.

Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.[313]

Recommendation 14-B: To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until either final disposition of the case or a determination that the allegations are unfounded.

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

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

Discussion

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

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

312 DTFMSA, *supra* note 181, at 16.

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

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

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

of investigative outcomes. The chart below illustrates the disparity in procedure and application among the Services, as well as the Subcommittee's recommended process:

Table 8

Comparison of Procedures to Review Investigations Prior to a Disposition Decision

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

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

315 *See Transcript pf RSP Comparative Systems Subcommittee Meeting* 357 (Nov. 19, 2013) (testimony of Lieutenant Mark Kidd, Fairfax Police Department).

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

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

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

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

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

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

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

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

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

320 *Id.*, *Appendix M,* at 2.

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

322 *Id.*

323 MCASA at 2.

324 See *Transcript of RSP Public Meeting* 221-22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

325 *Id.* at 180, 245, 250.

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

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

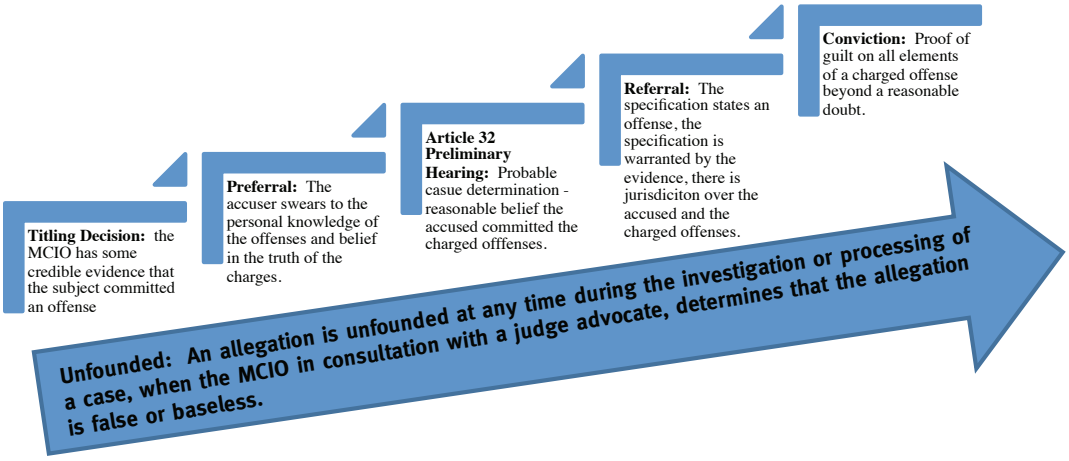
328 U.S. Dep't of Def., DTM 14-002, The Establishment of Special Victim Capability (SVC) Within the Military Criminal Investigative Organizations ¶ 2.c (Feb. 11, 2014).

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

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

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

Figure 3



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

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

329 *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

330 *See* Army Response to Request for Information 66 (Nov. 21, 2013).

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

in the case file that coordination has been completed.[331] AFOSI may informally coordinate with trial counsel, but the only written requirement is that AFOSI cannot close a case until the General Court-Martial Convening Authority (GCMCA) provides written notification that he or she is aware of the final disposition in the sexual assault cases.[332]

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

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

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

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331 DoD IG, Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigations 16 (July 2013) [hereinafter DoD IG July 2013 Report], *available at* http://www.dodig.mil/pubs/documents/DODIG-2013-091.pdf.

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

333 DoDI 5505.18 encl. 2, ¶ 5.

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

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

336 DTM 14-003 requires initial notification within 24 hours and consultation within 48 hours.

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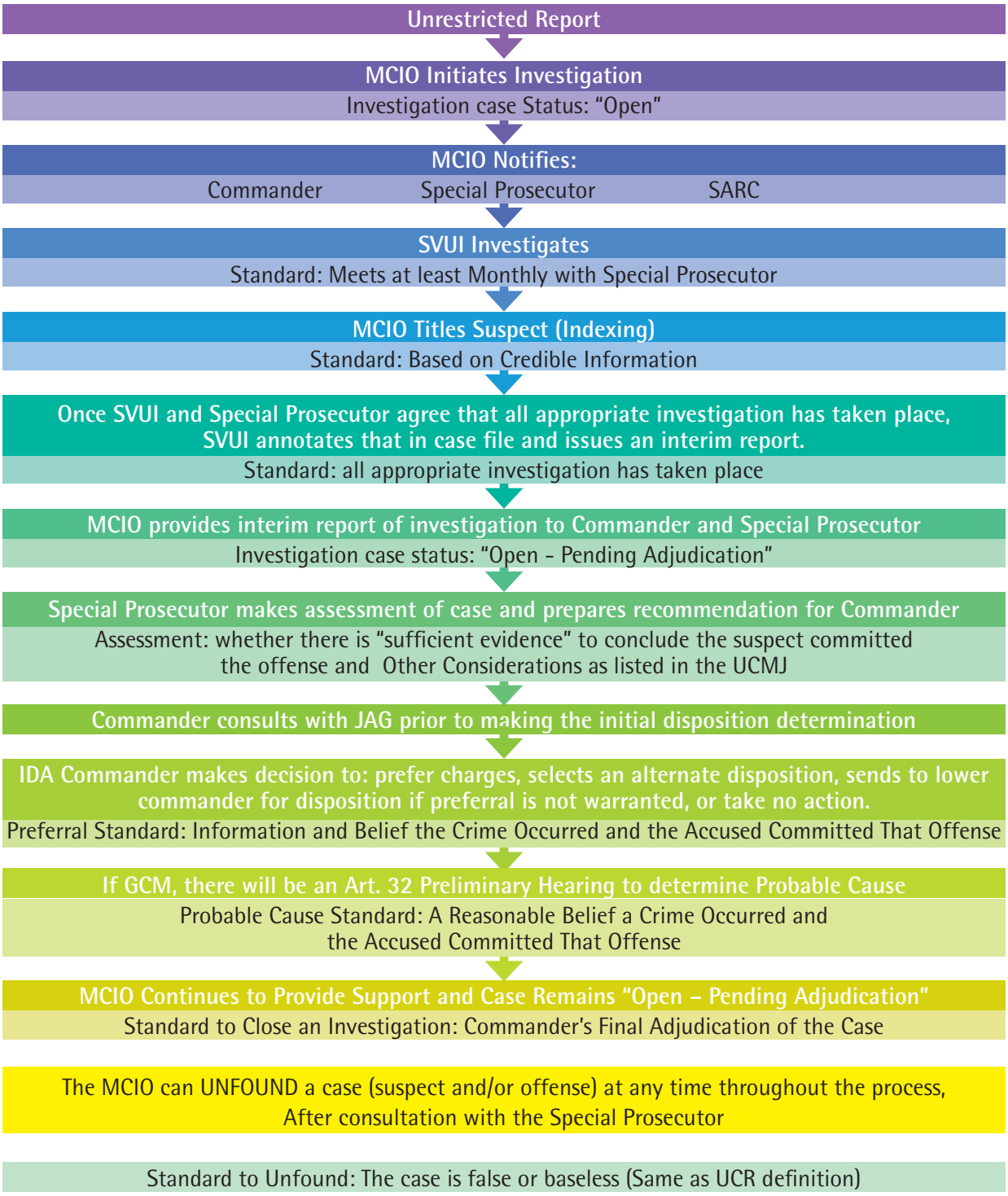
- A copy of the case file is provided to the IDA and SVP/trial counsel. The case remains in an "Open – Pending Adjudication" status.
- The SVP or TC assesses evidence in the case and prepares a recommendation for the commander. SVP or TC conducts a legal analysis to determine if there is sufficient evidence to pursue adverse action and then develops a recommendation for appropriate disposition. The IDA consults with the SVP or TC prior to making the initial disposition decision.
- The IDA decides to prefer charges, selects an alternate disposition, sends to lower commander for disposition or takes no action. The standard to prefer charges is personal knowledge and belief in the truth of the charges, that the crime occurred, and the accused committed that offense.
- If appropriate disposition of the case may include a general court-martial, an Article 32 preliminary hearing must occur, one of the purposes of which is to determine whether there is probable cause, which is "a reasonable belief a crime occurred and the accused committed that offense."[337]
- The MCIO will continue to provide support and the case will remain in an "Open – pending adjudication" status. The standard to close an investigation will be the commander's final adjudication of the case, or a determination by the MCIO in conjunction with the SVP/trial counsel that the case is unfounded, which can occur at any time throughout the investigative process.

337 FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

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

Figure 4



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

2. MCIO Caseload

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

Finding 15-1: DoD policy now requires that specially trained and selected MCIO investigators be assigned as the lead investigators for all sexual assault cases, which has substantially increased the MCIOs' case loads.[338] As a result, Marine Corps CID investigators cannot handle any sexual assaults in violation of Article 120 of the UCMJ, including those involving an allegation of an unwanted touching with no intent to satisfy a sexual desire.

Discussion

In January 2013, DoD policy began requiring that all adult sexual assault cases be investigated by the MCIOs.[339] Army CID historically investigated all adult sexual assault cases,[340] but NCIS and AFOSI often used Marine Corps CID agents and Air Force Security Forces investigators, respectively, to investigate some of the non-penetrative (e.g., unwanted touching) sexual assault offenses. Since the policy change, the sexual assault cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.[341]

Fully accredited Marine Corps CID agents are trained at the MCIO level, and many are SVUIC trained.[342] The Marine Corps CID argues its investigators are fully qualified to handle sexual assault investigations, especially the "touching offenses."[343] AFOSI similarly argues that Security Forces investigators, traditionally responsible for investigating non-penetrative cases, could effectively continue to investigate these types of offenses, under the supervision of a trained AFOSI agent.[344] AFOSI and NCIS find that the additional caseload has been detrimental to other felony investigations. [345]

3. Pretext Phone Calls and Text Messages

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

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338 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 137 (Nov. 19, 2013) (testimony of Mr. Robert Vance, NCIS).

339 DoDI 5505.18 ¶ 3.a. Section 1742 of the FY14 NDAA codifies this requirement.

340 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 80 (Nov. 19, 2013) (testimony of Mr. Guy Surian, Army CID).

341 *See id.* at 137 (testimony of Mr. Robert Vance, NCIS); *see also id.* at 255 (testimony of Mr. Kevin Poorman, AFOSI).

342 *See id.* at 172-73 (testimony of Chief Warrant Officer 5 Shannon Wilson, U.S. Marine Corps).

343 *See id.* at 173.

344 *See id.* at 256 (testimony of Mr. Kevin Poorman, AFOSI).

345 *See, e.g., id.* at 187.

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

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

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

Discussion

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

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

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

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

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

353 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, DFSC/USACIL* (Nov. 14, 2013) (on file at RSP) (interviews of DFSC/USACIL personnel).

354 *Id.*

355 *Id.*

356 *Id.*

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

358 *Id.*

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

G. SEXUAL ASSAULT FORENSIC EXAMINATIONS

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

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

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

Discussion

The FY14 NDAA requires every military installation medical treatment facility (MTF) with an emergency department that operates 24 hours per day, seven days a week to have at least one assigned SANE.[359] DoD policy requires timely, accessible, and comprehensive healthcare for victims of sexual assault, including a SAFE Kit.[360] Healthcare providers conducting a forensic exam must be trained in accordance with the current version of the Department of Justice, Office on Violence Against Women's "A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents." [361] Victims can choose to have a SAFE kit conducted regardless of whether they choose restricted or unrestricted reporting. The National Protocol developed by the Department of Justice identifies a number of clinical and educational programs through which medical providers can be qualified to conduct forensic examinations. Compliance with this protocol should dictate the level of qualification for service providers, and is not limited to SANE certification. The protocol notes:

> SANEs are registered nurses who receive specialized education and fulfill clinical requirements to perform these exams. Some nurses have been certified as SANEs–Adult and Adolescent (SANE–A) through the International Association of Forensic Nurses (IAFN). Others are specially educated and fulfill clinical requirements as forensic nurse examiners (FNEs), enabling them to collect forensic evidence for a variety of crimes. The terms [SAFE] and "sexual assault examiner" (SAE) are often used more broadly to denote a health care provider (e.g., a physician, physician assistant, nurse, or nurse practitioner) who has been specially educated and completed clinical requirements to perform this exam.[362]

359 FY14 NDAA, Pub. L. No. 113-66, § 1725, 127 Stat. 672 (2013).

360 DoDI 6495.02 encl. 7

361 *Id.*

362 *See* OVW, *supra* note 176, at 59 (footnote omitted); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).

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

The Navy established policy to provide forensic exam capabilities around the globe. All Navy medical facilities must be capable of performing SAFEs, or are required to execute memoranda of understanding with local civilian medical facilities to provide the capability.[363] This also encourages relationships and reciprocity between law enforcement agencies and medical centers. In Virginia Beach, detectives coordinate with NCIS and the SANE at the Naval Medical Center Portsmouth. If a victim files a delayed report with civilian authorities in Virginia Beach, detectives know that the local civilian forensic examiners will not collect a SAFE kit after 72 hours has passed. The Naval Medical Center Portsmouth will collect SAFE kits up to six weeks after an alleged assault, and civilian detectives will take victims to that facility for an exam, when necessary.[364]

The Air Force has a limited number of facilities that conduct SAFEs, but rely on other MTFs in close proximity or civilian providers to supplement the capability.[365] While the Army has some military medical facilities with trained SANEs, other facilities have contracts with civilian providers to respond to the base to perform the exams, or rely solely on the same civilian facilities used regionally by the civilians for exams.[366] In some cases this may require a drive of 30 minutes or more. Some victims also choose to not be seen in a military medical facility, and prefer to have the exam conducted off a military installation..

SANEs in civilian medical facilities typically have more experience in conducting forensic exams because they see more sexual assault victims over the course of a year than SANEs on most military installations.[367] For example, Inova, a hospital in northern Virginia, saw approximately 700 sexual assault victims last year, of which only 12 were military cases.[368] Some state laws require a SANE to conduct a specified number of exams annually in order to maintain certification, which is challenging at military facilities given the relatively low volume of exams conducted.[369] Regardless of the location or whether the SAFE exam is performed on or off a military installation, all military installations have established protocols and procedures, often supplemented by memoranda of agreement with local hospitals, to ensure eligible personnel can be adequately supported and examined while forensic evidence is preserved.

363 U.S. Dep't of the Navy, Bureau of Medicine and Surgery, Instruction (BUMEDINST) 6310.11A CH-1, Sexual Assault Prevention and Response Medical-Forensic Program (Sept. 18, 2013).

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

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

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

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

368 *Id.*

369 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interview of representatives from Scott and White Hospital).

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

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

Finding 19-1: Many civilian agencies no longer collect plucked hairs as part of a SAFE kit because there is little, if any, probative value to that material.[370] The Director of DFSC/USACIL agrees there is no need to collect these samples.[371]

Discussion

Interviews with lab personnel and leadership from DFSC/USACIL and GBI reveal the probative value of taking plucked pubic hairs as part of a SAFE examination is negligible. The military and civilian medical forensic examiners interviewed on site visits and who appeared before the Subcommittee overwhelmingly stated the taking of plucked hairs was of little value to the case.[372]

Current Department of Justice Protocols for the collection of hair samples from victims and subjects in a sexual assault investigation notes that many jurisdictions do not routinely collect plucked head and pubic references samples. The protocol further suggests that "jurisdictions should evaluate the necessity of routinely collecting hair samples based on discussions of how often such evidence is actually useful or used in the jurisdiction."[373]

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

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

Discussion

FY14 NDAA requires that the curriculum and other components of the program for certification of Sexual Assault Nurse Examiners-Adult/Adolescent, utilize the most recent guidelines and standards as outlined by the Department of Justice, Office on Violence Against Women, in the National Training Standards for Sexual Assault Medical Forensic Examiners.[374] Each Service has established its own programs to implement this common mandate. The Navy's training protocol consists of a minimum of 14.5 hours of standardized training, including 11.5 hours of DVD training that corresponds with the Department of Justice national protocol for care of adult victims of sexual assault, and three additional hours of Navy training. The Navy

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

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

372 *See, e.g., id.*

373 OVW, *supra* note 176, at 71.

374 FY14 NDAA, Pub. L. No. 113-66, § 1725(b), 127 Stat. 672 (2013); *see also* OVW, *supra* note 176.

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

is also creating supplemental training video.[375] Air Force policy requires healthcare personnel performing forensic examinations to attend a three day forensic sexual assault course and complete one case/mock exam.[376] Forensic Nurse Examiner's initial training includes attendance at a five-day course and three cases/mock exams. Refresher training is also required to maintain certification. The Army sexual assault medical forensic examiner training educates health care providers to conduct SAFEs through a 60-hour training program that includes 40 hours of classroom training and 20-plus hours of skilled practicums. The Army is reviewing and updating the needed course content and is considering putting it in a formalized schoolhouse at the Army Medical Department Center and School.[377]

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

Oversight and Review of Sexual Assault Investigations

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

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

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

Discussion

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

375 See *Transcript of RSP Comparative Systems Meeting* 251 (Nov. 19, 2013) (testimony of Commander Kristie Robson, Department Head of Clinical Programs, Bureau of Medicine and Surgery, U.S. Navy).

376 U.S. Dep't of the Air Force, Instr. 44-102, Medical Care Management ¶ 16.5.6 (Jan. 20, 2012).

377 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 308 (Nov. 19, 2013) (testimony of Ms. Carol L. Haig, Chief, Women's Health Service).

378 *Id.* at 290 (testimony of Dr. Sue Rotolo, Sexual Assault Nurse Examiner).

379 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).

380 MCASA, *supra* note 202; *see also* Joanna Walters, *Investigating Rape in Philadelphia: How One City's Crisis Stands to Help Others,* The Guardian (July 2, 2013); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP); *Transcript of RSP Comparative Systems Subcommittee Meeting* 339 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

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

sexual assault case files from the Los Angeles Police Department and the Los Angeles Sheriff's Office and found that a significant number of cases were inappropriately unfounded or inappropriately closed through clearance by exceptional means.[381] In the FBI's UCR Program, law enforcement agencies can clear, or close, a case by arrest or exceptional means which is explained as:[382]

> In certain situations, elements beyond law enforcement's control prevent the agency from arresting and formally charging the offender. When this occurs, the agency can clear the offense exceptionally. Law enforcement agencies must meet the following four conditions in order to clear an offense by exceptional means. The agency must have:
>
> - Identified the offender.
> - Gathered enough evidence to support an arrest, make a charge, and turn over the offender to the court for prosecution.
> - Identified the offender's exact location so that the suspect could be taken into custody immediately.
> - Encountered a circumstance outside the control of law enforcement that prohibits the agency from arresting, charging, and prosecuting the offender.[383]

Within civilian police departments, more senior investigators or patrol officers typically review case files. This is also true in the military. Each MCIO also has an internal Inspector General and policies regarding the review of sexual assault cases.[384] Additionally, DoD IG reviews MCIO cases on a periodic basis.[385]

The DoD IG is responsible for developing policy for the MCIOs to oversee sexual assault investigations, and provide oversight of sexual assault training within the DoD investigative community.[386] In June 2011, the Government Accounting Office (GAO) completed a review of the extent of DoD IG oversight over the MCIOs' investigation of sexual assault.[387] The GAO found that DoD IG had not "performed these responsibilities, primarily because it believes it has other, higher priorities."[388] The GAO found "no evidence of Inspector

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

382 *See* U.S. Department of Justice – Federal Bureau of Investigation, *Crime in the United States, 2010*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearancetopic.pdf (last visited May 20, 2014) ; *see* U..S. Dep't of Justice, Uniform Crime Reporting Handbook 41 (2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

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

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

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

386 DoDI 6495.02 encl. 2, ¶ 5.

387 Government Accountability Office, Military Justice: Oversight and Better Collaboration Needed for Sexual Assault Investigations and Adjudications (June 2011), *available at* http://www.gao.gov/assets/320/319962.pdf.

388 *Id.* at 1.

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General oversight at the Service level for any of the 2,594 sexual assault investigations that DOD reported the Services completed in fiscal year 2010."[389]

Following the GAO Report, in 2011 the DoD IG established a Violent Crimes Division to provide recurring investigative training and oversight of violent crimes, such as homicide, suicide, sexual assault, child abuse, and serious domestic violence.[390] The objective was to provide regular and recurring oversight to evaluate the quality of violent crime investigations and training and recommend improvements. In July 2013, DoD IG completed an evaluation of MCIO sexual assault investigations.[391] The evaluation did not apply external standards for case quality but did study the adequacy of MCIO investigations of adult sexual assaults in accordance with DoD, Service, and MCIO policies and procedures.[392]

389 *Id.*

390 *See, e.g., Transcript of RSP Comparative System Subcommittee Meeting* 8 (Nov. 19, 2013) (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).

391 DoD IG July 2013 Report, *supra* note 331

392 *Id.* at 5.

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VI. TRAINING PROSECUTORS, DEFENSE COUNSEL, AND MILITARY JUDGES

INTRODUCTION

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

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

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

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

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

A. OVERVIEW – BASIC MILITARY LAWYER TRAINING, SELECTION, AND CERTIFICATION STANDARDS

In all Services, the basic legal training curricula train judge advocates (JAGs) in a breadth of subjects, including basic trial advocacy, trial procedure, and criminal law.[393] In addition, each Service's curriculum has a specific focus on litigating adult sexual assault cases that begins in the basic legal training courses.[394] A more detailed overview of the training curriculum for each Service appears below and in the appendices.

1. Basic Lawyer Training – Army

In the Judge Advocate Officer Basic Course (JAOBC), new judge advocates learn the military justice system through lecture, seminar, and practical exercise instruction.[395] The ten-and-a-half-week course prepares them to provide military justice advice and to serve as counsel in courts-martial and administrative board proceedings.[396] Classes cover almost all areas of criminal law and procedure[397] and students participate as trial counsel and/or defense counsel in two moot court exercises.[398] The course uses a sexual assault case scenario, which emphasizes key aspects of sexual assault cases such as victim-witness programs, victim behavior, and related evidentiary rules.[399]

The Army JAG Corps trains and certifies all judge advocates for assignment as trial counsel, which includes the ability to prosecute sexual assault cases.[400] As detailed below, all trial counsel complete the JAOBC trial advocacy training, the New Prosecutor/Essential Strategies in Sexual Assault Prosecution Course, and the Intermediate Trial Advocacy Course. All of these training courses employ a sexual assault prosecution scenario.[401]

2. Basic Lawyer Training – Air Force

All Air Force judge advocates receive trial advocacy training and preparatory moot court experience during their nine-week initial training course, the Judge Advocate Staff Officer Course (JASOC).[402] This training

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393 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 276-80 (Jan. 7, 2014) (testimony of Lieutenant Colonel Matthew Calarco, U.S. Army).

394 *See* Services' Responses to Request for Information 1(d) (Nov. 1, 2013); Services' Responses to Request for Information 75(b) and 75(c) (Dec. 19, 2013).

395 *See, e.g.*, U.S. Army, "ARMY JAG CORPS," *at* http://www.goarmy.com/jag/about/training.html; Army's Response to Request for Information 1(d) (Nov. 1, 2013).

396 *See id.*

397 "The attorney strength of the Active Army (AA) JAGC at the end of 2013 was 1,970 (including general officers). This total does not include 88 officers attending law school while participating in the Funded Legal Education Program (FLEP)." Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2012 to September 30, 2013, at 49 [hereinafter CAAF FY13 Annual Report], *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY13AnnualReport.pdf.

398 Army's Response to Request for Information 1(d) (Nov. 1, 2013).

399 *Id.*

400 *Id.*

401 DoD SVC Report, *supra* note 171, at 18.

402 *Id.* at 315-16.

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

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

"Improving the quality and increasing the availability of military justice and trial advocacy training was a cornerstone of the JAG's agenda for FY13."[406]

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

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

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403 *Id.* at 317.

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

405 *Id.*

406 CAAF FY13 Annual Report, *supra* note 397, at 57.

407 *Transcript of RSP Comparative Systems Subcommittee Meeting* 344 (Jan. 7, 2014) (testimony of Lieutenant Commander Justin McEwan, U.S. Navy); *see also* Navy's Response to Request for Information 1(d) (Nov. 1, 2013).

408 *Transcript of RSP Comparative Systems Subcommittee Meeting* 344 (Jan. 7, 2014) (testimony of Lieutenant Commander Justin McEwan, U.S. Navy).

409 *Id.*

410 *Id.* Article 120 is the military's sexual assault statute; Article 125 is the military's sodomy statute.

411 *Transcript of RSP Comparative Systems Subcommittee Meeting* 344 (Jan. 7, 2014) (testimony of Lieutenant Commander Justin McEwan, U.S. Navy); *see also* Navy's Response to Request for Information 1(d) (Nov. 1, 2013).

412 *Transcript of RSP Comparative Systems Subcommittee Meeting* 344 (Jan. 7, 2014) (testimony of Lieutenant Commander Justin McEwan, U.S. Navy).

413 *Id.* at 345.

414 Military Rule of Evidence 412 is the military's "rape shield" provision.

415 *Transcript of RSP Comparative Systems Subcommittee Meeting* 345 (Jan. 7, 2014) (testimony of Lieutenant Commander Justin McEwan, U.S. Navy).

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

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

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

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

Discussion

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

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

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

417 *See, e.g.*, Recommendations 32-D, 49-A, and 49-B, and accompanying discussions, *infra*.

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

B. SPECIALIZED SEXUAL ASSAULT TRAINING FOR CIVILIAN AND MILITARY PROSECUTORS

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

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

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

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

Discussion

1. Overview of Civilian Prosecutor Sexual Assault Training and Experience

Civilian jurisdictions often hire new prosecutors with little or no prosecutorial experience, but many have previous experience as a law clerk or intern. In large offices and jurisdictions around the country, new prosecutors will generally spend two to three years prosecuting misdemeanor offenses to gain experience in motions practice, managing a large caseload, cross-examining the accused, and preparing and presenting testimony of victims, witnesses and experts. Some prosecutors continue to gain experience working in units preparing grand jury testimony and prosecuting juvenile or less serious felony offenses for another one to three years. Afterward, prosecutors with about five to ten years of prosecution experience may be selected for sex crimes units.[418] However, there are variations throughout the United States. For example, in the Philadelphia District Attorney's Office, counsel begin working in the Family Violence and Sexual Assault Section Trial Division after two and one-half years at the office and normally depart the unit and DA's office after five years.[419]

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

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

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2. Civilian Training

In many large prosecution offices, instead of formal classroom training, funding limitations and prioritization of case work require a civilian prosecutor's primary source of training to be supervised on-the-job courtroom work, supplemented by topical seminars taught by senior prosecutors within the office.[420] Daily or near-daily courtroom work is combined with supervisor feedback.[421] However, training in civilian prosecutors' offices also varies by office size.[422]

In larger jurisdictions, prosecutors typically progress through a few weeks of formal training involving classroom and seminar instruction..[423] Training programs will cover criminal law, criminal procedure, evidence, and ethics, and usually place substantial emphasis on developing trial practice (courtroom) skills.[424] The core training of prosecutors, including those who later become sex crimes prosecutors, occurs in a supervised progression through a series of assignments, beginning with misdemeanors and moving through general felony crimes.[425] During this progression, prosecutors work with senior colleagues and supervisors to learn

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that handles sex crimes has 7 years [of] experience and six attorneys have 5 years [of] experience.").

420 The Executive Office of United States Attorneys (EOUSA) categorizes offices into four types based upon attorney staffing levels – extra-large (greater than or equal to 100 attorneys), large (between 45 and 99.9 attorneys), medium (between 25 and 44.9 attorneys), and small (less than 25 attorneys). The term "large" here generally means greater than or equal to 100 attorneys. *See* EOUSA, Resource Management of United States Attorneys' Offices (Audit Report 03-03) ch. 3 (Nov. 2008), *available at* http://www.justice.gov/oig/reports/EOUSA/a0903/; *see, e.g.*, *Written Statement of Mr. Bill Montgomery, Maricopa County Attorney, to RSP* (submitted Dec. 12, 2013); *see also Transcript of RSP Public Meeting* 455 (Dec. 12, 2013) (testimony of Ms. Kelly Higashi that the Sex Offense and Domestic Violence Section of the U.S. Attorney's Office for District of Columbia has 35 prosecutors); *id.* at 431 (testimony of Ms. Martha Bashford that Manhattan District Attorney's Office has 60 sex crimes prosecutors); *id.* at 487 (testimony of Ms. Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, that San Diego County District Attorney's Office has 300 prosecutors).

421 *See, e.g.*, *Transcript of RSP Public Meeting* 459 (Dec. 12, 2013) (testimony of Ms. Kelly Higashi, U.S. Attorney's Office for the District of Columbia) ("[Supervisors] observe every felony trial and give support during the trial, and then feedback after the trial"); *see also id.* at 434 (testimony of Ms. Martha Bashford, New York County District Attorney's Office) ("[A supervisor] will sit in on every single felony trial, no matter how senior the [prosecutor] is.").

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

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

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

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

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witness preparation, how to conduct investigations and advise investigators, grand jury practice, how to handle pretrial and trial motions, and the handling of judge and jury trials as lead and assisting (second) counsel.[426] Some prosecutors also train in the appellate section.[427] Civilian prosecutors are able to gain substantial trial experience in this process.[428] For instance, jury trial prosecutions for driving under the influence of alcohol or domestic violence can introduce newer prosecutors to working with experts, victims, and reluctant witnesses.[429]

Ongoing classroom-style instruction and focused continuing education courses occur in some jurisdictions through in-house training from senior attorneys.[430] Prosecutors may also attend annual or topical seminars hosted by organizations such as the National District Attorneys' Association (NDAA) and AEquitas.[431] Some state agencies such as the National Association of Prosecutor Coordinators and the New York Prosecutors Training Institute also provide topical or annual training.[432]

Prosecutors seeking admission to sex crimes units in large jurisdictions typically must have five or more years of experience, and may be required to apply and interview concerning their experience, skill, and personal fit for the unit.[433] Some civilian prosecutors identified turnover and burnout as challenges they face in seeking to build expertise and continuity through training and experience.[434] To counteract this, some offices train their attorneys on vicarious trauma.

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the misdemeanor sections.").

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

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

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

429 *See, e.g., id.* at 456-58 (testimony of Ms. Kelly Higashi, U.S. Attorney's Office for the District of Columbia, describing progression of prosecutors).

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

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

432 *See, e.g.*, New York Prosecutors Training Institute, *at* http://www.nypti.org/; National Association of Prosecutor Coordinators, *at* http://www.napc.us/.

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

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

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3. Civilian Prosecutors' Offices Organization

Of the jurisdictions appearing before the Subcommittee, a majority have specialized units that prosecute sexual assault crimes.[435] Smaller prosecution offices, which comprise the majority of jurisdictions in the United States, do not have specialized units but instead assign sexual assault cases to attorneys with specialized training.[436] In several large jurisdictions, such as the New York boroughs, it is common for supervisors to work in the sex crimes bureau for twenty years or more.[437] These attorneys develop extensive expertise that may be difficult to replicate. In contrast, in some jurisdictions such as Snohomish County, Washington, or Dover, Delaware, prosecutors rotate from one specialty unit to another on a cycle of approximately three years.[438]

4. National Training of Civilian Prosecutors

National training organizations, such as the NDAA and AEquitas, offer tailor-made courses and national training events.[439] However, in recent years, after the NDAA withdrew from the National Advocacy Center (NAC), which also trains federal prosecutors, these courses are offered less frequently.[440] Additionally, the NDAA could no longer afford scholarships or tuition reimbursement. Although the NDAA recently began offering similar courses in a training facility in Utah this year, funding still limits course availability.[441] Moreover, large caseloads and lack of attorney staffing in many offices may prevent civilian prosecutors from attending such training courses, even when offered for free or at discounted rates.[442] Likewise, civilian prosecutors identified challenges of funding, time, and receiving permission to attend.[443]

To address these challenges, organizations such as the NDAA and AEquitas have started conducting more on-site training courses and telephonic case consultations, and also producing webinar recordings.[444] Currently, NDAA also focuses on responding to requests for assistance, and assisting prosecutors in their learning in

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

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

437 *See id.*

438 *See id.*

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

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

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

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

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

444 *Id.* at 101 (testimony of Candace Mosley, NDAA); *see also id.* at 131-32, 134 (testimony of Ms. Viktoria Kristiansson, AEquitas); *see also* AEquitas, "Webinar Recordings," *at* http://www.aequitasresource.org/webinar-recordings.cfm.

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preparation for trials.[445] Similarly, the NDAA maintains online courses and an online listserv to facilitate specialization and learning communities.[446]

5. Federal Sex Crimes Prosecution

State, rather than federal, prosecutors handle most violent crimes.[447] In forty-eight Federal Judicial Districts, Department of Justice (DOJ) attorneys prosecute crimes that occur on Indian land.[448] However, the total number of sexual assault cases that the DOJ prosecutes is a small fraction of the number of sexual assault cases nationwide.[449] DOJ's NAC in Columbia, South Carolina[450] trains DOJ attorneys on advocacy skills, legal administration, and substantive legal subjects, including violent crime (primarily on Indian Country).[451]

6. Military Prosecutor Advanced/Specific Sexual Assault Training

> *"Our counsel are almost continuously in training. And I think it is critical that they stay in training. If those dollars are cut, that is where the damage is going to come from to any prosecution or any defense."*[452]

Prosecuting and defending sexual assault crimes is a priority in all of the Military Services, and judge advocate training reflects this emphasis.[453] Each Service focuses on teaching judge advocates to litigate adult sexual

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445 *Transcript of RSP Comparative Systems Subcommittee Meeting* 98 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA).

446 *Id.* at 115.

447 For federal jurisdiction to apply, an offense must occur on a federal reservation, in a federal prison, or otherwise within the special maritime or territorial jurisdiction of the United States; otherwise, sexual offenses are state crimes. Sexual assaults prosecuted by the federal government are those that occur on Native American lands, military installations, national parks, and territorial property. The U.S. Attorney's Office for the District of Columbia is one exception, because its Superior Court Division prosecutes all crimes that occur in the District of Columbia, including all violent crime. That Division is akin to a typical district attorney's office. *See, e.g., Transcript of RSP Public Meeting* 453 (Dec. 12, 2013) (testimony of Ms. Kelly Higashi, U.S. Attorney's Office for the District of Columbia).

448 Office of the United States Attorneys, "Federal Judicial Districts with Indian Country," *at* http://www.justice.gov/usao/briefing_room/ic/districts_listing.html.

449 *See* "Selected Sentencing Statistics for Fiscal Year 2012 for the Federal Sentencing Guidelines for Criminal Sexual Abuse (Rape) (§2A3.1) and Abusive Sexual Contact (§2A3.4)" (submitted Feb. 11, 2014 Mr. L. Russell Burress) (listing FY 2012 federal conviction totals as 116 for rape and 121 for abusive sexual contact, as determined by the sentencing guidelines applied), *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20140211_CSS/Materials_Presenters/Burress_Stats_FY2012_CrimSexAbuse_SexContact.pdf.

450 *See* Office of the United States Attorneys, "Office of Legal Education," *at* http://www.justice.gov/usao/training/. Training courses at the NAC rarely include state or local prosecutors.

451 Office of the United States Attorneys, National Advocacy Center, "Indian Country Basics Seminar," *at* http://www.justice.gov/usao/training/training/descript.html#C00OLE-IND-CS-20; Office of the United States Attorneys, National Advocacy Center, "Investigating and Prosecuting Indian Country Domestic Violence and Sexual Assault Cases Seminar," *at* http://www.justice.gov/usao/training/training/descript.html#C00OLE-IND-CS-14; Office of the United States Attorneys, National Advocacy Center, "Forensic Interviewing of Child and Adolescent Victims and Witnesses in Indian Country Cases Seminar," *at* http://www.justice.gov/usao/training/training/descript.html#C00OLE-IND-CS-28.

452 *Transcript of RSP Comparative Systems Subcommittee Meeting* 418 (Jan. 7, 2014) (testimony of Colonel Vance Spath, Director of Training and Readiness, U.S. Air Force).

453 *See* Services' Responses to Request for Information 1(d) (Nov. 1, 2013); Services' Responses to Request for Information 75(b) (Dec. 19, 2013); *Transcript of RSP Public Meeting* 412-13 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, Trial Counsel

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assault cases beginning in basic judge advocate training.[454] In addition, the Services have created specialized programs for sexual assault prosecution and training, such as: the Army's SVP program; the use of civilian HQEs in the Army, Navy, and Marine Corps; the Air Force's Special Victims Unit (SVU); and the Navy's MJLCT.[455]

Federal sequestration in 2013 affected the training budget of military counsel, which resulted in cancellation of some training courses.[456] However, it is imperative to maintain emphasis on training counsel to handle complex cases, given turnover and personnel rotations of the military.[457]

Furthermore, the Services ensure experienced senior attorneys, with extensive training and trial experience, supervise military prosecutors and defense counsel handling adult sexual assault cases in all Services.[458] The Services also ensure military prosecutors and defense counsel have smaller caseloads than their civilian counterparts to enable sufficient preparation time for trials.[459]

Assistance Program (TCAP), U.S. Army); *id.* at 404-08 (testimony of Colonel Don Christensen, U.S. Air Force); *id.* at 304-09 (testimony of Commander Don King, U.S. Navy); *id.* at 427-30 (testimony of Major Mark Sameit, U.S. Marine Corps); CAAF FY13 Annual Report, *supra* note 397, at 34 (Annual Report of The Judge Advocate General of the Army) ("Except for the GOLO course, which is provided individually to General Officers, all courses are taught using a sexual assault fact pattern and are synchronized with other JAGC training agencies."); *id.* at 57, 58, 68-72, 75-77, 79-80 (Annual Report of the Judge Advocate General of the Navy); *id.* at 118-119, 123-129 (Annual Report of The Judge Advocate General of the Air Force); *id.* at 104-05 (U.S. Marine Corps Annual Military Justice Report); *id.* at 140-41 (Annual Report of the Judge Advocate General of the Coast Guard).

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

455 *Id.*

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

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

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

459 *See* Services' Responses to Request for Information 75(b) (Dec. 19, 2013); *see also* Services' Responses to Request for Information

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However, despite significant efforts by the Services to train and prepare practitioners, a continuing challenge throughout the Services is the ability to build and retain specialized litigation experience for military prosecutors and defense counsel.[460] This pertains specifically to adult sexual assault cases, which experienced attorneys characterized as among the most complex cases.[461] For example, while training, supervision, and caseloads address most experience challenges, the Subcommittee received information from two witnesses about a lack of experienced defense counsel in the Marine Corps.[462]

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

a. Army

Trial Counsel Assistance Program and Highly Qualified Experts

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

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

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145 (Apr. 14, 2014).

460 *See, e.g., Transcript of RSP Public Meeting* 407 (Dec. 12, 2013) (testimony of Colonel Don Christensen, U.S. Air Force, describing Air Force's consideration of career track "so that we can get more litigation experience").

461 *See, e.g., id.* at 209-10 (testimony of Ms. Lisa Wayne, NACDL).

462 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 426 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County); *Transcript of RSP Public Meeting* 321 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps).

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

464 *Id.*

465 *Id.*; *see also* Army's Response to Request for Information 1(d) (Nov. 1, 2013); Army's Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

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

467 *Id.*

468 *Id.* at 412-14.

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

Army Special Victim Prosecutor Program and Training

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

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

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

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469 *Id.* at 413. The Army's JAG School is located in Charlottesville, VA. *See* U.S. Dep't of the Army, "JAGCNet," *at* https://www.jagcnet.army.mil/.

470 *Transcript of RSP Public Meeting* 413 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

471 *Id.* at 414.

472 *Id.* at 421-22.

473 *Id.* at 414; Army's Response to Request for Information 1(d) (Nov. 1, 2013); Army's Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

474 Army's Response to Request for Information 1(d) (Nov. 1, 2013); Army's Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

475 *Transcript of RSP Public Meeting* 414, 416 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army); *see also* Army's Response to Request for Information 1(d) (Nov. 1, 2013); Army's Response to Request for Information 75(b) and (c) (Dec. 19, 2013).

476 Army's Response to Request for Information 75(c) (Dec. 19, 2013).

477 Army's Response to Request for Information 1(d) (Nov. 1, 2013). Of the current 23 SVPs, two are lieutenant colonels, 10 are majors, and 11 are senior captains. Army's Response to Request for Information 75(c) (Nov. 1, 2013).

478 *Transcript of RSP Comparative Systems Subcommittee Meeting* 295-96 (Jan. 7, 2014) (testimony of Lieutenant Colonel Matthew Calarco, U.S. Army).

479 *Transcript of RSP Public Meeting* 414-22 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

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

Additional Skill Identifier Program

The Army designed the Additional Skill Identifier (ASI) Program to help identify and sustain military justice expertise and to assist in the selection of personnel for key military justice positions.[481] Under this program, judge advocates are awarded varying degrees of military justice skill identifiers depending on their level of expertise. [482] The Army instituted the ASI program for military justice in 2008 and revised it in 2011.[483]

b. Air Force Special Victims Unit Program and Training[484]

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

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

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

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480 *Id.*

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

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

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

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

485 Air Force's Response to Request for Information 75(c) (Dec. 19, 2013).

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

487 *Transcript of RSP Public Meeting* 404-08 (Dec. 12, 2013) (testimony of Colonel Don Christensen, U.S. Air Force).

488 *Id.* at 404-05.

489 *Id.* at 406.

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After the basic JAG training course, Air Force lawyers selected for litigation positions attend the Trial and Defense Advocacy Course (TDAC) and the Advanced Trial Advocacy Course (ATAC).[490] The Advanced Sexual Assault Litigation Course (ASALC), implemented in 2013, incorporates material focused on sexual assault, domestic violence, and child abuse.[491] All SVU-STC attend this course annually.[492] SVU JAGs also continuously attend various advanced training courses.[493]

c. Navy

> *"The training of effective litigators takes both actual training and experience. We are a young law firm. … [J]ust by the nature of our businesses we'll always be on the short end when it comes to experience. We make up for that in training. We probably do more training than any other group of lawyers on the planet."*[494]

Military Justice Litigation Career Track (MJLCT)

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

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

Discussion

The Navy's Military Justice Litigation Career Track (MJLCT) provides a structure for developing and maintaining a cadre of judge advocates who specialize in court-martial litigation.[495] Judge advocates who exhibit both an aptitude and a desire to further specialize in litigation may apply for inclusion in the MJLCT.[496] Once selected, MJLCT officers spend most of their career in litigation-related billets as trial counsel, defense

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490 Air Force's Response to Request for Information 75(c) (Dec. 19, 2013).

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

492 *Id.*

493 *See* Air Force's Response to Request for Information 1(d) (Nov. 1, 2013). These courses include Trial and Defense Advocacy (Air Force); Advanced Trial Advocacy (Air Force); Advanced Sexual Assault Litigation (Air Force); Prosecuting Complex Cases (Navy); Intermediate Trial Advocacy (Department of Justice); Criminal Law Advocacy Course/Prosecuting Sexual Assaults (Army); Special Victims Unit Course (Army); Sex Crimes Investigation Training Program (Air Force); Prosecuting Alcohol-Fueled Sexual Assaults (Navy); and National District Attorneys Association Sexual Assault Prosecution. *Id.*

494 *Transcript of RSP Public Meeting* 423 (Dec. 12, 2013) (testimony of Commander Aaron Rugh, U.S. Navy).

495 Navy's Response to Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013).

496 CAAF FY13 Annual Report, *supra* note 397, at 77-78 (Annual Report of the Judge Advocate General of the Navy).

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counsel, and military judges.[497] In the course of a typical military career, a MJLCT officer will advance from Specialist I to Specialist II to Expert.[498] Most MJLCT officers also receive an advanced law degree (a Master of Laws or LL.M.) in trial advocacy or litigation from a civilian institution.[499] These officers are then required to complete a follow-on tour in a courtroom intensive billet with leadership requirements.[500]

The general MJLCT career progression is as follows.[501]

Table 9

Designation	Years of Experience	Time Limit to Advance (Years)	Members (jury) Trials Completed
Specialist I	4	N/A	5
Specialist II	10	7	10
Expert	16	7	20

Navy Trial Counsel Assistance Program and Highly Qualified Experts

TCAP oversees training for Navy trial counsel.[502] It provides on scene and online training to prosecutors in a variety of specialized areas and then monitors effective training completion to ensure world-wide capability in a variety of court-martial skills.[503] TCAP conducts annual mobile training; installation site-visits with training sections on special victim crimes and process inspection; live online training; and interactive web-based training (sponsored by TCAP and conducted by subject matter experts).[504] TCAP also inspects and critiques local training plans to ensure senior prosecutors have developed a robust weekly or bi-weekly training program for junior litigators.[505]

497 *Id.*

498 *Id.*

499 Navy's Response to Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013).

500 *Id.*

501 CAAF FY13 Annual Report, *supra* note 397, at 77-78 (Annual Report of the Judge Advocate General of the Navy); *see also* Navy's Response to Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013).

502 *Id.*

503 CAAF FY13 Annual Report, *supra* note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

504 Navy's Response to Request for Information 1(d) (Nov. 1, 2013).

505 CAAF FY13 Annual Report, *supra* note 397, at 70-71 (Annual Report of the Judge Advocate General of the Navy).

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

The Navy relies on its STC and TCAP to supervise sexual assault prosecutions.[506] Eight of nine STC and all uniformed TCAP personnel are members of the MJLCT.[507] Five of nine STC have received their LL.M. in litigation or trial advocacy from a civilian law school.[508]

To further refine the JAG Corps' litigation capabilities, in 2012 the Navy established an externship program and assigned two mid-level career officers to work in the sex crimes units in the Office of the State Attorney in Jacksonville, Florida, and the San Diego District Attorney's Office in San Diego, California.[509] These six-week clinical training externships enable officers to gain practical experience and insight into how civilian prosecutors' offices manage a high volume of sexual assault cases.[510]

In May 2013, the Navy hired an HQE to work with TCAP.[511] The HQE has 17 years of experience as a prosecutor and as an instructor and course coordinator for the NDAA.[512]

d. Marine Corps[513]

Force Restructuring and Trial Counsel Requirements

In 2012, the Marine Corps entirely restructured its criminal justice offices by creating Complex Trial Teams (CTT) to oversee sexual assault prosecutions, consult with prosecutors on complex cases, and develop training programs (in conjunction with TCAP).[514] Only trial counsel certified as Special Victim Qualified Trial Counsel (SVTC) may be assigned sexual assault cases in the Marine Corps.[515] To qualify for certification as an SVTC, a judge advocate must: (1) be a General Court-Martial Qualified trial counsel; (2) receive a written recommendation from the Regional Trial Counsel that the judge advocate possesses the requisite expertise to try a special victim case; (3) demonstrate to the satisfaction of an O-6 level Legal Services Support Section Officer-in-Charge that the judge advocate possesses the requisite expertise, experience, education, innate ability, and disposition to competently try special victim cases; (4) prosecute a contested special or general court-martial in a special victim case as an assistant trial counsel; and (5) attend an intermediate-level trial advocacy training course for the prosecution of special victim cases.[516]

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506 Navy's Response to Request for Information 1(d) (Nov. 1, 2013). According to the Navy's Response to this RFI, as of December 2013, all STCs, all TCAP personnel, and a majority of trial counsel had successfully completed the Army Special Victims Unit Investigations Course (an intensive two-week course exploring the neurobiology of sexual trauma and focusing on investigative techniques unique to these cases). All STCs and a large majority of trial counsel had also attended Prosecuting Alcohol Facilitated Sexual Assaults (PAFSA) and all prosecution offices had completed a nine-hour online course of lectures on special victims' offenses by the end of January 2014. *Id.*

507 *Id.*

508 *Id.*

509 *Id.;* Navy's Response to Request for Information 75(c) (Dec. 19, 2013).

510 *Id.*

511 *Id.;* CAAF FY13 Annual Report, *supra* note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

512 CAAF FY13 Annual Report, *supra* note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

513 Marine Corps' Response to Request for Information 1(d) (Nov. 1, 2013).

514 *Id.*

515 *Id.*

516 *Id.*

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

Marine Corps Trial Counsel Assistance Program

Since 2010, the Marine Corps has relied on TCAP to provide training to trial counsel.[517] Marine Corps TCAP frequently answers questions from prosecutors in the field, and also maintains a website for trial counsel to share motions and best practices throughout the Marine Corps.[518] TCAP's secondary mission is to conduct training, which it does in conjunction with Navy TCAP.[519] Every Marine trial counsel goes through a prosecuting sexual assault course that includes a mix of experts on subjects such as toxicology, DNA, and forensic psychology.[520] In addition, because the Marine Corps has rapid turnover, regional trial counsel and the senior trial counsel instruct courses to ensure that trial counsel are implementing best practices.[521] TCAP also conducts monthly conference calls with regional trial counsel to discuss and disseminate best practices.[522] As with the other Services, TCAP works with NDAA and the TCAPs of fellow Services to locate and distribute best practices."[523]

Marine Corps Highly Qualified Experts

The Marine Corps recently hired three HQEs to assist in all sexual assault cases; two are assigned to the prosecution.[524] The primary job of the HQEs is to train trial counsel to prosecute sexual assault cases.[525] Trial counsel must consult with their regional HQE within ten days of being detailed to any sexual assault case.[526] In addition to attending training conducted by the HQEs, every trial counsel attends a week-long intensive training course on prosecuting sexual assault cases coordinated by the Marine Corps TCAP, and quarterly training provided by the Regional Trial Counsel.[527]

e. Coast Guard

> *"We rely very heavily on the Navy and the Army Trial Counsel Assistance Program to assist our folks. But one of the big challenges that we face is experience. When you only put on 11 trials, Service-wide, in a year, you're not going to have very many people with an extensive amount of trial experience."*[528]

Through a long-standing Memorandum of Understanding with the Navy, Coast Guard judge advocates gain trial experience through assignment to Navy offices around the country. [529]Over the last eight years, Coast

517 *Id.*

518 *Transcript of RSP Public Meeting* 427-30 (Dec. 12, 2013) (testimony of Major Mark Sameit, U.S. Marine Corps).

519 *Id.*

520 *Id.*

521 *Id.*

522 *Id.*

523 *Id.*

524 Marine Corps' Response to Request for Information 1(d) (Nov. 1, 2013).

525 *Id.; Transcript of RSP Public Meeting* 427-30 (Dec. 12, 2013) (testimony of Major Mark Sameit, U.S. Marine Corps).

526 Marine Corps' Response to Request for Information 1(d) (Nov. 1, 2013).

527 The Marine Corps has requested an additional HQE for TCAP. *See* CAAF FY13 Annual Report, *supra* note 397, at 108-09 (Marine Corps Annual Military Justice Report for Fiscal Year 2013).

528 *Transcript of RSP Public Meeting* 409-10 (Dec. 12, 2013) (testimony of Captain Stephen McCleary, U.S. Coast Guard).

529 Coast Guard's Response to Request for Information 1(d) (Nov. 1, 2013).

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

Guard judge advocates gained experience as prosecutors with the Marine Corps at Marine Corps Base Quantico, Camp Lejeune, and Camp Pendleton.[530] The Coast Guard also has close working relationships with the Army and Navy TCAPs.[531] Beginning in FY 2013, Coast Guard Judge Advocates began attending the Army's Special Victim Investigator Unit course.[532] In addition, two Coast Guard judge advocates completed the Prosecuting Alcohol Facilitated Sexual Assault Cases course at the Naval Justice School in FY 2013.[533]

C. TRAINING FOR CIVILIAN AND MILITARY DEFENSE COUNSEL

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

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

1. Overview of Defense Counsel Training Assessment and Comparison

In assessing training and experience levels of military defense counsel, the Subcommittee compared civilian approaches and examined best and promising practices. Based on comments of experienced civilian counsel, the Subcommittee paid particular attention to the minimum level of experience necessary to competently represent those accused of sexual assault crimes.[534] Given the complexity of these cases and potential consequences resulting from conviction, including sex offender registration, the Subcommittee determined that a best practice in defending those accused of adult sexual assault crimes is to require some litigation experience.

530 *Id.*

531 *Id.*

532 *Id.*

533 *Id.*

534 *See, e.g.*, *Transcript of RSP Public Meeting* 362 (Dec. 12, 2013) (testimony of Ms. Amy Muth, The Law Office of Amy Muth); *id.* at 372 (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department); *see also id.* at 353-60 (testimony of Ms. Laurie Rose Kepros, Colorado Office of the State Public Defender, describing complexity of sexual assault cases and importance of having experienced counsel defend them).

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

2. Civilian Defense Counsel Training and Experience

There are no minimum training or experience criteria, nationally or within most states, for counsel defending sex crimes.[535] Classroom and course training varies widely, and is limited by funding.[536] Training often occurs during supervised experience with client interactions, pretrial motions, and trial work.[537]

As with civilian prosecutor training, sustained defense counsel training occurs on the job, with in-house seminars or through supervisor mentoring.[538] Intensive defense counsel training for specialized topics such as DNA and forensics is usually offered in smaller groups of 20 or 30 lawyers.[539] Some topics identified as necessary for effective civilian defense counsel training include: forensics, including integrity of evidence, chain of custody, and misidentification; drug and alcohol effects on perception and memory; and mental health issues.[540]

Public defenders handling adult sexual assault crimes generally have at least three years of experience, and often more than five.[541] However, defense counsel in private practice tend to have more experience handling adult sexual assault cases because some choose to specialize in this area.[542] Public defender offices are often not organized into specialized sex crimes units.[543] Thus, many experienced defense counsel handle various types of crimes. Caseloads for defense counsel vary, but are often not as large as those of civilian prosecutors. Most defense counsel have caseloads of about 10-30 cases.[544]

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535 In the state of Washington, for example, the minimum qualifications to do public defense contract work for sex crimes are to be a lawyer for one year and have done at least one felony trial and another trial with the assistance of another attorney. *Transcript of RSP Public Meeting* 362 (Dec. 12, 2013) (testimony of Ms. Amy Muth, The Law Office of Amy Muth).

536 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 267 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, former President, NACDL, and Training Director of Colorado State Public Defender System, discussing funding and pay differences between prosecutors and defense counsel) ("We [Colorado] are well-funded because it is a state system. So, it is dictated geographically. It is dictated by county. If you go to the south, the disparity is incredible. In the federal system, it is pretty equal in terms of the federal defenders and the United States Attorney office. And so, really, it is dictated geographically. If you are in a rich jurisdiction, you have pretty equal funding. If you are in a poor county or a rural county, it is not at all.").

537 *See, e.g., id.* at 203, 261-64 (testimony of Ms. Yvonne Younis, Defender's Association of Philadelphia).

538 *Id.* at 203 ("[M]ost of my training is very one-on-one or small group training within the office[.]").

539 *Id.* at 210-14 (testimony of Ms. Lisa Wayne, NACDL and Colorado State Public Defender System).

540 *Id.* at 210-14, 258-59.

541 *See, e.g., Transcript of RSP Public Meeting* 372 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department, stating that, after 20 years of experience, he believes that attorneys should not be defending sexual assault cases until they have at least three years of experience, and should do them alone only after at least five years).

542 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 199-200 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL and Colorado State Public Defender System).

543 *See, e.g., Transcript of RSP Public Meeting* 378-80 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia); *id.* at 336-37 (testimony of Mr. Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon); *id.* at 375-76 (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 201-02 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender's Association of Philadelphia).

544 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 411 (Jan. 7, 2014) (testimony of Mr. Neal Puckett, Highly Qualified Expert, Defense Counsel Assistance Program, U.S. Navy); Services' Responses to Request for Information 145(c) (Apr. 11, 2014).

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

3. Civilian Defense Counsel Training Schools

Although some national defense organizations are not as large or well-funded as those of the prosecution, a number of training schools exist. The National Association of Criminal Defense Lawyers (NACDL) is a professional defense association that sponsors training and continuing legal education courses, and provides legal education publications and webcasts.[545] Likewise, the National Legal Aid and Defenders Association (NLADA) offers training courses for defense counsel.[546] The National Criminal Defense College (NCDC) is a not-for-profit corporation in Macon, Georgia that conducts seminars and training sessions for criminal defense lawyers. [547] The Trial Lawyers College is a training school for defense counsel, with courses focusing on topics such as death penalty defense, trial practice, and the components of advocacy.[548]

Some states have organized group training for their attorneys. [549] For instance, the New York State Defender Association (NYSDA) Defender Institute offers an annual intensive trial advocacy course.[550] Likewise, the Oregon Criminal Defense Lawyers Association (OCDLA) provides CLE training for defense attorneys.[551] Similarly, the California Public Defender Association (CPDA) offers annual courses in basic and intermediate trial advocacy.[552]

4. Advanced Training of Military Defense Counsel

> *"The backdrop of this, in terms of what we think is good training and best practices, I have to be very honest that I think that the military does a lot right. And the scrutiny that has come upon the military, in many ways, is politically driven and not really based in fact."*[553]

a. Training for Army Defense Counsel Handling Adult Sexual Assault Cases

Established in 2007, Army DCAP is staffed by five experienced trial practitioners, military and civilian, including two civilian HQEs.[554] DCAP provides training, resources and assistance for defense counsel worldwide.[555] Both HQEs are former military judges and experienced trial practitioners with over 40 years of combined military justice experience.[556]

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545 NACDL, *at* http://www.nacdl.org/.

546 NLADA, *at* http://www.nlada100years.org/.

547 NCDC, *at* http://www.ncdc.net/. It has courses covering trial practice skills. Each year, the NCDC presents two sessions of the summer Trial Practice Institute on the campus of Mercer Law School in Macon, Georgia. The Institute also holds seminars on specialized topics at other times of the year and in other locations. *Id.*

548 The Trial Lawyers College, *at* http://www.triallawyerscollege.org/AboutTLC.aspx.

549 *See, e.g.,* Virginia Indigent Defense Commission, *at* http://www.indigentdefense.virginia.gov/training.htm. Once a year, the Virginia Commission convenes a Public Defender Conference that provides six hours of training, including one hour of legal ethics. *Id.*

550 *See* NYSDA, "Upcoming NYSDA Defender Institute Training Events," *at* http://www.nysda.org/index-5.html.

551 *See* OCDLA, "Continuing Legal Education Seminars," *at* http://www.ocdla.org/seminars/shop-seminar-index.shtml.

552 *See* CPDA, *at* http://www.claraweb.us/.

553 *Transcript of RSP Comparative Systems Subcommittee Meeting* (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL and Colorado State Public Defender System).

554 *Id.* at 310.

555 *Id.* at 310-11.

556 *Id.* at 311.

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

> *"DCAP is available around the clock for case consultation. During Fiscal Year 2013, DCAP received over 2,000 inquiries from defense counsel in the form of emails, phone calls and in-person inquiries during training events."*[557]

The majority of defense counsel come to Trial Defense Services (TDS), the organization to which all defense counsel are assigned, with prior military justice experience, including time in the courtroom.[558]At a minimum, they are graduates of the JAOBC, where they have been trained to serve as the second chair in all phases of a court-martial.[559] Once assigned to TDS, defense counsel undergo further training from introductory courses such as Defense Counsel 101 and advanced trial advocacy courses such as the Sexual Assault Training Advocacy Course.[560]

Besides formal training, supervisory defense counsel continuously monitor the training status of each defense counsel and adjust based on individual development.[561] In addition, defense counsel routinely "reach back" to DCAP for advice on individual cases.[562]

b. Training for Air Force Defense Counsel Handling Adult Sexual Assault Cases[563]

The Air Force criminal defense network is broadly divided into three regions worldwide.[564] In total, there are 187 attorneys and paralegals assigned, serving at 69 operating locations worldwide with 85 area defense counsel (base level counsel) and 19 senior defense counsel.[565]

Most base offices have only one defense counsel and one paralegal assigned, and are responsible for defense services at that installation.[566] The Air Force is unique in that defense counsel are selected in a very competitive, best-qualified standard by the Air Force Judge Advocate General.[567] Most defense counsel arrive with two to five years of experience working in a base legal office, which includes time as a trial counsel in courts-martial.[568] New defense counsel typically have tried between eight and 10 courts-martial trials before starting as a defense counsel.[569]

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557 *Transcript of RSP Public Meeting* 312 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, U.S. Army Trial Defense Service).

558 *Id.*

559 *Id.*

560 Army's Response to Request for Information 1(d) (Nov. 1, 2013); Army's Response to Request for Information 75(c) (Dec. 19, 2013).

561 *Id.*

562 *Id.; see also Transcript of RSP Public Meeting* 310-11 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, U.S. Army).

563 *Transcript of RSP Public Meeting* 314-19 (Dec. 12, 2013) (testimony of Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force).

564 *Id.*

565 *Id.*

566 *Id.*

567 *Id.*

568 *Id.*

569 *Id.*

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

In the Air Force, Area Defense Counsel (ADC) receive initial training as defense counsel at the Defense Orientation Course (DOC).[570] The DOC is held twice a year in an attempt to catch the incoming defense counsel and defense paralegals as they are coming into their jobs.[571] It is primarily taught by the Trial Defense Division, the organization to which all Air Force defense counsel and defense paralegals are assigned.[572] DOC is a combined course with defense counsel and defense paralegals focusing primarily on how to run a defense office, and the legal issues which they can anticipate encountering during their tenure.[573]

In 2013, for the first time, the Air Force initiated a litigation training course specific to prosecuting and defending sexual assault cases.[574] Air Force defense counsel participated in two different levels of courses, the intermediate sexual assault litigation course and the advanced sexual assault litigation course.[575]

The Air Force also relies heavily on on-the-job training.[576] However, on-the-job training for geographically separated counsel proves complicated.[577] Out of the 19 Senior Defense Counsel regions, only three (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.[578]

A senior counsel in the Trial Defense Division told the RSP that the Air Force struggles to maintain a specialized training regimen because of the limited time that defenders remain in the position, usually only 18 to 24 months for an area defense counsel and 24 to 36 months for a senior defense counsel.[579]

c. Training for Navy Defense Counsel Handling Adult Sexual Assault Cases[580]

At the beginning of their careers, all Navy judge advocates that assist in prosecuting or defending courts-martial must complete special Professional Development Standards (PDS), which are checklists of tasks and skills required to progress to greater responsibility.[581] Those judge advocates who exhibit both an aptitude and a desire to further specialize in litigation may apply for inclusion in the MJLCT, which is previously described in more detail.[582]

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

571 *Transcript of RSP Public Meeting* 314–19 (Dec. 12, 2013) (testimony of Lieutenant Colonel Julie Pitvorec, U.S. Air Force).

572 *Id.*

573 *Id.*

574 *Id.*

575 *Id.*

576 *Id.*

577 *Id.*

578 *Id.*

579 *Id.*

580 Navy's Response to Request for Information 1(d) (Nov. 1, 2013).

581 *Id.*

582 *Id.*

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

After basic training at the JAG school, Navy lawyers go to Region Legal Service Offices (RLSO).[583] There, lawyers perform legal assistance work (wills, powers of attorneys, etc.) and begin to experience trial and defense counsel work.[584] However, they are not assigned cases, though they can help write motions and conduct research.[585] During their first 24 months, judge advocates begin advocacy training representing Sailors, Marines, and Coast Guardsmen at administrative separation boards.[586]

Following their first 24-month tour, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.[587] DSOs are located in Washington, DC; Norfolk, Virginia; San Diego, California; and Yokosuka, Japan.[588] At the DSOs, counsel receive additional training, which includes a basic trial advocacy course focusing on courtroom advocacy.[589] Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts from forensics and psychology and very experienced civilian defense counsel.[590]

Because attorneys enter the Navy with a range of legal experience from their time before military service, MJLCT officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.[591] Also, when appropriate, more experienced defense counsel are assigned as co-counsel to junior defense counsel to ensure continued training and supervision.[592]

Navy Defense Counsel Assistance Program (DCAP)

In conjunction with the Naval Justice School (NJS) in Newport, Rhode Island, Navy DCAP coordinates and provides training for defense counsel. DCAP also provides ongoing training to current and prospective defense counsel worldwide, through on-site command visits and online training.[593] When resources permit, defense counsel also attend civilian courses at the National Association of Criminal Defense Lawyers, Gerry Spence College, and others.[594]

583 *Transcript of RSP Public Meeting* 304-09 (Dec. 12, 2013) (testimony of Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy).

584 *Id.*

585 *Id.*

586 *Id.*

587 *Id.*

588 *Id.*

589 *Id.*

590 *Id.*

591 *Id.*

592 *Id.*

593 CAAF FY13 Annual Report, *supra* note 397, at 68 (Annual Report of the Judge Advocate General of the Navy).

594 *Transcript of RSP Public Meeting* 304-09 (Dec. 12, 2013) (testimony of Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy).

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

In the Navy, defense counsel are also provided on-the-job training.[595] Sexual assault cases are typically detailed to "core attorneys" assigned to a DSO.[596] A DSO core attorney is a judge advocate that has completed at least one full tour of duty prior to assuming the duties of a defense counsel.[597] Detailing of counsel is within the discretion of the DSO Commanding Officer (an O-6 Judge Advocate), who takes into consideration such matters as competence, experience and training, existing caseload, and availability of counsel, as well as case specifics and opportunities for training of counsel.[598] A Commanding Officer may detail one or more counsel to a particular case and will often detail both an experienced defense counsel and a less-experienced defense counsel to a case to provide the opportunity for practical mentoring.[599] Additionally, uniformed members of DCAP may also be detailed to cases.[600]

Additionally, Navy and Marine Corps judges complete quarterly evaluations on counsel.[601] These evaluations provide DCAP with the Judiciary's opinion on courtroom performance of defense counsel in all aspects of litigation.[602] DCAP uses this feedback to track trends and identify areas for training, and then monitor subsequent evaluations to ensure the training has improved the practice.[603] Evaluations of the Judiciary, along with any DCAP remarks, are provided to the leadership of the DSOs for their use in mentoring and further developing individual defense counsel.[604]

Finally, DCAP created and monitors an internet site where defense counsel post, download, and share resources involving sexual assault litigation as well as a "discussion board" where defense counsel anywhere in the world can receive nearly instantaneous assistance with any issue from DCAP and the defense bar at large.[605] Monitoring this discussion board also provides DCAP the opportunity to measure performance and determine future training requirements.[606]

595 *Id.* at 306-09.

596 Navy's Response to Request for Information 75(d) (Dec. 19, 2013).

597 *Id.*

598 *Id.*

599 *Id.*

600 *Id.*

601 Navy's Response to Request for Information 1(d) (Nov. 1, 2013).

602 *Id.*

603 *Id.*

604 *Id.*

605 *Id.*

606 *Id.*

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

d. Training for Marine Corps Defense Counsel Handling Adult Sexual Assault Cases[607]

The Chief Defense Counsel (CDC) of the Marine Corps is designated as the Officer-in-Charge (OIC) of the Defense Services Organization (DSO).[608] The DSO established formal defense counsel training programs after it was formed in 2011. Defense counsel training requirements are set forth in Marine Corps policy.[609]

The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than three years of experience as an attorney. [610] They typically serve 18 months as defense counsel before moving to another assignment.[611] The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.[612]

At a minimum, each defense counsel must attend two Continuing Legal Education (CLE) training events each year.[613] The DSO has an annual CLE training event that every defense counsel and enlisted support staff member attends, in addition to monthly training conducted by the Senior Defense Counsel (usually a Major/O-4 or experienced Captain/O-3) at the local Branch Office and quarterly training by the Regional Defense Counsel (usually a Lieutenant Colonel/O-5 or experienced Major/O-4).[614] Curriculum topics addressed during individual training events vary depending on identified needs within the DSO, but range from practical exercises such as mock cross-examinations and opening statements/closing arguments to more academic classes on new developments in the law.[615]

Established in 2011, DCAP is staffed by the Officer-in-Charge and an HQE, a retired civilian public defender from San Diego with over 30 years of experience.[616] The DCAP provides telephone and email assistance for defense counsel, and operates a SharePoint website with an online database of motions.[617]

e. Training for Coast Guard Defense Counsel Handling Adult Sexual Assault Cases[618]

By longstanding memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of crimes under the UCMJ.[619] In return,

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607 Marine Corps' Response to Request for Information 1(d) (Nov. 1, 2013).

608 Marine Corps' Response to Request for Information 75(d) (Dec. 19, 2013).

609 *See* U.S. Marine Corps, Order P5800.16A CH7, Manual for Legal Administration (Feb. 10, 2014).

610 *Transcript of RSP Public Meeting* 319-35 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps).

611 *Id.*

612 *Id.* at 321; *Transcript of RSP Comparative Systems Subcommittee Meeting* 426 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County).

613 Marine Corps' Response to Request for Information 1(d) (Nov. 1, 2013).

614 *Id.*

615 Marine Corps' Response to Request for Information 75(d) (Dec. 19, 2013).

616 *Transcript of RSP Public Meeting* 319-35 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps).

617 *Id.*

618 Coast Guard's Response to Request for Information 1(d) (Nov. 1, 2013); Coast Guard's Response to Request for Information 75(c) (Dec. 19, 2013).

619 *Id.*

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

four Coast Guard judge advocates are detailed to work at various Navy Defense Service offices on two year rotations, which provide another significant source of trial experience to Coast Guard judge advocates.[620]

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

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

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

Discussion

Military defense counsel in all the Services tend to have more standardized and extensive course training than their civilian counterparts to compensate for a relative lack of experience.[621] Like their prosecution counterparts, defense counsel receive training, oversight, and mentoring from senior counsel.[622]

5. Civilian Defense Counsel Experience and Career Progression

Civilian defense counsel career progression varies by jurisdiction, and is often less standardized than that of civilian prosecutors. As with prosecutors, new defense counsel in larger public defense organizations frequently go through internal training programs for one to three weeks covering procedure, evidence, ethics, and trial practice, along with basic motions and other litigation topics.[623] For example, in the Alaska Public Defender Agency, there is a two-week "new lawyer" intensive trial practice course.[624] Similarly, in Colorado, newer defense attorneys attend an intensive, seven-day course in which they bring their own case to use for learning.[625]

Afterward, as with prosecutors, public defense counsel are assigned to defend misdemeanor or juvenile cases, often for two to three years.[626] During this time, defense counsel may gain experience with judge (bench)

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620 *Id.*

621 *See, e.g.*, *Transcript of RSP Public Meeting* 310-12 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, U.S. Army).

622 Services' Responses to Request for Information 1(d) (Nov. 1, 2013); Services' Responses to Request for Information 75(c) (Dec. 19, 2013).

623 *See, e.g.*, *Transcript of RSP Public Meeting* 377 (Dec. 12, 2013) (testimony of Mr. James Whitehead, District of Columbia Public Defender's Office) ("Typically our attorneys are straight out of law school, or had just clerked from local or federal judges, or have very little litigation experience. . . . We put them through a 10-week training involving substantive training as well as skills that culminates in kind of a mock trial with judges at the end[.]").

624 JSC-SAS Report, Appendix C, at 5 (Sept. 2013) (on file at RSP).

625 *Transcript of RSP Public Meeting* 350 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Colorado Office of the State Public Defender).

626 *See, e.g.*, *id.* at 363-64 (testimony of Ms. Amy Muth, The Law Office of Amy Muth); *see also id.* at 377-79 (testimony of Mr. James Whitehead, District of Columbia Public Defender's Office).

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

trials.[627] Juvenile defense work allows defense counsel to become familiar with issues of procedure, evidence, and trial practice in many serious cases (including sexual assault, robbery, arson, and homicide) without the same stakes; if convicted, many juveniles receive only probation, or a term of confinement until they reach age 18 or 21, depending on when the court's jurisdiction ends.[628]

Next, defense counsel typically begin defending basic felony crimes.[629] As counsel progress in experience, expertise, and credibility, they begin to work as second-chair counsel with senior colleagues on more serious felony crimes such as aggravated assault, robbery, sexual assault, and homicide.[630] Senior attorneys handle the most serious cases, such as sex offenses.[631]

"[T]he way we teach it is ... if you would not give that lawyer a homicide case, you can't give him a rape case. It is very serious."[632]

Some civilian defense counsel identified turnover and burnout as challenges they face in seeking to build expertise and continuity through training and experience.[633] One defense counsel stated: "And just like all public defense systems throughout this country, there is a turnover issue, right? And there is always going to be a turnover issue. It's something that we have to live with. I practiced in the Public Defender Department in Hawaii for 10 years and now in New Mexico for 10 years, and that's just part of what we have to deal with."[634] To avoid burnout, some offices do not have specialized sections, but instead divide serious felony cases among their most experienced defense counsel.[635]

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627 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 203 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender's Association of Philadelphia) ("[B]efore our attorneys get their first rape jury cases, rape cases, and I did the math on this and I think it is pretty accurate, they have tried over between 1200 and 1400 trials . . . Now, those are judge trials.").

628 *See, e.g., Transcript of RSP Public Meeting* 378 (Dec. 12, 2013) (testimony of Mr. James Whitehead, District of Columbia Public Defender's Office).

629 *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 204 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender's Association of Philadelphia).

630 JSC-SAS Report, Appendix L, at 12 (Sept. 2013) (on file at RSP).

631 *Id.*, Appendix C, at 5.

632 *Transcript of RSP Comparative Systems Subcommittee Meeting* 204 (Jan. 7, 2014) (testimony of Ms. Yvonne Younis, Defender's Association of Philadelphia).

633 *See, e.g., Transcript of RSP Public Meeting* 375-76 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department).

634 *Id.* at 371; *see also, e.g., id.* at 350-51 (testimony of Ms. Laurie Rose Kepros, Colorado Office of the State Public Defender) ("Similar to some of the other people you're hearing from right now, we have a lot of turnover. We're a public defender's office. That is where people go to get some experience, and sometimes unfortunately they move on. So we are constantly training new people and so we're very sensitive to those challenges.").

635 *See, e.g., id.* at 336 (testimony of defense attorney Mr. Lane Borg, Metropolitan Public Defenders, Portland, Oregon, describing division of office); *id.* at 337 ("I think it does damage and trauma to people to make them only prosecute sex crimes or only defend sex crimes. I think it's good to get to do other things[.]"); *see also id.* at 375-76 (testimony of Mr. Barry G. Porter, New Mexico Public Defender Department) ("[W]e find that attorneys burn out on these cases because they're so emotionally driven and [because of] the impact on our clients.").

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

6. Military Defense Counsel Experience Level

Counsel interviewed during site visits and at meetings stated that defense counsel tour lengths may range from 12-24 months.[636] Some defense counsel said they were assigned adult sexual assault cases during their first tour of duty, when they had no prior litigation experience.[637]

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

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

Discussion

During site visits and RSP and Subcommittee meetings, defense counsel, and HQEs, particularly in the Marine Corps, voiced concerns about training budget funding inequities between prosecutors and defense counsel.[638] Defense counsel from the Air Force, Army, and Navy also mentioned inequities in funding generally between the prosecution and defense, but did not emphasize them with respect to training specifically. However, all Services provided details about their training budgets, as noted below.

636 *Id.* at 321, 325 (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps); *Transcript of RSP Comparative Systems Subcommittee Meeting* 426-27 (Jan. 7, 2014) (testimony of Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Norfolk, VA* (Feb. 20, 2013) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (same).

637 *Id.*

638 *Transcript of RSP Public Meeting* 329-31 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps); *Transcript of RSP Comparative Systems Subcommittee Meeting* 437-39 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel).

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

Table 10

Trial and Defense Counsel Annual Training Spending By Service[639]

Service	Army	Navy	Air Force	Marine Corps[640]	Coast Guard
Defense Has Own Budget?	No	No[641]	Yes	Unclear.[642]	No. See Navy budget.
Annual Defense/ DCAP Budget	DCAP $377,178.96 ("sexual assault funds")	N/A	$350,000 for other than litigation travel	DSO access to $250,000 SAPR/SVC training funds	See Navy budget.
Annual Trial Counsel Budget	TCAP $468,734.64 ("sexual assault training funds")	Not provided.	N/A	TCAP $250,000 SAPR/SVC training funds	See Navy budget.
Annual Average Spending Per Defense Counsel	$1033.36 per counsel[643]	Not provided.	$1870	$3,125 per defense counsel	Not provided.
Annual Average Spending Per Trial Counsel	$1407.61 per counsel	Not provided.	$2105 (per STC)[644]	$2,778 per trial counsel	Not provided.

7. Highly Qualified Experts

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

639 Services' Response to Request for Information 146 (Apr. 11, 2014).

640 Marine Corps' Response to Request for Information 146 (Apr. 11, 2014) (explaining number for FY 13).

641 *But see* Navy's Response to Request for Information 146 (Apr. 11, 2014) (explaining that Naval Justice School administers funding and quota allotments for both trial and defense counsel, and that Defense Service Offices each receive about $10,000 annually for personnel training).

642 *But see* Marine Corps' Response to Request for Information 146 (Apr. 11, 2014) (stating that Office of Chief Defense Counsel has budget to fund travel and training for leaders of Defense Services Organization (DSO) and that DSO leaders had access to $250,000 in funds for sexual assault training programs in FY 13—the same amount provided to TCAP).

643 *But see* Army's Response to Request for Information 146 (Apr. 11, 2014) (listing "$2,500" as another per capita spending amount for defense counsel, with alternative calculation and discussion).

644 *But see* Air Force's Response to Request for Information 146 (Apr. 11, 2014) (discussing figures in context).

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

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

a. Army Highly Qualified Experts (HQEs)

Experienced civilian HQEs in the Army supplement and support the TCAP and DCAP components, as well as some experienced litigation experts serving in similar civilian positions. Most HQEs have criminal law experience of 20-30 years, which often includes work in both civilian and military practice.[645] Working in tandem with TCAP and DCAP, the HQEs provide continuity for training, a different viewpoint, and significant specialized expertise in adult sexual assault litigation.

Established in 2007, Army DCAP is staffed by five experienced trial practitioners, military and civilian, including two HQEs.[646] DCAP provides training, resources and assistance for defense counsel worldwide.[647] Both HQEs are former military judges and experienced trial practitioners with over 40 years of combined military justice experience.[648] Created in 1980, the Army's TCAP oversees training for all Army trial counsel. TCAP is composed of five O-3 (captain) training officers; an O-5 (lieutenant colonel) deputy; a lieutenant colonel chief; and two highly-qualified experts (HQEs), who are civilians with more than 30 years of combined prosecution experience between them.[649]

b. Navy Highly Qualified Experts (HQEs)

In May 2013, the Navy hired an HQE to work with TCAP.[650] The HQE has 17 years of experience as a prosecutor, as well as experience as an instructor and course coordinator for the NDAA.[651]

c. Marine Corps Highly Qualified Experts (HQEs)

The Marine Corps recently hired three HQEs to assist in all sexual assault cases; two are assigned to the prosecution.[652] The primary job of the HQEs is to train trial counsel to prosecute sexual assault cases. Trial counsel must consult with their regional HQE within ten days of being detailed to any sexual assault case.[653]

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645 CAAF FY13 Annual Report, *supra* note 397, at 55, 68 (Annual Report of the Judge Advocate General of the Navy); *id.* at (Marine Corps Annual Military Justice Report for Fiscal Year 2013); *see also, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 411 (Jan. 7, 2014) (testimony of Mr. Neal Puckett, Highly Qualified Expert, Defense Counsel Assistance Program, U.S. Navy).

646 *Transcript of RSP Public Meeting* 310 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, U.S. Army.

647 *Id.* at 310-11.

648 *Id.* at 311.

649 *Transcript of RSP Public Meeting* 412 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

650 Navy's Response to Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013); CAAF FY13 Annual Report, *supra* note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

651 CAAF FY13 Annual Report, *supra* note 397, at 69 (Annual Report of the Judge Advocate General of the Navy).

652 Marine Corps' Response to Request for Information 1(d) (Nov. 1, 2013).

653 *Id.*

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

D. MILITARY JUDGE TRAINING AND ASSESSMENT OF COUNSEL'S ADVOCACY SKILLS

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

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

Discussion

Military judges, both trial and appellate, are selected based on their legal experience, military service record, and exemplary personal character, including sound ethics and good judgment.[654] Once selected, military judges from all Services attend a three-week Military Judge Course at the Army JAG School in Charlottesville, Virginia, which covers judicial philosophy, case management, and specific scenarios.[655] All judges must successfully complete this course before their respective Service TJAGs will certify them to be judges.[656]

The Military Judge Course includes substantive criminal law and procedure, practical exercises designed to simulate trial practice, and scenarios focusing on appropriate factors for consideration in reaching appropriate sentences.[657] The entire course is designed around a sexual assault case.[658] The chief trial judges of all Services collaborate to create the Military Judge Course curriculum, and all Services provide instructors.[659] Experienced senior military judges grade the capstone exercise, which is a mock trial over which student military judges must preside.[660] Military Judges also attend the week-long Joint Military Judge Annual Training (JMJAT).[661] Presiding over sexual assault cases is a major focus of both courses.[662] In both courses, military judges participate in training seminars regarding sentencing, including for sexual assault cases.[663]

Depending on funding, judges also attend Joint Military Judges Training, in conjunction with the National Judicial College.[664] Trial judges for all Services historically attended the JMJAT.[665] However, the 2013 course

654 Army's Response to Request for Information 147 (Apr. 11, 2014).

655 *Id.*

656 *Id.*

657 *Id.*

658 *Id.*

659 *Id.*

660 *Id.*

661 *Id.*

662 *Id.*

663 *Id.*

664 *Id.*

665 *See id.*; CAAF FY13 Annual Report, *supra* note 397, at 65 (Annual Report of the Judge Advocate General of the Navy).

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was postponed due to the impact of sequestration and the continuing resolution in Congress.[666] On odd-numbered years, the training is held at the Air Force JAG School, and on even-numbered years it is hosted by the Navy and Marine Corps, in conjunction with the National Judicial College (NJC) at Reno Nevada.[667] JMJAT is the vehicle for discussing current topics of judicial training interest, such as the new Article 120, the impact of command influence in sexual assault cases, advanced evidence, sentencing methodology, and judicial ethics.[668] All members of the trial judiciary participate in these classes, which will be completed during FY 14.[669] Successful completion of NJC curriculum leads to a professional certificate, and potentially a Master's or doctorate degree."[670]

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

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

Discussion: Navy and Marine Corps judges complete quarterly evaluations on counsel.[671] These evaluations provide the Judiciary's opinion on courtroom performance of counsel in all aspects of litigation.[672] This feedback identifies trends and areas for training, which training supervisors then monitor to ensure training is working.[673] In the Navy, evaluations of the Judiciary, along with any DCAP remarks, are provided to the leadership of the DSOs for their use in mentoring and further developing individual defense counsel.[674] Based on the information gathered, the Subcommittee did not see evidence of this practice in the other Services.

666 CAAF FY13 Annual Report, *supra* note 397, at 65 (Annual Report of the Judge Advocate General of the Navy).

667 *Id.*; *see also* Services' Responses to Request for Information 147 (Apr. 11, 2014).

668 *Id.*

669 *Id.*

670 CAAF FY13 Annual Report, *supra* note 397, at 65 (Annual Report of the Judge Advocate General of the Navy).

671 Navy's Response to Request for Information 1(d) (Nov. 1, 2013).

672 *Id.*

673 *Id.*

674 *Id.*

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VII. PROSECUTION AND DEFENSE

A. ORGANIZATION OF PROSECUTION OFFICES AND THE MULTIDISCIPLINARY APPROACH

A victim-centered and offender focused response to the prosecution of sexual assault is predicated on the need to protect the victim's safety, privacy and well-being while holding offenders accountable. The goal of this approach is to decrease re-victimization by ensuring the survivor is treated with compassion and respect. The myths and misinformation surrounding the crime of sexual assault, along with the tendency of the defense and jurors to focus on the victims' actions, present unique challenges in the successful prosecution of the crime of sexual assault.[675]

1. Co-locating Prosecutors, Investigators, and Victim Support Personnel

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

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

Finding 31-1: The organizational structures of civilian prosecution offices vary. Some civilian prosecutors specialize in sexual assault cases for their entire careers or rotate through sex crime units specializing for a few years, whereas others do not specialize and handle all felony level crimes. [676] The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases. [677]

675 Wisconsin Office of Justice Assistance, Violence Against Women Program, Wisconsin's Prosecutor's Sexual Assault Reference Book 91 (2009).

676 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP).

677 *See generally id.*

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

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

Discussion

The organizational structure of civilian prosecution offices varies greatly.[678] Many of the large, urban offices the Subcommittee studied had sex crime units with attorneys who stay in that unit for several years and develop a specialty for such cases.[679] There are, however, some large jurisdictions that do not specialize and assign sexual assault cases to attorneys who do several different types of felony cases.[680] One county prosecutor explained that he requires attorneys to rotate through the sex crimes unit every two to three years to avoid burnout.[681] Most of the prosecutors in medium size and smaller jurisdictions are assigned cases based on their experience level rather than a specific expertise.[682] Regardless of the structure of the prosecution office or level of specialization, all of the civilian offices studied emphasized the importance of the relationship between the prosecutor's office, the police department, investigators, and victim advocates in sexual assault cases.[683]

The Subcommittee studied four types of co-location models used in some civilian and military jurisdictions.

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678 *See generally id.*

679 *See, e.g., id.*; *see also*, *Transcript of RSP Comparative Systems Subcommittee Meeting* 95-96 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, NDAA). Ms. Mosley testified as follows:

> [O]ne of the things that I was asked was the relative level of experience of prosecutors handling these [sexual assault] cases. . . [It] is just so varied. I mean, you would think that, obviously, promising practices would dictate that it would be a more seasoned prosecutor who has had some experience, has a certain number of trials and felonies, had maybe chiefed or supervised somebody in the misdemeanor division before going to a felony. But many offices across the country many people think are large urban offices and they are not. Many of the prosecutors that we have seen that come to training are in two- and three- person offices. There are, obviously, some that are very structured like New York and Houston, and Dallas, and large urban areas. But the majority of prosecutors' offices out there for state and local prosecutors are these smaller offices in rural areas. So, we get technical assistance requests constantly from a person who doesn't have trial experience and they have got the felony.

680 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP).

681 *Transcript of RSP Comparative Systems Subcommittee Meeting* 183 (Jan. 7, 2014) (testimony of Mr. Mark Roe, Snohomish County); *see also id.* at 183 (testimony of Ms. Candace Mosley, NDAA) ("There are prosecutors who only want to do sexual assault cases for their entire career and then there are some that shouldn't be in there for a long period of time. It really does, it depends on the individual, their passions."); *id.* at 186 (commentary of Ms. Rhonnie Jaus). Ms. Jaus stated as follows:

> I also think it was unrealistic for them to conclude the other prosecutors that there was very little burn [out]. I think that is crazy. I have been doing this as a prosecutor for 30 years. I ran the sex crimes division for like 25. There is burnout. People get burned out. I mean, it is crazy to think they don't. People leave the job. Not everyone stays or else there would never be any movement. But I think that some people are, as Candace [Mosley] is saying, [there are prosecutors who] are incredibly committed and passionate, but there are people who do burn out and I think that it is the same as the military.

682 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP).

683 *See generally id.*; *see supra* Part I (discussing co-location).

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The Dawson Place in Everett, Washington and Joint Base Lewis-McChord (JBLM) model combines all personnel who respond to a sexual assault allegation, including victim advocates, mental health personnel, SANEs, investigators, and prosecutors.[684]

The Philadelphia and Austin model includes: detectives/investigators, SANE and medical personnel, an office for a prosecutor who works there part time, and SVU law enforcement personnel work closely with the local victim advocacy agency.[685]

The Arlington, Virginia and Fort Hood, Texas model either has investigators and prosecutors in the same location[686] or have the investigators provide an office for the prosecutor to work out of on a routine basis.[687]

The Marine Base Quantico, Virginia model co-locates all victim services support personnel, including the SARC, victim advocate, and special victim counsel in the military.[688]

Figure 5

1. Dawson Place, Everett, WA and JBLM	2. Philadelphia, PA & Austin TX	3. Arlington, VA & Ft. Hood, TX	4. Marine Base Quantico, VA
• Victim Advocate • SANE/SAFE Support • Special Victim Counsel (military) • Investigator • Prosecutor • Victim Witness Liaison	• Partnership with Victim Advocate • SANE/SAFE Support • Investigator • Victim Coordinator • Prosecutor	• Investigator • Prosecutor • Victim Witness Liaison	• SARC • Victim Advocate • Special Victim Counsel

The Dawson Place and JBLM model is a "one-stop shop," providing all necessary resources to respond to a sexual assault victim. This approach coordinates services to avoid victims feeling like they are on a "scavenger

684 Dawson Place; Everett, Washington; and Joint-Base Lewis-McChord share this structure. *See* JSC-SAS Report, Appendix P (Sept. 2013) (on file at RSP); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (same).

685 *See generally* JSC-SAS Report, Appendix M (Sept. 2013) (on file at RSP); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (same).

686 *See generally* JSC-SAS Report, Appendix K, N, O (Sept. 2013) (on file at RSP) (summarizing jurisdiction information for Bronx, New York; Austin, Texas; and Arlington, Virginia).

687 *Id.*, Appendix M; *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

688 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

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hunt" as they move through the initial investigative process, which includes police interviews, medical examinations, and crisis intervention services.[689] Members of the Subcommittee visited two of this type of facilities.[690] One civilian facility, Dawson Place in Everett, Washington, includes investigators, SANEs, and/or victim advocate agencies and mental health personnel in a single location to increase communication among the stakeholders, minimize victim travel, and enhance the multidisciplinary approach in child and young adult sexual assault cases. The Army recently established a similar facility at JBLM in Washington called the Sexual Assault Response Center.[691] It houses the SARC, victim advocates, special victim counsel, IG, special victim investigator and special victim prosecutor. The primary differences between the two facilities are that Dawson Place performs sexual assault forensic exams and its services are mostly offered to children who are sexual abuse victims.

While these models appear to work well, there are potential drawbacks to co-locating these services. Co-locating victim services personnel with law enforcement and prosecution officials could create a misperception that victim services are aligned with, or a part of, the prosecution team – and do not operate independently. This misperception has several potentially deleterious effects: First, although the intent of this consolidation model is to support the victim, these arrangements may actually deter reporting if victims perceive victim services are tied to, or working with, investigators or prosecutors. Second, victim services personnel who work too closely with prosecutors may not be perceived as independent medical providers, but rather as extensions of law enforcement.[692] And third, the victim advocate-victim privilege, which generally ensures that communications between victims and advocates remain confidential, may be degraded or lost if confidential statements are made in the presence of, or disclosed to prosecutors.[693] Accordingly, if larger

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689 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP).

690 *Id.*

691 At JBLM, the Army created a consolidated facility with representatives from the CID, SVP, SARC, VA, the special victim counsel, and sexual assault care coordinator. The sexual assault forensic exam takes place at Madigan Army Medical Center located on JBLM. Victims are not required to go to the consolidated facility for services. The facility is arranged so that a victim who makes a restricted report to the SARC or VA will not come into contact with those on the criminal justice side (investigators and prosecutors) unless the victim decides to convert his or her report to an unrestricted one. *See id.*

692 For example, while visiting Dawson Place, Subcommittee members observed a multidisciplinary meeting where both the SANE and victim advocate offered solutions to the prosecutor to deal with a witness cooperation problem in a pending case unrelated to the services they provided to the victim. *See id.*

693 In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a) ,"[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim." MCM, *supra* note 97, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule "when admission or disclosure of a communication is constitutionally required." *Id.,* M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. Therefore, to avoid possible litigation of this issue, it is necessary to build a Chinese wall between the victim advocate and prosecutor. *Cf. Transcript of RSP Public Meeting* 231 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York). The Joint Service Committee's analysis indicates "constitutionally required" exception would be satisfied only in extraordinary circumstances, where the accused could show harm of constitutional magnitude if such communication was not disclosed." The JSC states,

> In drafting the "constitutionally required" exception, the Committee intended that the communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless.

See id. at A22-46.

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

military installations adopt this model, any multidisciplinary meetings between victim services personnel, the prosecutor, and investigator should be limited to topics related to victim support and ensuring the victim remains informed and engaged in the process, but should not include discussions about case details.

The Philadelphia Sexual Assault Response Center (PSARC) in Pennsylvania and the Austin Police Department (PD) Special Victim Unit (SVU) in Texas offer a second model. These investigation facilities provide working space for prosecutors and investigators. Moreover, both the Philadelphia and Austin police departments provide office space for specialized sex crimes prosecutors to work with investigators at least one day per week reviewing cases and assisting with investigations. The District Attorneys' Offices also ensure that a prosecutor is on call to respond to questions about sexual assault cases, as needed.

Both PSARC and Austin PD SVU personnel have gone to great lengths to strengthen their relationships with victim advocate agencies.[694] PSARC partnered with Women Organized Against Rape (WOAR) and other local victim advocate agencies to gain victim confidence and encourage victims to utilize their resources. Austin PD provides an office for victim advocates from SafePlace – a local rape crisis center – to work at the SVU.

The PSARC facility's capacity to perform SANE exams is unique in that Drexel University provides PSARC's SANE support and other medical assistance to victims, regardless of whether they wish to file a police report.[695] Austin PD has a SANE Coordinator on-call 24 hours a day to arrange for forensic exams at one of eight local hospitals.

On most, if not all, military installations, a full time SANE would be unnecessary because not enough sexual assaults are reported within the first 96 hours of an incident to require a nurse to be physically located at a consolidated sexual assault center. However, it may be useful to provide appropriate space, supplies and equipment for SANE forensic exams in facilities housing investigators and prosecutors. This would support currently existing arrangements between military installations and civilian forensic examiners who provide SAFE services. Further, such arrangements would increase communication between prosecutors, investigators, and forensic examiners while easing the burden on victims by limiting the need to travel to a military hospital or off base civilian facility. Consequently, the PSARC model may be the best means of increasing communication while avoiding misperceptions or conflicts of interest.

Arlington, Virginia, and Fort Hood, Texas, use a third model of co-location in which Special Victim Unit Investigators (SVUI) and Special Victim Prosecutors (SVP) share the same building.[696] This model is easier to adopt for medium to small jurisdictions because it requires fewer resources, but yields the positive results associated with investigators and prosecutors working closely together.

The victim support personnel at Marine Base Quantico, Virginia, offered a fourth model that involves co-locating the SARC, victim advocate, and Special Victim Counsel.[697] The Subcommittee considered this model, but did not look for similar civilian examples because victim support services are outside this

694 In Philadelphia, investigators work with Women Organized Against Rape (WOAR) and in Austin, a representative from the victim advocate agency, SafePlace, has an office at the police department. *See* JSC-SAS Report, Appendix M, N (Sept. 2013) (on file at RSP).

695 *Id.*, Appendix M.

696 *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); JSC-SAS Report, Appendix O (Sept. 2013) (on file at RSP).

697 *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

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

Subcommittee's Terms of Reference. However, based on the information received, this is a positive step by the Marine Corps, especially when there are so many resources and service providers offered to sexual assault victims. Victims could find and access all of the different services available to them under one roof.

In general, the Subcommittee determined that it may be helpful for all of the victim service partners to work in a consolidated facility, as the Marine Corps is doing at Quantico, but victim services must remain independent and separate from the investigators and prosecutors.

2. Special Prosecutors in the Military's Special Victim Capability

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

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

Recommendation 32-C: The Secretary of Defense should direct the Directive-Type Memorandum (DTM) 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of "covered offenses" accurately reflect specific offenses currently listed in Article 120 of the UCMJ.

Recommendation 32-D: The Secretary of Defense require standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service's organizational structure.

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

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

Discussion

Section 573 of the FY13 NDAA required the Military Services to implement fully a Special Victim Capability (SVC) – e.g., specialized prosecutors, investigators, victim witness liaisons, and paralegals – by January 2014.[698]

Most of the Services established aspects of these capabilities prior to Congress's mandate, which enabled the Services to formalize and fully staff the initiative by the January 2014 deadline. DoD's policy document (DTM

698 FY13 NDAA, Pub. L. No. 112-239, § 573(a), 126 Stat. 1632 (2013).

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

14-003) effects Congress's requirements by including timelines for special prosecutors' involvement in reported sexual assaults, criteria to measure effectiveness, and other standards.[699]

The SVC strives to provide a level of prosecution expertise through specialization in complex sex-related cases, while recognizing that every Judge Advocate is not a subject matter expert in sexual assault prosecution. Therefore, the Services have established various ways to meet the requirement for a specialized prosecution capability that can assist or take the lead in sexual assault cases. Each Service designed a different approach to meet the SVC requirement based on the resources and structure of the separate Services' installation legal offices.[700]

However, pursuant to DoD policy, "covered offenses" – which includes "sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ,"[701] – are required to be resolved using the SVC, including special victim prosecutors. Accordingly, the prosecutors and investigators of the SVC are required to handle cases beyond Article 120 offenses. The Subcommittee recommends changing the definition of "covered offenses" in this new DTM to coincide with offenses in the UCMJ.[702] The generic list of covered offenses inaccurately represents the cases that the SVC was designed to support. If literally adhered to, the "covered offenses" exclude large categories of sex-related offenses, including rape.

The Army refers to its special prosecutors as Special Victim Prosecutors; the Air Force's as Special Victims Unit Senior Trial Counsel; the Navy's as Region Senior Trial Counsel and the Marines Corps' as Complex Trial Teams. The DTM refers to these positions as specially trained prosecutors. There is no reason for the variation in titles; this Subcommittee recommends standardizing them.

The Military Services provided the details of the various special prosecutor programs within the SVC, depicted below.[703]

Table 11

Army	**Special Victim Prosecutors (SVP):** The core of this team now includes 23 SVPs working with 21 Sexual Assault Investigators (SAI) and 28 Special Victim NCOs. They are located at 19 installations across the globe and trained in the unique aspects of investigating and prosecuting sexual assault cases. These teams have geographic areas of responsibility to ensure coverage Army-wide, including all deployed forces in theater.

699 U.S. Dep't of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support 12 (Feb. 12, 2014).

700 *See* DoD and Services' Responses to Request for Information 50 (Nov. 21, 2013).

701 U.S. Dep't of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support 12 (Feb. 12, 2014) (defining covered offenses as "[t]he designated criminal offenses of sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ").

702 The listing of covered offenses does not accurately reflect offenses under the UCMJ. "Sexual assault" is a specific offense under the UCMJ rather than an omnibus description of offenses. "Domestic violence" and "child abuse" are not specific offenses under the UCMJ; instead, violations commonly referred to by those terms are incorporated into other offenses. *See generally* MCM, *supra* note 97, pt. IV.

703 Information contained in the table is based on DoD and Services' Responses to Request for Information 50 (Nov. 21, 2013).

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Air Force	**Special Victims Unit (SVU) Senior Trial Counsel (STC):** There are currently 16 STC. Of these 16, an elite team of 10 are part of the Air Force's SVU, specializing in the prosecution of particularly difficult cases including sexual assault, crimes against children, and homicides. Two of these SVU-STC serve additional roles. One acts as a liaison to the Defense Computer Forensics Laboratory, ensuring expeditious analysis of forensic evidence (particularly in child pornography cases) and providing expert consultation to local trial counsel on issues of digital evidence. The other, the SVU Chief of Policy and Coordination, serves numerous roles: 1) liaison with HQ AFOSI to improve JA-AFOSI teaming at the HQ and local level; 2) expert reach-back capability to local JA offices; and 3) leads training of JAGs worldwide in all aspects of sexual assault prosecution.
Navy	**Region Senior Trial Counsel (STC)** Each of the nine Region Legal Service Offices (RLSO) is required to have trial counsel trained and certified to prosecute and provide oversight of special victim cases. The core of the prosecution capability is each Region's STC. These Navy JAG Corps prosecutors are board-selected as Military Justice Litigation Career Track (MJLCT) officers based on their significant litigation experience, aptitude, and training; they are detailed to their positions by the Judge Advocate General. STC either personally prosecute or oversee the prosecution of special victim cases.
Marines	**Regional Trial Counsel (RTC) and Complex Trial Teams (CTT)** The Marine Corps Special Victim Capability operates through regional Legal Services Support Sections (LSSS) with the goal of having the right counsel detailed to the right case at the right time. The Marine Corps legal community is organized into four LSSSs—National Capital Region, East, West, and Pacific—each responsible for a particular region. The LSSS region in which a joint base is located is responsible for providing legal support to any Marine Corps convening authority at that base. Existing arrangements with the Navy at certain installations allow for Navy personnel to prosecute Marine cases. Each LSSS is supervised by a colonel judge advocate and contains a RTC office with a CTT capability. Each RTC office is supervised by an experienced lieutenant colonel. A highly qualified expert (HQE), an experienced civilian prosecutor, supports the lieutenant colonel in leading two CTT military prosecutors, two experienced military criminal investigators, a legal administrative officer, and paralegal support. The HQEs, resident in the RTC Office, have significant experience in complex criminal litigation as successful trial-level prosecutors on sexual assault cases. A HQE's primary job is to train trial counsel (TC) to prosecute sexual assault cases. TC must consult with his or her regional HQE within ten days of being detailed to any sexual assault case.

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

3. Sustaining the Special Victim Prosecutor Capability

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

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

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

Discussion

In the years leading up to the Congressional requirement for a SVC, the Services established programs that centralized specially trained prosecutors for complex cases. For example, the Army obtained eighteen authorizations for SVPs beginning in 2009.[704] The Air Force maintained sixteen STC worldwide – ten of these designated as STC-SVUs to comply with the Congressional SVC mandate.[705] The Navy established its career litigation track in 2007, which enabled it to meet the SVC requirement for specialized prosecutors,[706] and in 2012, the Marine Corps completely reorganized its legal community by developing regional Complex Trial Teams.[707] The FY13 NDAA requirement to establish a SVC within each Service did not significantly impact overall JAG manpower requirements as the Services were already developing these capabilities, and, depending on the Service, may have already received additional authorizations for personnel. A Marine witness told the RSP, that, "while we haven't increased the numbers of people who are prosecuting these cases, we've definitely improved the way that we do business."[708]

The Subcommittee concluded it is "reasonable to think that in a time of scarce resources, right on the horizon, that it may be difficult to maintain this kind of capability in each of the different Services with the global reach and standardization process that the SVC capability and the NDAA is trying to find."[709] Therefore, DoD and the Services need to ensure continued resources dedicated to this capability.

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

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704 *Transcript of RSP Public Meeting* 181 (Dec. 11, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

705 *Id.* at 158 (testimony of Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force).

706 *Id.* at 148-50 (testimony of Captain Jason Brown, Military Justice Officer, Marine Corps Headquarters, U.S. Marine Corps).

707 *Id.* at 146.

708 *Id.*

709 *Id.* at 174-75 (comments of Dean Elizabeth Hillman, RSP Member).

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Finding 34-1: DoD established five evaluation criteria "to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel."[710] In addition to the DoD criteria, the Army uses the victim "drop out" rate to also measure the effectiveness of the SVP program. Since the Army established the SVP program in 2009, only 6% of sexual assault victims "dropped out" or were unable to continue to cooperate in the investigation and prosecution of the case.[711] In contrast, in 2011, prior to implementing the specially trained prosecutors or victims' counsel, the Air Force suffered from a 29% victim drop-out rate.

Discussion

The Subcommittee is cautiously optimistic about the success of the SVC to hold offenders appropriately accountable. The Army provided information to demonstrate improvements in its ability to prosecute complex cases since it established the Special Victim Prosecutor program in 2009. Colonel Michael Mulligan, Chief of the Army's Criminal Law Division, stated, "[s]ince these efforts started, the Army has seen an over 100 percent increase in prosecutions, convictions, and sentences."[712] In addition, "The program is now being expanded. It will now include dedicated paralegal and Special Victim Witness Liaisons to these prosecutors to better resource them . . . ."[713]

The FY13 NDAA required the Secretary of Defense to prescribe common criteria for measuring the effectiveness and impact of the SVC from investigative, prosecutorial, and victim perspectives.[714] The DoD and the Services will assess the SVC by reviewing the following measures:[715]

- Percentage of SVC cases preferred, compared to overall number of courts-martial preferred in each fiscal year;
- Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor;
- Compliance with DoD Victim Witness Assistance Program reporting requirements to ensure SVC legal personnel consult with and regularly update victims as required;
- Percentage of specially-trained prosecutors and other legal support personnel who receive additional and advanced training in SVC topic areas; and

710 DoD SVC Report, *supra* note 171, at 10.

711 *Written Statement of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, to RSP* (Dec. 11, 2013).

712 *Transcript of RSP Public Meeting* 230-231 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

713 *Id.* at 231.

714 FY13 NDAA, Pub. L. No. 112-239, § 573(f), 126 Stat. 1632 (2013).

715 *See Transcript of RSP Public Meeting* 121-41 (Dec. 11, 2013) (testimony of Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense for Personnel and Readiness); *see also* DoD and Services' Responses to Request for Information 50 (Nov. 21, 2013); U.S. Dep't of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support 9 (Feb. 12, 2014).

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- Victim feedback on the effectiveness of SVC prosecution and legal support services and recommendations for possible improvements; [716]

Special prosecutors, and now Special Victim Counsel, are trained to prevent victim fatigue and to ensure victims remain informed. Evidence indicates that these programs have thus far been effective. For example, since the Army established its SVP program in 2009, only 6% of the victims in sexual assault cases have dropped out or otherwise stopped cooperating with the prosecution.[717] By comparison, in 2011, the Air Force – which at the time did not have an SVP program – had a 29% victim drop-out rate.[718] Considering the correlation between implementation of the SVP program and a reduced victim drop-out rate, it is reasonable to conclude that SVPs may abrogate a primary cause of victim drop-out: their belief that "the process is very intimidating and the odds of success are very low."[719] Nonetheless, in order to assess the long-term effectiveness of these programs, the Services should track the percentage of cases in which the victim declines to cooperate after filing an unrestricted report. This additional data could reflect the effectiveness of both the special prosecutor and Special Victim Counsel.

4. Prosecutors' Initial Involvement in Sexual Assault Cases

Recommendation 35: The Secretary of Defense maintain the requirement for an investigator to notify the legal office of an unrestricted sexual assault report within 24 hours, and for the special prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established early in the process to insert the prosecutor into the investigative process and to ensure that the special victim prosecutor contacts the victim or the victim's counsel as soon as possible after an unrestricted report. [720]

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

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

Discussion

Studies show that the longer prosecutors wait to interview sexual assault victims, the higher the probability that those victims will not cooperate.[721] Prosecutors in the Manhattan District Attorney's office stated that it is

716 U.S. Dep't of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support 9 (Feb. 12, 2014).

717 *Transcript of RSP Public Meeting* 230-31 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

718 Jakob Rodgers, "Air Force Program Puts Lawyer in Victim's Corner," [Colo. Springs] Gazette (Mar. 25, 2013).

719 *Id.*

720 *See supra* Part IV, Section F(1).

721 *See, e.g.,* OVW, *supra* note 176, at 51 ("Some victims . . . are unable to make a decision about whether they want to report or be

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"critical" to involve the prosecutor in the investigation as early as possible.[722] They explained that "an attorney who 'rides' on a case will take the case from start to finish."[723] Some of the other large urban prosecution offices have "ride-a-long" programs and established protocols for notifying prosecutors as soon as serious sexual assaults are identified by investigators and for facilitating the investigator through much of the process.[724] For instance, the Queens County District Attorney's Office established one of the first Ride-a-long programs in the Special Victims Bureau.[725] There, "a prosecutor will work with officers before probable cause to arrest develops."[726] Police contact the on-call prosecutor who responds to the report of a serious sex offense, such as first degree/forcible rape, crimes against children, etc. This early action assists the Assistant District Attorney in collecting potentially perishable evidence – such as text messages, cell site info, GPS data, phone records, alternative light sources, etc. – early in the investigation. Special Victim police and prosecutors work hand-in-hand and have developed a good working relationship over time.[727]

In the "Riding Program" model, the prosecutor will arrive at the hospital, meet with the detective, read the detective's paperwork, obtain background information, and then sit down with the complainant. The prosecutor will work to establish rapport, put the victim at ease, and complete a forensic interview. In non-crisis cases, the strong preference is to complete the interview at the prosecutor's office. It should be noted that under this model investigators' initial interviews and the prosecutor's discussions with victims remain separate in order to preserve the neutrality of the investigative process.

The prosecutor's early involvement in the case can also facilitate proper understanding by the police of the relevant legal requirements for establishing probable cause. The Subcommittee received evidence that it is critical that an investigator knows the legal definitions and required elements of proof of sexual assault offenses in order to focus the physical evidence collection properly. In addition, the prosecutor can focus investigative efforts on gathering additional corroborating evidence to assist the government in meeting its legal obligation to prove the offense beyond a reasonable doubt.[728]

SVC affords military prosecutors comparable early access to witnesses and evidence afforded attorneys in ride-along program jurisdictions. DoD policy requires investigators to notify the legal office within 24 hours of an unrestricted sexual assault allegation, and special prosecutors must consult investigators within 48 hours of the report.[729] Although there is no specified time for the prosecutor to interview the victim,[730] The Subcommittee

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involved in the criminal justice system in the immediate aftermath of an assault. Pressuring these victims to report may discourage their future involvement. Yet, they can benefit from support and advocacy, treatment, and information that focuses on their well-being. . . . Victims who are recipients of compassionate and appropriate care at the time of the exam are more likely to cooperate with law enforcement and prosecution in the future.").

722 *See* JSC-SAS Report, Appendix K (Sept. 2013) (on file at RSP).

723 *See id.*

724 *See id.*

725 *See id.*

726 *See id.*

727 *See id.*

728 JSC-SAS Report, Appendix K-3, at 2 (Sept. 2013) (on file at RSP) (stating that through the use of the "riding program," Manhattan Assistant DAs "will become involved with a case early enough that they can help build the case by working alongside investigators to identify and properly preserve evidence at the beginning of a case").

729 *See* U.S. Dep't of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support (Feb. 12, 2014).

730 *See id.*

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found that Army SVPs are on-call and try to interview the victim early in the process. The military special prosecutors appear to follow the same procedures as prosecutors in large offices with well-established programs.

B. DEFENSE COUNSEL ORGANIZATIONAL STRUCTURE & RESOURCE REQUIREMENTS

> *I urge this panel to look at our clients as people, some of whom stand falsely accused. Our clients, like victims of sexual assault and other crimes, are real people, impacted by decisions and recommendations this panel will make.*[731]

"Army defense counsel [play a] critical role in ensuring the integrity and constitutional sufficiency of our military justice system."[732] Defense counsel from the Services informed the RSP that the mission of the Defense Services is to provide independent and world-class representation in a zealous, ethical, and professional manner thereby ensuring the military justice system is both fair and just.[733]

With media attention focused on sexual assaults in the military, on college campuses, or in civilian jurisdictions almost every day, victims' rights are front and center. There is increasing pressure to "hold offenders accountable." It is crucially important that the military justice system remains balanced and respects the rights of the accused, particularly the presumption of innocence.

As one defense counsel told the RSP:

> [I]t's relatively easy to stand up for beliefs when it's the popular thing or the in vogue thing. It's relatively easy to be pro-victim or anti-crime. But it can be quite another to be against the injustice done to accused, especially when they are already considered guilty by society, by the media, by their unit and by their commander, all prior to trial.[734]

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731 *Transcript of RSP Public Meeting* 320-21 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

732 *Transcript of RSP Public Meeting* 292 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army).

733 *See id.* at 292 ("The mission of the U.S. Army Trial Defense Service is to provide independent, professional, and ethical defense services to soldier."); *id.* at 305 (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) ("The Marine Corps Defense Services Organization provides zealous, ethical, and effective defense counsel services to Marines and sailors who are facing administrative, nonjudicial, and judicial actions in order to protect and promote due process, statutory and constitutional rights, thereby ensuring the military justice system is both fair and just."); *id.* at 310-11 (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force) ("Our charge is to further the Air Force's mission by providing America's airmen with independent, world-class representation in a zealous, ethical, and professional manner."); *see also* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System,* The Champion (June 2012) (noting that roles of military defense attorney and public defender are critical to ensure accused's "Sixth Amendment right to counsel . . . [and that] the procedural protections which exist on paper, are actually applied"); *Transcript of RSP Public Meeting* 313 (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency) (noting that military defense counsel, in particular, ensure the fair administration of the military justice system, which assists in maintaining good order and discipline and ultimately strengthens the national security of the United States).

734 *Transcript of RSP Public Meeting* 333 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps); *see also See Transcript of RSP Public Meeting* 303-304 (Nov. 8, 2013) (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) ("As persons dedicating ourselves to the military, to the law, for the betterment of military law, we must likewise never forget that the Marines and sailors defended by the DSO are not attackers, victimizers, assailants, rapists, or any other

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

As required by law and policy, the Military Services provide military defense counsel, free of charge, to Service members facing potential court-martial, nonjudicial punishment, administrative separation, and similar adverse action.[735] Defense counsel perform a wide range of duties, including: (1) representing Service members before tribunals and other administrative bodies – e.g., at courts-martial, Article 32 hearings, lineups, administrative separation boards, and disciplinary and adjustment boards; (2) counseling Service members under investigation or prior to being subject to punitive or negative administrative action – e.g., those suspected of offenses, pending nonjudicial punishment under Article 15 of the UCMJ, subject to Summary Court-martial (at which Service members are not entitled to be represented by counsel), recommended for administrative separation; and (3) other legal services as determined by the Services.

1. Military Trial Defense Structure and Budget

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

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

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

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

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

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

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pejorative brand they have been given, and I'm disturbed by the loose and repeated application of those brands particularly in advance of a finding of guilty.").

735 Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, Army Lawyer (Mar. 2001); *see also* U.S. Courts of Appeals for the Armed Forces, "Military Justice Personnel: Defense Function: Detailed Military Counsel," *at* http://www.armfor.uscourts.gov/newcaaf/digest/IIA4.htm; *see also* 10 U.S.C. § 827 (UCMJ art. 27).

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

Discussion

All of the Services organize the provision of trial defense services by geographic region.[736] Military defense counsel are assigned to separate and independent organizations that are not under the supervision or control of their clients' commanders. This organizational structure ensures the independence of military defense counsel, both in fact and perception.

An Army defense counsel stated to the RSP that, "[s]ervice members deserve the best possible representation, and this means that we must continue to resource the defense function even in today's constrained budget environment."[737] He explained that,

> [I]n representing an accused Service member, the defense counsel is confronted with the tremendous resources of the command, military law enforcement, and prosecutors. It can be a lonely and often uphill struggle for the defense to gain access to the witnesses, evidence, and resources needed to properly defend a soldier and ensure a fair trial.[738]

Congress, DoD and the Services have dedicated significant resources in recent years to prosecuting sexual assault cases, including establishing the SVC. There is not a similar requirement for "special victim defenders," solely dedicated to defending those accused of sexual assault offenses. Neither civilian public defenders offices nor military defense services have attorneys dedicated to specializing in sexual assault cases; rather, both use their most experienced attorneys to handle complex cases, including sexual assaults.[739] Instead of developing new positions for specialized defense counsel, DoD and the Services should focus on a training and resource structure that ensures defense organizations and counsel can function effectively.

Some public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.[740] In the federal system, there is specific funding to pay for defense witness travel and experts for Federal Defender organizations. Federal discovery rules generally require the defense to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel. Military defense counsel must request their witnesses through the trial counsel.[741]

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736 *See generally Transcript of RSP Public Meeting* 291-396 (Nov. 8, 2013) (testimony of military defense organization personnel, including Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army; Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast, U.S. Navy; Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps; Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force; and Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard); *see also id.* at 315 (noting that "trial defense services for Coast Guard members accused of violating the Uniform Code of Military Justice are actually provided by the Navy, pursuant to the terms of a Memorandum of Agreement").

737 *Id.* at 299 (testimony of Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army).

738 *Id.* at 294.

739 *Transcript of RSP Public Meeting* 336, 362-63 (Dec. 12, 2013) (testimony or Mr. Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon) ("We don't divide ourselves in terms of like a sexual crimes unit. We divide among major felonies, minor felonies and misdemeanors. And you work your way up based on state guidelines for experience."); *id.* at 362 (testimony of Ms. Amy Muth, Attorney-at-Law, Law Offices of Amy Muth) ("Specific to sex crime cases there are minimum standards of qualifications. You need to have been a lawyer for at least a year. You need to have done at least one felony trial and another trial with the assistance of another attorney.").

740 *See, e.g., id.* at 374, 382 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department; and Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

741 *Id.*

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

Some military defense counsel requested their own budget to attain further independence during an interview with the Subcommittee. However, the Subcommittee does not recommend requiring the Services to establish separate budgets for military defense organizations at this time.

2. Defense Investigators

Recommendation 37: The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice. [742]

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

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

Discussion

Public defenders have conveyed the importance of employing their own investigators, who typically assist the defense in locating and interviewing witnesses, finding appropriate experts, and finding services to assist the defense in complying with court ordered treatment or services.[743] The investigators' involvement and contributions permit the defense counsel to prepare for trial and may assist in reaching alternate dispositions in cases.[744] Investigators can "give[] attorneys a fighting chance to develop facts and other evidence that is

742 *Id.* at 327 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 221-30 (Mar. 11, 2014).

743 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP); Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" (Nov. 6, 2013) (noting "the best public defender offices in the country have full-time criminal investigators"); *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL) ("I don't know a lawyer in the country that does sex offenses without an investigator, except in the military. Really, there is no such thing.").

744 James Whitehead told the RSP:

> But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for awhile. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things — sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word "victim." When we talk about pre- trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent -- not only a decent, but a zealous defense.

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rarely provided to them by the government and is crucial for the proper representation of their clients" and "contribute to the efficient disposition of cases." [745] One public defender from the Washington D.C. Public Defender's Office told the RSP, "[I]t's surprising to hear about the lack of investigators involved when we're trying to uphold the Constitution here and try to give our clients the utmost in representation and being zealous."[746]

One military defense counsel illustrated the comparative point to the RSP:

> Congress has provided investigators for the adequate representation of Federal indigent defendants. And virtually every state and Federal public defender's office has in-house investigators. For example, in the central branch of the San Diego Public Defender's Office, 80 attorneys are supported by 16 investigators. In the [Marine Defense Services Organization], we have 72 defense counsel, but not a single defense investigator.[747]

Many civilian defense attorney offices have investigators on staff. [748] Military defense counsel repeatedly told the Subcommittee that having their own investigators was crucial. One civilian defense counsel stated "I can't tell you how many cases pre-indictment I have had dismissed because my investigator got out and did the ground work that the cops couldn't do, that law enforcement didn't have the resources to do it right . . . ."[749] [sic] Likewise, another civilian defense counsel told the Subcommittee that, in her experience in four public defender offices – spanning urban, rural, state, and Federal jurisdictions – investigators were "an integral part of the office."[750]

Civilian defense investigators have a variety of backgrounds and training; most have criminal justice training or education.[751] Others have a law enforcement background or are former private investigators.[752] But this is not always the case. For example, the Bronx Public Defenders office, as a matter of policy, does not hire former police officers as investigators.[753] Defense attorneys sometimes find that police detectives are more intimidating and not as approachable for defendants, their families, or other witnesses as others who do not possess a law enforcement background.[754]

Transcript of RSP Public Meeting 377-82 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

745 Stimson, *supra* note 743, at 18-19.

746 *Transcript of RSP Public Meeting* 377-82 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

747 *Id.* at 326 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

748 *See e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 226-28 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL).

749 *Id.* at 229.

750 *See, e.g., id.* at 438 (testimony of Ms. Kathleen Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County).

751 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP).

752 *See generally id.*

753 *See generally id.,* Appendix K.

754 *See id.*

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During Subcommittee member site visits, military defense counsel repeatedly requested that the Services provide independent investigators to defense offices. Although military defense counsel can request the MCIO follow-up on defense leads, defense counsel told the RSP and Subcommittee that requests to the MCIOs are routinely denied. In addition, any information the MCIO agent obtains at the behest of the defense is not protected by the attorney-client or work-product privileges. Accordingly, the prosecutor would also have access to the information, placing the military defense counsel in the untenable position of requesting investigative assistance that might lead to additional incriminating evidence for the prosecutor to use against the accused.[755]

The alternative – military defense counsel conducting his or her own case investigations – is equally unsatisfactory.[756] This places an additional burden on counsel that is untrained in investigative techniques and lacking investigative assets. Further, it may place defense counsel in ethically compromising circumstances if he or she becomes the only witness to exculpatory or inconsistent statements.[757] A civilian defense counsel currently working as an HQE expressed the concern that the large number of resources available to military prosecutors and the addition of the Special Victim Counsel for victims, has put "an incredible amount of weight on one side of the scales without comparable resourcing on the other side."[758]

The Subcommittee identified several potential ways DoD could fulfill the requirement to provide defense investigators. One would create MCIO positions within the defense counsel offices[759] and ensure the investigators' evaluation and supervisory chains remain within the military trial defense organizations.[760] Investigators could "unplug" from the parent MCIO for an assignment, "plug" into the defense system, then "unplug" to resume work for the MCIO.[761] This would mirror JAG Corps attorneys who serve as both prosecutors and defense counsel, although always in different assignment tours. Another option is to hire civilian investigators as full time government employees or hire contractors to work for the defense.[762] Some public defenders offices hire former law enforcement personnel who get narrow-purpose credentials issued to them to perform the investigative functions for the defense.[763]

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755 Information learned during site visits at Fort Hood, Naval Base Kitsap, JBLM, and Quantico. *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

756 Lisa Wayne told the RSP, "you all [don't] assign investigators to the defense. And that doesn't make sense. You can't be effective. You cannot provide effective assistance of counsel to your client without an investigator." *Transcript of RSP Comparative Systems Subcommittee Meeting* 229 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL).

757 Lisa Wayne explained, "We never interview witnesses on our own in civilian practice. It is unethical. The ABA Standards are clear on that. That is like a number one rule in civilian practice is never making yourself a witness in a case." *Id.* at 242.

758 *Id.* at 439 (testimony of Ms. Kathleen Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County). Lisa Wayne reiterated this point when she said, "[Prosecutors] are there with their investigators and the victim's advocates and all their resources. So, there has to be, obviously, the balance. And it is incredible to me that you could ever do these cases without an investigator." *Id.* at 231 (testimony of Ms. Lisa Wayne, NACDL).

759 *Transcript of RSP Public Meeting* 326-27 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

760 *Transcript of Comparative Systems Subcommittee Meeting* 220-23 (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member).

761 *Id.* at 222.

762 *Id.* (comments of Mr. Russ Strand, Subcommittee Member).

763 *Id.* (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member).

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3. Measuring the Effectiveness of Military Defense Counsel

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

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

Discussion

It is difficult for civilian or military defense counsel to measure success in defending those accused of sexual assault offenses. Just as conviction rates are not an accurate or desirable measure of prosecution success, acquittal rates are also not an accurate or desirable measure of defense success. Instead, a favorable plea agreement, negotiated sentence, or agreement to dispose of a case through alternate means for a client may be an accomplishment. Additionally, high acquittal rates in military sexual assault cases may indicate that the staff judge advocates are recommending, and convening authorities are referring, cases that do not warrant trial by court-martial.

Therefore, in addition to the metrics designed to measure the success of the special prosecutors and special victim counsel, the Subcommittee recommends that the Secretary of Defense develop systemic tools to measure the defense of those accused in sexual assault cases.

C. VICTIMS' RIGHTS AND SPECIAL VICTIM COUNSEL IMPACT ON THE JUDICIAL PROCESS

1. Trial Counsel Role in Ensuring Military Crime Victim Rights

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

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

Discussion

The FY14 NDAA included the following provisions to enhance victim protections:

1. Added Article 6b to the UCMJ setting forth military crime victims' rights;

2. Codified the requirement for Special Victims' Counsel;

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3. Narrowed the scope of Article 32 hearings and gave military victims the option not to testify;

4. Required higher level review of a commander's decision not to refer a sexual assault charge to court-martial;

5. Gave victims a right to participate in the post-trial clemency process; and

6. Prohibited convening authorities from considering information about a victim's character that was not admitted at trial during the post-trial review process.[764]

The trial counsel, as the representative of the government and convening authority in a military sexual assault prosecution and court-martial, is charged with affording victims certain rights throughout the judicial process. In December 2013, DoD articulated specific requirements to ensure victims receive appropriate notifications and have the opportunity to confer with the trial counsel. Specifically, the new DoD instruction states that the trial counsel must consult with the victim and obtain his or her views concerning:

The decision to pursue charges against the suspected offender;

- The decision not to prefer charges;
- Dismissal of charges;
- Disposition of the offense if other than court-martial;
- Pretrial restraint or confinement, particularly an accused's possible release from any pretrial restraint or confinement;
- Pretrial agreement (PTA) negotiations, including PTA terms;
- Plea negotiations;
- Discharge or resignation in lieu of court-martial; and
- Scheduling of judicial proceedings, including changes or delays, of each pretrial hearing pursuant to Article 32, UCMJ, and each court proceeding that the victim is entitled or required to attend.[765]

Congress also enacted legislation that codified specific rights for military crime victims.[766] DoD policy already provided victims many of the protections now statutorily required, although "[c]odifying common practices

764 *See* Letter from the Assistant Secretary of Defense for Legislative Affairs to the Honorable Carl Levin, Chair, Senate Armed Services Committee (undated) [hereinafter DoD VPA Letter] (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014), *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials. For further analysis of the Victims Protection Act, see the Victim Services Subcommittee's Report to the Response Systems Panel, *supra* note 16.

765 Lieutenant Colonel Ryan Oakley, Deputy Director, Office of Legal Policy, Personnel & Readiness, Supplemental Information Provided to Response Systems Panel on Sexual Assault on Department of Defense Victim and Witness Assistance (citing to DoDI 1030.2, Victim and Witness Assistance Procedures ¶ 6.3 (June 4, 2004) (noting DOD issuance is currently being revised and will implement new FY14 NDAA provisions)).

766 FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013). For further analysis of the amendments to Article 6b, UCMJ, see the

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into legal mandates enhances the credibility of the system while increasing victims' confidence that their rights will be protected."[767]

One easily implemented procedural safeguard to ensure trial counsel comply with their obligations and victims are afforded the rights Article 6b of the UCMJ and other policy provisions is to modify the Services' compendiums of pattern military jury instructions and other matters such as scripts for guilty plea inquiries[768] known as "Benchbooks."[769] Modifications to the Benchbooks would provide checks and balances in the system to ensure trial counsel are properly consulting with the victim without disrupting the court-martial procedure, or the military judge could order timely remedial actions as authorized by law. This colloquy could also include attaching a document to the record of trial reflecting whether the victim was afforded all his or her rights. These simple steps are similar to current requirements to reflect, on the record, that the accused was aware of, and afforded, a number of constitutional, statutory, or other rights, and can help ensure that the trial counsel complies with all his or her obligations to victims and avoid litigation on those issues.

2. Assessment of Special Victim Counsel by the SJA, Trial and Defense Counsel

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

Finding 40-1: Military trial and defense counsel, SARCs, and victim advocate personnel reported to the Subcommittee that they have positive working relationships with Special Victim Counsel. However, some counsel foresee potential issues such as privilege, confidentiality, or delays when the government and victim's interests do not align.

Discussion

Although the Special Victim Counsel Programs in the Services are still in their early stages, the trial and defense counsel the Subcommittee interviewed during site visits did not report any significant issues with Special Victim Counsel impacting the administration of justice or maintenance of good order and discipline. Each of the Services have established Special Victim Counsel Program Managers who share best practices and

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Victim Services Subcommittee's Report to the Response Systems Panel, *supra* note 16.

767 Stimson, *supra* note 743, at 6; *see* DoD VPA Letter, *supra* note 764 (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014). For further analysis of the Victims Protection Act and amended Article 6b, UCMJ, see the Victim Services Subcommittee's Report to the Response Systems Panel, *supra* note 16.

768 Inquiry into the providence of the accused is required in guilty pleas before military courts-martial. *See United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

769 The Military Judge's Benchbook serves as a supplement to the Uniform Code of Military Justice, opinions of appellate courts, other departmental publications dealing primarily with trial procedure, and similar legal reference material. The pamphlet sets forth pattern instructions and suggested procedures applicable to trials by general and special court-martial. It has been prepared primarily to meet the needs of military judges. It is also intended as a practical guide for counsel, staff judge advocates, commanders, legal specialists, and others engaged in the administration of military justice. In the Army, the benchbook is DA Pamphlet 27-9, The Military Judges' Benchbook, and it is available at https://www.jagcnet.army.mil/Portals/USArmyTJ.nsf/6065c91f137aff3685256cbf0079f732/2eba83d745c6dfe7852579c300487713.

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

discuss issues or concerns as they arise. Over time, court decisions should resolve many issues regarding the counsel and military crime victims' rights.[770]

> The SVC program managers of the respective SVC programs regularly reach out to one another via email and telephone to communicate SVC issues and exchange lessons learned/best practices generated by their respective Services. On a more formal basis, the SVC program managers meet monthly to discuss a variety of SVC program issues.[771]

3. Choice of Venue and the Victims Protection Act (VPA) of 2014, Section 3(b)

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

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

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

Discussion

Consulting with victims, whenever practical, is very important to ensure victims' rights are protected throughout the military justice process. However, jurisdiction is based on legal authority, not victim preference. The Military Services have no authority over civilian jurisdictions or prosecution decisions.[772] The decision of whether civilian or military authorities will prosecute a particular case is routinely negotiated between the entities sharing jurisdiction. Neither the Subcommittee nor the RSP heard evidence of problems with coordination between civilian prosecutors and military legal offices.

The DoD's position on this issue is:

> With regards to Section 3(b), the Department of Defense is committed to ensuring that victims are treated with fairness, dignity, and respect. This includes consulting with victims throughout the process and taking their preferences into account whenever appropriate. Requiring convening

770 Army's Response to Request for Information 144 (April 2014).

771 *Id.* "The last meeting took place at Marine Corps CID Headquarters in Quantico, Virginia on 4 April 2014 and involved Army CID, AF OSI, and NCSI to discuss best practices for collecting evidence when an SVC was involved in the case." *Id.*

772 *Transcript of RSP Comparative Systems Subcommittee Meeting* 632 (Apr. 11, 2014) (Subcommittee deliberations).

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> authorities to give "great weight" to a victim's preference about whether an alleged sexual assault should be tried in military or civilian court, however, would prove difficult because the Department does not have authority over civilian criminal justice systems. For example, placing the military prosecution apparatus on hold while a civilian prosecutor decides whether to exercise jurisdiction in the case could result in significant delay, which is inconsistent with both the cause of justice and military readiness. Additionally, the military and civilian justice systems often share concurrent jurisdiction. In such cases, military prosecution would not preclude prosecution of the same offense in a civilian court if that is preferred by the victim.[773]

If the sexual assault incident occurs outside a military installation, the local District Attorney's office has jurisdiction over the crime. If the suspect is a Service member, there is concurrent civilian and military jurisdiction. If the offense happens on a military installation in the United States, the federal U.S. Attorney's office has jurisdiction. Again, if the suspect is a Service member, there is concurrent jurisdiction with the military.

The Subcommittee members received evidence that in the civilian sector, state courts try the majority of sexual assault cases. In fact, in FY12, there were only 121 sexual assault cases tried in the federal system, most of which occurred on Native American reservations.[774] One Assistant U.S. Attorney (AUSA) informed Subcommittee members that the leadership in his office was accustomed to federal fraud cases, and therefore, due to fact they were not familiar with the challenges of sexual assault cases, declined to prosecute a case he believed should have gone to trial. Therefore, federal prosecutors may not always be better at handling sexual assault cases than military attorneys and U.S. Attorney offices may have less training or experience in sexual assault cases than state or military prosecutors. Therefore, a victim may not realize that a request to have the case prosecuted in a civilian jurisdiction may not always be in his/her best interest. The Victims Protection Act of 2014, Section 3(b), should not be enacted and the decision should remain between the civilian prosecutor's office and the Convening Authority.

D. INITIAL DISPOSITION AND CHARGING DECISIONS

Civilian prosecutors near military installations sometimes take military sexual assault cases to trial and other times reject military cases that are then referred to court-martial. Subcommittee members heard evidence on this when trial counsel interviewed by Subcommittee members on site visits stated that their offices have taken cases declined by civilian jurisdictions.[775] Further, in response to a request for information by the RSP, the Services confirmed the military does take some of the cases declined by civilian jurisdictions. [776]

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773 *See* DoD VPA Letter, *supra* note 764 (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014).

774 *Transcript of RSP Comparative Systems Subcommittee Meeting* 198 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission).

775 Trial counsel at multiple installations (Fort Hood, Naval Base Kitsap, JBLM, and Quantico) cited anecdotally cases that were prosecuted in military jurisdictions following declination by civilians. *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

776 Services' Responses to Request for Information 41(k) (Nov. 21, 2013). The Services explained they do not usually collect this data, but some were able to provide information based on a data sampling:

- The U.S. Army does not specifically collect the requested data. However, on 6 November 2013, The Judge Advocate General of the Army provided the Chair of the Response Systems Panel a non-exhaustive sampling of 79 cases, in which an Army

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There is a broad range of military sexual assault offenses which criminalize some conduct that is not prohibited in civilian jurisdictions. The military also has uniquely military crimes common in military sexual assault cases such as disobedience to orders or fraternization. At its core, the military justice system is designed to achieve justice and to help enforce good order and discipline in the Armed Forces.[777] Therefore, the military justice system may pursue a case that civilian prosecutors decline.

To compare civilian and military prosecution and defense systems, and understand why some cases are pursued by the military or civilian jurisdictions, it is critical to understand what conduct constitutes a crime, the level of discretion is there in drafting charges within criminal statute, the considerations by the prosecutorial authority in assessing the case, and the options of alternate dispositions or trial. All of these aspects are discussed below.

1. The Scope of Article 120 of the UCMJ

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

Finding 42-1: Military and civilian jurisdictions categorize crimes referred to generically as "sexual assault" in different ways. Criminal sexual conduct under Article 120 of the UCMJ spans a broad spectrum from minor non-penetrative touching of another person's body, with no requirement to gratify any person's sexual desire, to penetrative offenses accomplished by force. [778] In contrast, "sexual assault" in civilian jurisdictions is generally classified as either a penetrative offense or a contact offense with intent to gratify the sexual desires of some person. [779]

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commander chose to prosecute an off-post offense that the civilians either declined to prosecute or could not prosecute. The cases included allegations made by 97 victims, and resulted in a 78% conviction rate. The Air Force does not formally track this data point. However, in response to a similar request received through the office of the Chairman of the Joint Chiefs of Staff, the Air Force provided a non-exhaustive list of 10 sexual assault cases in which an Air Force commander elected to pursue court-martial charges after the local civilian authorities declined to prosecute. The Air Force has a policy of maximizing jurisdiction of offenses allegedly committed by Air Force members IAW AFI 51-201, Administration of Military Justice, para. 2.6

- From February 2010 through June 2013 the Marine Corps prosecuted 28 cases involving sexual misconduct that civilian jurisdictions declined to prosecute. The Marine Corps obtained convictions for Article 120 offenses in 14 of those cases and convictions for other misconduct in five additional cases.
- From 2012-2013, the Coast Guard took taken military justice action in 12 cases involving adult and child sexual assault crimes after civilian law enforcement declined to prosecute. The breakdown of those cases are: (5) Guilty at court-martial; (2) Acquitted; (2) Pending, (2) Dismissed after Art. 32, (1) NJP.

777 Charles D. Stimson, "Military Sexual Assault Reform: Real Change Takes Time," at 2 (Mar. 6, 2014).

778 10 U.S.C. § 920 (UCMJ art. 120).

779 AEquitas: The Prosecutor's Resource on Violence Against Women, Rape and Sexual Assault Analyses and Laws (Jan. 2013) (compiling state sexual violence laws and military's Article 120), *available at* http://www.aequitasresource.org/Rape_and_Sexual_Assault_Analyses_and_Laws.pdf.

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

Discussion

What constitutes criminal sexual conduct varies widely from state to state.[780] Some states, such as New York, require penetration (however slight), while other states consider any unwanted or unsolicited sexual touching an offense. Many states have classes of offenses which are generally based on the level of violence, harm to the victim, and/or intimidation of a victim through threats of harm to self or loved ones.[781] The seriousness of the offense increases when the perpetrator is in a position of trust such as a teacher, guardian or other person of authority.

> In comparison, "[t]he [UCMJ] criminalizes various forms of unwanted sexual contact and includes a broader range of conduct than is generally understood in common usage of the term 'sexual assault' or as typically used in civilian criminal statutes."[782] The table below divides Article 120 of the UCMJ into four parts which demonstrates the statute's complete spectrum of sex-related offenses.

780 *Id.*

781 *Id.*

782 United States Commission on Civil Rights, Report on Sexual Assault in the Military 3 (Sept. 2013), *available at* http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf.

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Table 12

Article 120	
Art. 120(a) Rape	Any person subject to this chapter who commits a sexual act upon another person by – (1) using unlawful force against that other person; (2) using force causing or likely to cause death or grievous bodily harm to any person; (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping; (4) first rendering that other person unconscious; or (5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.
Art. 120(b) Sexual Assault	Any person subject to this chapter who – (1) commits a sexual act upon another person by – (A) threatening or placing that person in fear; (B) causing bodily harm to that other person; (C) making a fraudulent representation that the sexual act serves a professional purpose; or (D) inducing a belief by any artifice, pretense, or concealment that the person is another person; (2) commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or (3) commits a sexual act upon another person when the other person incapable of consenting to the sexual act due to – (A) impairment by any drug, intoxicant, or other similar substance and that condition is known or reasonably should be known by the person; or (B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person; is guilty of a sexual assault and shall be punished as a court-martial may direct.
Art. 120(c) Aggravated Sexual Contact	Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a)(rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.
Art. 120(d) Abusive Sexual Contact	Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

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Both the character of the conduct (defined as "sexual act" or "sexual contact") and the level of force impact the severity of the charge under the UCMJ. [783] "Sexual contact" offenses, including aggravated and abusive sexual contact, involve the touching, or causing someone to touch, (either directly or through clothing) a person's genitalia, anus, groin, breast, inner thigh, or buttocks with the intent to abuse, humiliate, or degrade that person.[784] The term "sexual contact" also includes touching or causing someone to touch *any* body part, if done with the intent to arouse or gratify the sexual desire of any person.[785] The term "sexual act" describes conduct that includes "contact between the penis and the vulva or anus or mouth," where contact occurs upon "penetration, however slight."[786] "Sexual act" also includes the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object if done with the intent to abuse, humiliate, harass, degrade, or arouse/gratify the sexual desire of any person.[787] The degree of force can range from non-physical (threats, fear, fraud) to physical (simple assault, unwanted touching, incapable of consent) to a high degree of force (great bodily harm, fear of death, rendering unconscious, drugging).[788] Article 120 offenses, then, can range from a slap on the buttocks to degrade a co-worker to forced anal penetration after drugging.

The Army's chart, below, explains how the degree of force and the conduct, being a sexual act versus contact, influence a charging decision.[789] To use the chart:

- First determine the amount of force used, either a high degree of force or low degree of force.
- Next assess whether the conduct constituted a "sexual act" or "sexual contact."
- Then follow the bold or dotted lines to determine the applicable offense according to Article 120.

By using the chart, a high degree of force coupled with a sexual act, could constitute rape. A high degree of force that involved a contact offense results in aggravated sexual contact. A low degree of force, coupled with a sexual act, results in a charge of sexual assault. A low degree of force in an act of sexual contact results in abusive sexual contact.

783 10 U.S.C. § 920 (UCMJ art. 120). For explanation, see Army's Response to Request for Information 50, at 202232-36 (Nov. 21, 2013).

784 10 U.S.C. § 920 (UCMJ art. 120).

785 *Id.*

786 *Id.*

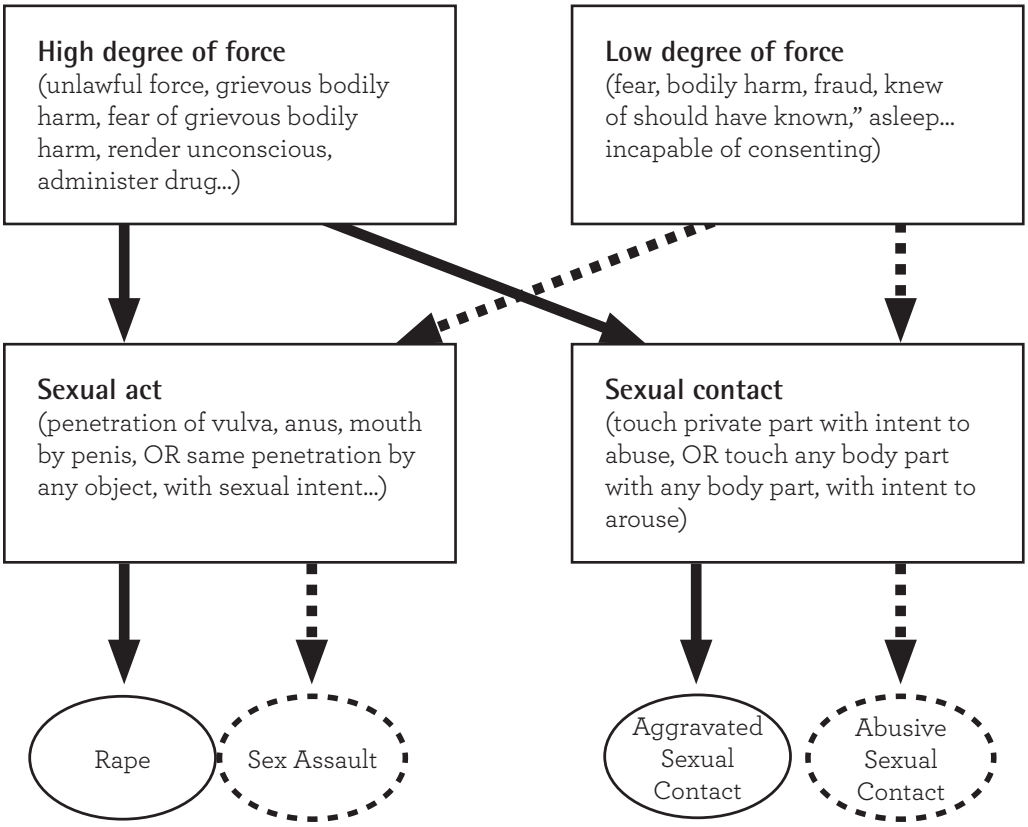
787 *Id.* For explanation, see Army's Response to Request for Information 50, at 202232-36 (Nov. 21, 2013).

788 10 U.S.C. § 920 (UCMJ art. 120).

789 Army's Response to Request for Information 50, at 202232 (Nov. 21, 2013).

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

Figure 6



2. Charging Discretion in Sexual Assault Cases

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

Discussion

Both military authorities and civilian prosecutors exercise "tremendous discretion over the decision" to refer a case to trial.[790] In the civilian system, the singular power prosecutors wield over the decision whether to initiate criminal charges against a citizen has been harshly criticized for decades.

790 Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 Harv. L. Rev. 937, 943 (2010).

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

> "The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous . . . While the prosecutor at his best is one of the beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[791]

Normally, in the military justice system, "[e]ach commander has discretion to dispose of offenses by members of that command."[792] The Secretary of Defense issued a policy on April 20, 2102, withholding the initial authority to dispose of sexual assault offenses to commanders who have Special Court-Martial Convening Authority and are in the grade of O-6 and above.[793] These commanders, also called the "initial disposition authority," consult with military trial counsel and Staff Judge Advocates before determining how to proceed on a case; they rely on their legal expertise to determine and draft appropriate charges for the commander to consider.[794] In this respect, trial counsel exercise broad discretion when determining appropriate charges in sexual assault and other cases.

3. Factors Considered in Disposition Decisions for Sexual Assault Cases

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

Finding 42-4: Section 1708 of the FY14 NDAA orders a non-binding provision in the Manual for Courts-Martial amended to "strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense,"[795] but does not prohibit the commander from considering this factor, so the change is unlikely to affect charging or disposition decisions in sexual assault or other cases.

Discussion

The decision to charge a person with a criminal offense, in particular a sexual assault offense, is a complex one requiring military and civilian prosecutors to weigh many factors. In the Military, commanders consider many factors when determining how to dispose of an allegation of wrongdoing, including whether to prefer charges against the Service member. The Discussion to Rule for Courts-Martial 306 provides a non-exclusive,

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791 *Id.* at 937, nn.1, 2 (citing Robert H. Jackson, *The Federal Prosecutor*, 31 J. Am. Inst. Crim. L. & Criminology 3, 3 (1940) and *Berger v. United States*, 295 U.S. 78, 88 (1935) ("In the American criminal justice system, the prosecutor is a uniquely powerful individual. Due to the huge number of prosecutable crimes, he has vast discretion in bringing and dismissing charges, negotiating plea bargains, trying cases, and recommending sentences. Because of these great powers, a prosecutor has a duty beyond that of an ordinary advocate in an adversarial legal system.")).

792 *See* MCM, *supra* note 97, R.C.M. 306.

793 *See* U.S. Dep't of Def., Memorandum from the Secretary of Defense on Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012). For further discussion, see the Report of the Role of the Commander Subcommittee to the Response Systems Panel, *supra* note 16.

794 *See generally Transcript of RSP Role of the Commander Subcommittee Meeting* 6-199 (Sept. 25, 2013) (testimony of senior military commanders and staff judge advocates explaining convening authority's reliance on advice of staff judge advocate).

795 FY14 NDAA, Pub. L. No. 113-66, § 1708, 127 Stat. 672 (2013).

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non-binding list of factors commanders should consider, to the extent they are known when determining disposition of an offense. These factors include:[796]

- the nature and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- when applicable, the views of the victim as to disposition;
- existence of jurisdiction over the accused and the offense;
- availability and admissibility of evidence;
- the willingness of the victim and others to testify;
- cooperation of the accused in the apprehension or conviction of others;
- possible improper motives or biases of the person(s) making the allegations;
- availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
- appropriateness of the authorized punishment to the particular accused or offense;
- the character and military service of the accused (to be deleted); and
- other likely issues.[797]

Additional "factors must be taken into consideration and balanced, including, to the extent practicable . . . any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair."[798]

Previously, the Discussion of Rule for Court-Martial 306, listed the character and military service of the accused as factors the commander should consider when determining case disposition.[799] But, with the enactment of Section 1708 of the FY14 NDAA, Congress directs the Discussion be amended by striking "the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense."[800] However, the amendment but does not prohibit the commander from considering this factor so the change is unlikely to affect charging or disposition decisions in sexual assault or other cases

For federal court cases, the United States Attorney's Manual states that, "the attorney for the government should initiate or recommend Federal prosecution if he/she believes that the person's conduct constitutes

796 MCM, *supra* note 97, R.C.M. 306; Navy's Response to Request for Information 67 (Nov. 21, 2013).

797 *See* MCM, *supra* note 97, R.C.M. 306 disc.

798 *Id.*

799 *Id.*, R.C.M. 306.

800 FY14 NDAA, Pub. L. No. 113-66, § 1708, 127 Stat. 672 (2013).

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a Federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction . . . unless, in his/her judgment, prosecution should be declined because:

- No substantial Federal interest would be served by prosecution;
- The person is subject to effective prosecution in another jurisdiction; or
- There exists an adequate non-criminal alternative to prosecution."[801]

In determining whether to decline prosecution because "no substantial federal interest would be served" federal prosecutors "should weigh all relevant considerations," including:

- Federal law enforcement priorities;
- The nature and seriousness of the offense, including the actual or potential impact of the offense on the community and on the victim;
- The deterrent effect of prosecution;
- The person's culpability, both in the abstract and compared to others involved in the offense;
- The person's criminal history or lack thereof;
- The person's willingness to cooperate;
- The person's personal circumstances;
- The probable sentence and whether it justifies the time and effort of prosecution, including whether the person has previously been prosecuted in another jurisdiction for the same or closely related offense.[802]

Some States publish charging criteria which indicate that prosecutors should only go forward if they believe there is a likelihood they will prevail at trial. In Colorado, for instance, "[t]his decision-making process is guided by legal and ethical standards that require a reasonable belief that the charge or charges can be proven to a jury, unanimously, beyond a reasonable doubt, after considering reasonable defenses."[803]

> There are no legislative or judicial guidelines about charging, and a decision not to file charges ordinarily is immune from review. According to the Supreme Court, "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion"[804]

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801 *See* U.S. Dep't of Justice, U.S. Attorneys' Manual 9-27.220 (1997), [hereinafter U.S. Attorneys' Manual], *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

802 *Id.*

803 Denver District Attorney's Office, "The Charging Decision," *at* https://www.denverda.org/Policies/The%20charging%20decision.pdf.

804 Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Just. Quarterly 651 (2004) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364

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In a study of civilian prosecutorial decision making in sexual assault cases, the authors concluded:

> The fact that the "prosecutor controls the doors to the courthouse" may be particularly important in cases in which the credibility of the victim is a potentially important issue, such as sexual assault cases. Studies of the charging process conclude that prosecutors attempt to avoid uncertainty by filing charges in cases in which the odds of conviction are good and by rejecting charges in cases for which conviction is unlikely. These studies suggest that although prosecutors' assessments of convictability are based primarily on legal factors such as the seriousness of the offense, the strength of evidence in the case, and the culpability of the defendant, legally irrelevant characteristics of the suspect and victim also come into play. In fact . . . "the character and credibility of the victim is a key factor in determining prosecutorial strategies, one at least as important as 'objective' evidence about the crime or characteristics of the defendant."[805]

The study further elaborated on the "legally irrelevant characteristics of the suspect and victim"[806] civilian prosecutors considered, and concluded:

> legally irrelevant victim characteristics did influence the decision to charge in cases in which the victim and the suspect were acquaintances, relatives, or intimate partners. In these types of cases, prosecutors' anticipation of a consent defense and downstream orientation toward judges and juries apparently leads them to scrutinize more carefully the victim's character and behavior. Evidence that challenges the victim's credibility or fosters a belief that she was not entirely blameless increases uncertainty about the outcome of the case and thus reduces the odds of prosecution. Notwithstanding the rape law reforms promulgated during the past three decades, victim characteristics continue to influence charging decisions in at least some sexual assault cases.[807]

4. Alternate Disposition Options in the Military Compared to the Civilian Sector

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

Finding 42-6: The UCMJ and military regulations provide several clear options for alternate dispositions. If a special or general court-martial convening authority consults with his or her legal advisor and decides that a sexual assault allegation does not warrant trial by court-martial because there is insufficient evidence of sexual assault,[808] other adverse options such as nonjudicial punishment, separation from the Service, or letters of reprimand, may be used for related misconduct when appropriate. Commanders very rarely choose nonjudicial punishment or other administrative adverse actions to dispose of penetrative sexual assault offenses. The

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(1978)).

805 *Id.* at III-5-3 (internal citations omitted).

806 *Id.*

807 *Id.* at III-5-9.

808 *See* Part V, Section F, Recommendation 14-A, *supra*. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists because the convening authority, a military judge, or the judge advocate at the Article 32 preliminary hearing make that official determination after the preferral of charges.

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misperception that commanders use options other than courts-martial to dispose of allegations of penetrative offenses may be due to the breadth of conduct categorized as "sexual assault" under the UCMJ.

Discussion

According to the Department of Justice's United States Attorney's Manual, the prosecutor should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and initiate or recommend pretrial diversion or other non-criminal disposition; or
5. Decline prosecution without taking other action.[809]

Military convening authorities have many tools available to address lower level offenses that may not be available in civilian jurisdictions. The President, through the Rules for Courts-Martial, directs that offenses under the UCMJ "should be disposed of in a timely manner at the lowest appropriate level of disposition . . . ."[810] Potential appropriate dispositions include: no action or dismissal of charges; administrative action (counseling, admonition, reprimand, administrative withholding of privileges, etc.); nonjudicial punishment; forwarding to a superior or subordinate authority for disposition; or preferral and/or referral of charges.[811]

In response to a request for information from the RSP, the Military Services provided the following responses to demonstrate when they believed alternate dispositions to courts-martial may be appropriate.[812]

- The Army stated that, "[e]very case requires the commander, upon the advice of his judge advocate, to carefully weigh the benefits and risks of every potential disposition."[813] After "reviewing the facts of a case, considering the wishes of the victim, and evaluating the likelihood of a conviction in a criminal proceeding, there would be scenarios where-as an evidentiary matter-an administrative proceeding would be a prudent disposition."[814]
- The Navy stated, "alternative dispositions provide commanders with a tool to enforce good order and discipline, terminate a [Service member's] active duty status, or establish an adverse record for a member who has committed misconduct but whose actions cannot be proven beyond a reasonable doubt at court-martial. These alternative forms of disposition are also beneficial to the command and the victim in that

809 U.S. Attorneys' Manual, *supra* note 801, at 9-27.200.

810 *See* MCM, *supra* note 97, R.C.M. 306(b).

811 Navy's Response to Request for Information 67 (Nov. 21, 2013); MCM, *supra* note 97, R.C.M. 306.

812 DoD and Services' Responses to Request for Information 70 (Dec. 19, 2013).

813 Army's Response to Request for Information 70 (Dec. 19, 2013).

814 *Id.*

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they offer swift and efficient resolution, when appropriate, at that level, whereas courts-martial cases often take several months to adjudicate."[815]

- The Coast Guard stated that the "benefits to the government to obtain an alternative disposition to courts-martial are largely to do with maintaining discipline in the ranks, and, to a degree, deterrence. Utilizing alternatives within the toolbox of disposition allows commanders to swiftly enforce discipline rooted in the principles of justice, provides immediate and public consequences, and strengthens command authority."[816]

Some of the Services provided other instances when alternatives to courts-martial may be appropriate to include:[817]

- When the member has already been convicted in a civilian court or is pending lengthy civilian criminal court proceedings;

- When the victim declines to participate in the proceeding, is unwilling to testify, or would prefer a more expeditious resolution of the matter. This occurs in some instances because the initial report may have become unrestricted against the victim's desires or circumstances change in the victim's life and he or she no longer wants to pursue a report of sexual assault. In these instances, if there is surrounding minor misconduct by the accused that can be proven without the victim's testimony, an alternate disposition allows the commander to adjudicate the surrounding minor misconduct without forcing the victim to undergo the stresses of a trial against his or her will.

- When the government has concerns about a victim's credibility, availability, or durability, as well as the overall impact on the victim.

- When there is significant doubt that material evidence might be admissible at trial, or insufficient evidence exists to meet the standard of proof of "beyond a reasonable doubt" to convict at court-martial. In these situations, allowing the convening authority to impose an alternative disposition to court-martial is a tool to hold the offender accountable without a court-martial and to potentially separate the offender from the Service. While it is not common to pursue administrative separation in lieu of a criminal conviction for a sexual offense, there are occasions where it may be appropriate due to the lower burden of proof for administrative proceedings, which require proof by a preponderance of evidence. Therefore, after reviewing the facts of a case, considering the wishes of the victim, and evaluating the likelihood of a conviction in a criminal proceeding, there would be scenarios where, as an evidentiary matter, an administrative proceeding would be a prudent disposition.

- When the Service member is accused of a relatively minor offense which does not warrant a trial by court-martial.[818]

Potential consequences for Service members who face alternate dispositions include loss of rank, wages, and liberty. In addition, the Service member may depart the military with a characterization of discharge that is derogatory in nature, which deprives him or her of any veteran's benefits associated with any prior honorable

815 Navy's Response to Request for Information 70 (Dec. 19, 2013).

816 Coast Guard's Responses to Request for Information 70 (Dec. 19, 2013).

817 *See* Services' Responses to Request for Information 70 (Dec. 19, 2013).

818 DoD and Services' Responses to Request for Information 70 (Dec. 19, 2013).

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

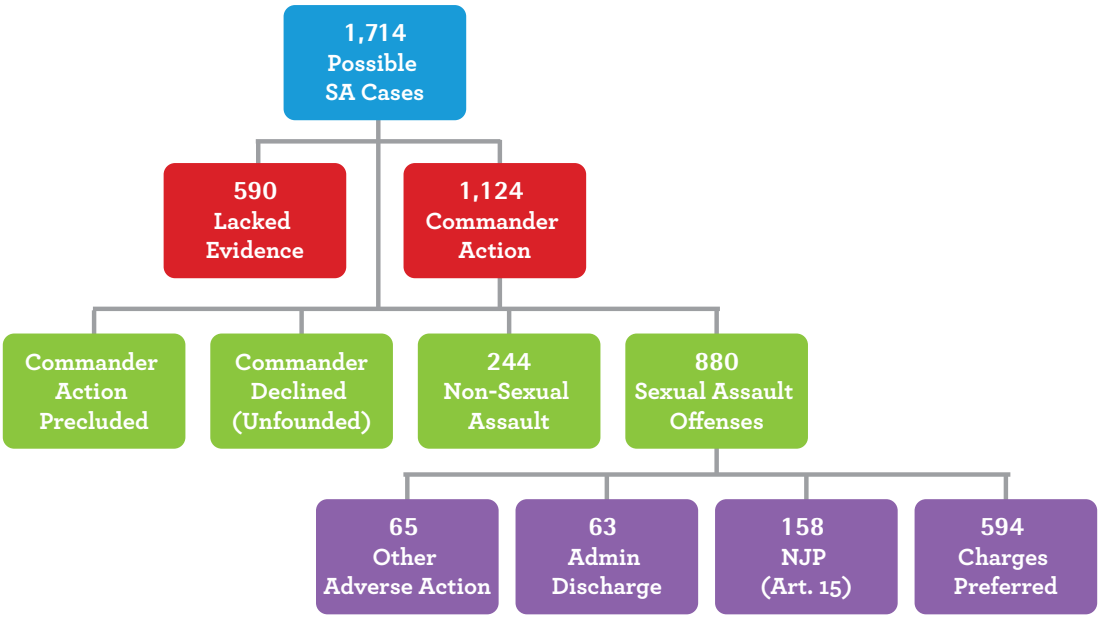
military service, regardless of the nature of prior service, including serving in combat operations.[819] The Services provided the following information in response to a request from the RSP and in DoD SAPRO reports regarding alternate dispositions used in sexual assault cases:[820]

FY12 DISPOSITION OF DOD SEXUAL ASSAULT CASES

The DOD SAPRO report for FY12, explains that there were:

- 1,714 military subjects in sexual assault cases reviewed for possible disciplinary action;
- 1,124 of those cases had evidence-supported commander action;
- 880 of those were determined to be sexual assault offenses;
- Of the 880 sexual assault offense cases:
  - 594 court-martial charges were preferred (Initiated),
  - 158 received nonjudicial punishment (Article 15, UCMJ),
  - 63 received administrative discharges, and
  - 65 categorized as other adverse administrative action.[821]

Figure 7



819 Coast Guard's Response to Request for Information 70 (Dec. 19, 2013).

820 *See* Part VII, Section J, Recommendations 49-A and 49-B, *infra* (providing Subcommittee's recommendation to further standardize reporting requirements for sexual assault allegations, including number of cases resulting in alternate dispositions rather than prosecution, and distinguishing between penetrative or non-penetrative offenses to gain understanding of commanders' use of alternate dispositions). Currently, the Services provide a detailed case-by-case synopsis of all sexual assault allegations from report to final disposition. However, when requested to provide numbers of alternate dispositions, results were mixed and some of the Services referred us to several other reports they provide DoD. The results the RSP received regarding alternate dispositions used in sexual assault cases are provided below.

821 FY12 SAPRO Annual Report, *supra* note 43, Vol. I, at 69 (Table 3: Military Subject Dispositions in FY12), *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

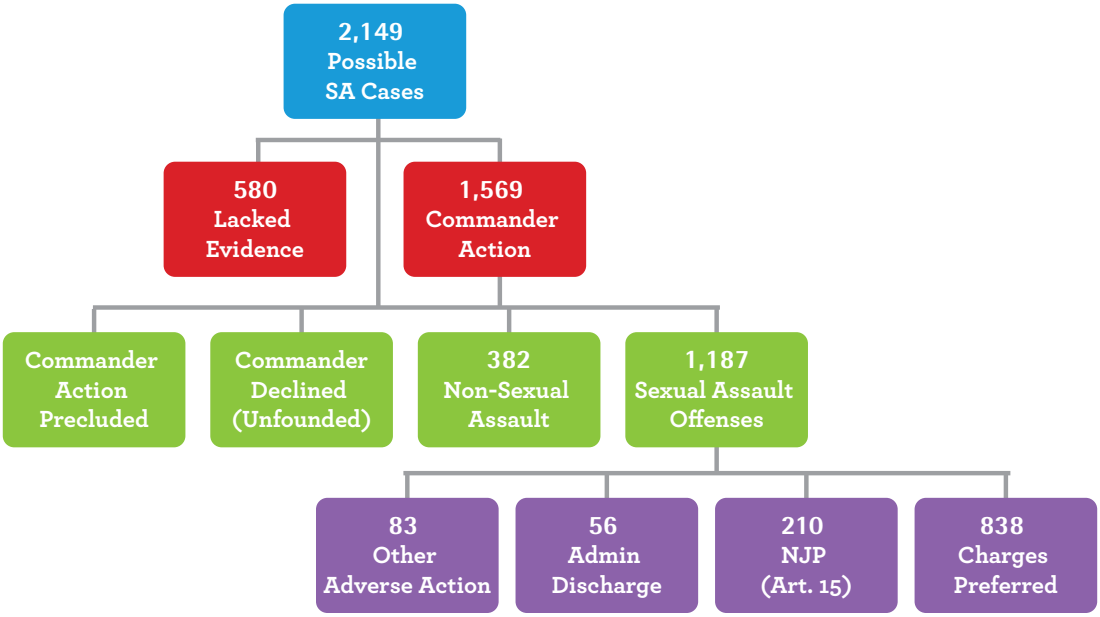
The Response Systems Panel has not yet considered or deliberated on the contents of this report.

FY13 DISPOSITION OF DOD SEXUAL ASSAULT CASES

The DOD SAPRO report for FY13, explains that there were:

- 2,149 military subjects in sexual assault cases reviewed for possible disciplinary action
- 1,569 of those cases had evidence-supported commander action
- 1,187 of those were determined to be sexual assault offenses
- Of the 1,187 sexual assault offense cases:
  - 838 court-martial charges were preferred (Initiated)
  - 210 received nonjudicial punishment (Article 15, UCMJ)
  - 56 received administrative discharges
  - 83 categorized as other adverse administrative action.[822]

Figure 8



822 FY13 SAPRO Annual Report, *supra* note 63, at 79 (Table 4: Military Subject Dispositions in FY13) (May 2014).

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

Number of cases involving sexual assault allegations resulting in Nonjudicial Punishment in FY08-FY13[823]

Figure 9

Army	Air Force	Navy	Marines	Coast Guard
FY13: 133 FY12: 117 cases - none of these cases involve penetration FY11: 103 FY10: 179 FY09: 277 FY08: 121	FY13: 27 FY12: 14 FY11: 2 FY10: 19 FY09: 15 FY08: 67	FY13: 27 FY12: 14 FY11: 2 FY10: 19 FY09: 15 FY08: 67	FY13: 1 FY12: 16 cases with SA allegations, but only two involved a contact sex offense FY11: 14 FY10: 22 FY09: 20 FY08: NA	2013 = 4 2012 = 22 2011 = 11 2010 = 9 2009 = 18

823 *See* Services' Responses to Request for Information 41(d) (Nov. 21, 2013). The Army stated this information is contained in the FY12 Annual Report to Congress on Sexual Assault.

- The Army explained that commanders imposed nonjudicial punishment in 117 cases for sexual assault crimes, all involving non-penetrative offenses. The vast majority of cases involved an unwanted touch over the clothing.
- The Air Force referred the RSP to DoD's annual SAPR report.
- The Navy stated that they do not track a specific metric of this data.
- The Marine Corps explained that of 16 cases, only 2 involved contact sex offenses.

See FY13 SAPRO Annual Report, *supra* note 63, at 227 (Army); *id.* at 691 (Air Force); *id.* at 534 (Navy); *id.* at 584 (Marines); FY12 SAPRO Annual Report, *supra* note 43, Vol. I, at 190 (Army); *id.* at 479 (Navy); *id.* at 531 (Marines); *id.* at 631 (Air Force); Department of Defense, Annual Report on Sexual Assault in the Military: Fiscal Year 2011 [hereinafter FY11 SAPRO Annual Report] encl. 1, at 41 (Army) (Apr. 2012), *available at* http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; *id.* at 487 (Air Force); *id.* at 322 (Navy); *id.* at 362 (Marines). Department of Defense, Annual Report on Sexual Assault in the Military: Fiscal Year 2010 encl. 1, encl. 1, at 1 (Army) (Mar. 2011), *available at* http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; *id.* at 573 (Air Force); *id.* at 414 (Navy); *id.* at 458 (Marines); Department of Defense, Fiscal Year 2009 Annual Report on Sexual Assault in the Military Tab A, at 29-30 (Army) (Mar. 2010), *available at* http://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf; *id.* at Tab C, Att./Tab 2, at 1 (unnumbered) (Air Force); *id.* at Tab B, Att. 4, at 2-3 (unnumbered) (Navy); *id.* at Tab B, Att. 4, at 14-15 (Marines). Department of Defense, FY08 Annual Report on Sexual Assault in the Military [hereinafter FY08 SAPRO Annual Report] Tab 4, at 30 (Army), *available at* http://www.sapr.mil/public/docs/reports/dod_fy08_annual_report_combined.pdf; *id.* at 230 (Air Force); *id.* at 182-83 (Navy). FY08 was the first year that data was provided at the Service level in the SAPRO Annual Reports.

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

Number of Cases involving allegations resulting in an officer's resignation in lieu of court-martial (RILO), FY07-FY13.[824]

Figure 10

Army	Air Force	Navy	Marines	Coast Guard
Total: 10	**Total: 1**	**Total: 5**	**Total: 1**	**Total: 1**
FY13: 4	FY13: 1	FY13: 0	FY13: 1	Data from FY07-13
FY12: 4	FY12: 0	FY12: 0	FY12: 0	
FY11: 1	FY11: 0	FY11: 0		
FY10: 1	FY10: 0	FY10: 2		
FY09: 0		FY09: 2		
FY08: 0		FY08: 0		
FY07: 0		FY07: 1		

824 *See* Services' Responses to Request for Information 41(f) (Nov. 21, 2013); FY13 SAPRO Annual Report, *supra* note 63, at 227 (Army); *id.* at 534 (Navy); *id.* at 584 (Marines); *id.* at 691 (Air Force); FY12 SAPRO Annual Report, *supra* note 43, Vol. I, at 190 (Army); *id.* at 631 (Air Force).; *id.* at 479 (Navy); *id.* at 531 (Marines); *id.* at 631 (Air Force); *see also* FY14 NDAA, Pub. L. No. 113-66, § 1753, 127 Stat. 672 (2013) (providing sense of Congress on discharges in lieu of court-martial for sex-related offenses). Officers may submit a voluntary request for discharge in lieu of court-martial. The characterization of service is normally under Other than Honorable Conditions, but may be characterized as General under Honorable conditions or Honorable. Requests are forwarded for decision to the Secretary concerned, who acts as separation authority for officers in each Service.

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

Number of Cases involving allegations resulting in an enlisted member's administrative discharge in lieu of court-martial, FY07-FY13[825]

Figure 11

Army	Air Force	Navy	Marines	Coast Guard
FY13: 66 FY12: 53 FY08: 19 Ch. 10 Post arraignment: • FY13: 21 • FY12: 30 • FY11: 17 • FY10: 13 • FY09: 10 • FY08: 5 • FY07: 11	FY13: 12 FY12: 6 FY11: 6 FY10: 2 FY08: 6	FY13: 4 FY12: 7 FY08: 8	FY13: 2 FY12: 2	FY07-13 Total: 10

825 Services' Responses to Request for Information 41(g) (Nov. 21, 2013); FY13 SAPRO Annual Report, *supra* note 63, at 227 (Army); *id.* at 691 (Air Force); *id.* at 534 (Navy); *id.* at 584 (Marines); FY12 SAPRO Annual Report, *supra* note 43, Vol. I, at 190 (Army); *id.* at 631 (Air Force); *id.* at 479 (Navy); *id.* at 531 (Marines); FY08 SAPRO Report, *supra* note 823, at Tab 4, at 30 (Army); *id.* at 230 (Air Force); *id.* at 182-83 (Navy); *see also* FY14 NDAA, Pub. L. No. 113-66, § 1753, 127 Stat. 672 (2013) (providing sense of Congress on discharges in lieu of court-martial for sex-related offenses). Enlisted members may also submit a voluntary request for discharge in lieu of court-martial. The characterization of service is normally under Other than Honorable Conditions, but may be characterized as General under Honorable Conditions or Honorable. Requests are forwarded for decision to the General Court-Martial Convening Authority, who acts as separation authority for officers in each Service when a discharge characterization of Other than Honorable is considered.

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

E. THE MILITARY JUDGE'S ROLE IN THE MILITARY JUSTICE SYSTEM

1. Overview of the Proposal to Increase the Military Judge's Role

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

The Secretary of Defense recommend the Congress enact legislation to amend the UCMJ, the President enact changes to the Manual for Courts-Martial, and Service Secretaries implement appropriate regulations to increase the authority of military judges over the pre-trial process to enhance fairness, efficiency, and public confidence.

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

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

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

Discussion

The military justice system has evolved from a disciplinary system run by operational commanders into a "sophisticated legal system which has placed increasing power in the military judiciary with the intent to achieve justice and thus order and discipline."[826] A military judge could resolve a number of issues if he or she is involved in the military justice matters from the time of preferral or imposition of pretrial confinement. Inserting the military judge at an earlier stage could streamline the judicial process, resolve pretrial issues that arise before referral, and institute procedures for defense counsel to represent their clients without revealing their case strategy to the prosecutor and convening authority when requesting resources and witnesses.

In 2004, The Judge Advocate General for the Army directed a study which included a detailed analysis and recommendation to insert the military judge earlier in the military justice process.[827]

> When the UCMJ was enacted, an independent judiciary did not exist. Judges were overlays on the UCMJ's preexisting landscape. While the role of the military judge is not likely ever to extend as far as that of his civilian counterparts, a supervisory role earlier in the military justice process . . . is not

826 Frederic I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary -- A Proposal to Amend the Uniform Code of Military Justice*, 3 Wm. & Mary Bill Rts. J. 629, 633 (1994).

827 U.S. Dep't of the Army, Military Justice Review 3-2 (2004) (discussing proposal to increase statutory role of military judges) (on file at Response Systems Panel).

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

> incompatible with, and will likely enhance, the fairness and efficiency of our system. Legal decisions regard an accused's constitutional and statutory rights [and victim's rights] should be made by judges.[828]

The Army study provided this concise summary of the proposed change:[829]

> Although the court-martial itself does not come into existence prior to referral, every case has a life of its own that begins at the time of the alleged offense, and significant legal issues arise prior to referral. This proposal recognizes that a military judge could play an important supervisory role in the military justice process prior to referral of charges. While commanders and convening authorities will continue to make all critical decisions in the case: preferral, level of referral,[be responsible for] funding witnesses and experts, and clemency, this proposal will relieve the Special Court-Martial Convening Authorities (SPCMCA) and General Court-Martial Convening Authorities (GCMCA) from the burden of making essentially judicial decisions on other matters. In addition, the proposal permits the accused to obtain pre-referral relief from illegal pretrial punishment in violation of Article 13 or from illegal pretrial confinement.

The Army study provided the following rationales for and against involving the military judge earlier in the process:[830]

Table 13

The Pro's	The Con's
Provides for neutral judicial supervision of critical pre-trial procedural aspects of the case. This is more in line with federal civilian practice, following the mandate of Article 36(a) of the UCMJ which states that the President ...	Significantly increases the duties and responsibilities of military judges and may require an increase in the size of the military trial judiciary.
Responds to criticism that the military justice system has no meaningful oversight mechanism for overzealous commanders [trial counsel] and Staff Judge Advocates.	Could be perceived as taking authority and control of the military justice system away from the command.
Streamlines the judicial process by permitting the military judge to take control of the process upon preferral of charges or imposition of restraint.	Will require significant MCM amendments.
Effectively eliminates the need for collateral investigations, including IG investigations, into the administration of military justice.	Will require a cultural change in approaching cases.
Permits an accused the opportunity to obtain real and meaningful pre-trial relief for Article 13 violations and illegal pretrial confinement.	May be perceived as giving military judges too much power.
Imposes more realistic penalties and swifter process on offenders.	

The 2004 Army study proposed statutory changes, which can serve as a starting point for future proposals to involve the military judge earlier in the process. his proposal could be re-written to protect newly enacted

828 *Id., Executive Summary,* at 3.

829 For complete analysis and proposed changes, see U.S. Dep't of the Army, Military Justice Review (2004) (on file at Response Systems Panel).

830 *Id.*

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

statutory rights of victims as well as the constitutional and statutory rights of the accused. The Subcommittee's modifications to the Army study's proposed statutory changes are shown in brackets below.

UCMJ Article 26a. Supervisory Authority of the Military Judge[831]

> (a) Upon preferral of charges, imposition of pretrial restraint [confinement], or illegal pretrial punishment, the military judge shall assume overall supervisory responsibility for preserving the statutory and constitutional rights of the accused [and the statutory rights of crime victims].
>
> (b) For good cause shown, the military judge may order persons subject to the [UCMJ] to comply with provisions of this Code, the Constitution of the United States, and other applicable legal authority related to preserving the statutory and constitutional rights of the accused [and the statutory rights of crime victims]. Personnel who violate these orders shall be subject to contempt proceedings under Article 48 of this code.
>
> (c) Upon preferral of charges or imposition of pretrial restraint [confinement], the military judge shall exercise overall judicial supervisory authority for all procedural aspects of the case. Under such procedural regulations as may be prescribed by the Secretary concerned, this shall include, but not be limited to, the authority to review confinement decisions of military magistrates, to issue search authorizations, direct the scientific testing of evidence, order inquiry into the mental capacity or mental responsibility of the accused, and to issue no-contact orders and other protective orders as appropriate.

The Army's 2004 report provided the following initial assessment of necessary changes to the UCMJ (statutory) and the Rules for Courts-Martial (executive order).[832]

831 The Subcommittee proposes that the military judge should be more accessible for counsel at the time of preferral of charges or pre-trial confinement, not pretrial restraint. If military judges were available at the time of pretrial restraint, there would be a possibility that it would open the floodgates for motions any time a commander imposed a restriction on a Service member's liberty.

832 *See id.* The left column lists the areas in which the statute will expand the authority of the military judge. The right column lists the corresponding UCMJ articles and Rules for Courts-Martial that would need to be examined and/or amended in light of the new authority. Some of these changes, such as contempt provisions, occurred subsequent to the Army study.

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

Table 14

Expanded Authority	Affected Articles and RCMs
1. Illegal Pretrial Punishment	UCMJ Art. 13 RCM 304
2. Pretrial Confinement	UCMJ Art.10 RCM 305
3. No-Contact Orders	Article 13a or 14a (proposed) RCM 304a or 305a
4. Inquiries into Mental Capacity	RCM 706
5. Contempt Power (amended after the Study)	UCMJ Art. 48, Art. 98, and Art. 66 RCM 801 RCM 809
6. Detailing Military Judge	R.C.M. 503
7. Responsibilities of Military Judge.	R.C.M. 801

Additional statutory or other changes may be necessary to implement this significant change to the current practice and to include victim rights as well, recognizing these are changes that would affect more than sexual assault cases. The Subcommittee's analysis below addresses the specific findings and issues that led to this recommendation, and contains additional rationale that support the military judge becoming involved earlier in the process.

2. Defense Requests for Witnesses, Evidence or Other Matters

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

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

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

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

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

Discussion

Military defense counsel repeatedly pointed out to the RSP and Subcommittee the imbalance in current practices that require them to reveal information and strategy to the trial counsel in order to obtain witnesses, experts, and other resources in all cases.

> The defense must request witnesses or documents through the prosecutor, providing a justification, which the prosecutor can deny. The defense counsel may take the issue up with the military judge, but not in an ex parte process. Instead, the prosecutor is present when the defense counsel explains to the military judge how the witness or evidence is relevant to the defense case. On the other hand, the prosecutor is not required to provide an explanation to the defense before issuing a subpoena to secure witnesses helpful to the government.[833]

If the trial counsel or, in the case of a request for expert employment, the convening authority, denies the request, the defense counsel can file a motion to compel the government to produce the witness(es). The judge may order that the government produce the witness. While the military judge does not control the convening authority's budget, the judge may abate the proceedings if the government declines to produce the witness.

This practice creates a valid perception that the government can get whatever it wants in terms of resources, experts and evidence to prove its case, regardless of the cost. In many instances, the trial counsel - as representative of the convening authority in a case - decides the witnesses he or she deems necessary without any requirement to obtain the convening authority's decision. Additionally, defense counsel are not privy to trial counsel requests for witnesses or resources.[834] In order to correct this perceived imbalance, military defense counsel requested that they receive subpoena power and independent budgets.[835]

A civilian defense counsel who appeared before the RSP noted the flaw requiring defense counsel to go through the government for requests in the military justice system.[836] She stated,

> And getting back to the independence that the military does not have right now, if they want to hire an expert, they have to go up a chain of command and it can be denied pretty readily. If I want to hire an expert in New Mexico, I hire him, right? And I don't see any reason why somebody who's charged with one of these crimes in our military branches should have any less protection and representation.[837]

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833 *Transcript of RSP Public Meeting* 297 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service, U.S. Army).

834 *See generally* MCM, *supra* note 97, R.C.M. 703.

835 *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

836 *Transcript of RSP Public Meeting* 374 (Dec. 12, 2013) (testimony of Ms. Amy Muth, Attorney-at-Law, Law Offices of Amy Muth).

837 *Id.*

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Current rules in the Manual for Courts-Martial create this imbalance. The trial counsel "shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution," with no requirement for synopses of testimony to demonstrate relevance, and no requirement for any higher approval.[838] The defense, on the other hand, must submit a written list of witnesses the defense requests the government produce to the trial counsel.[839] Along with the request, defense counsel also must provide a synopsis of the testimony that the witness is expected to give, either "to show its relevance and necessity" if the witness is for the merits of the case or interlocutory questions, or "the reasons why the witness' personal appearance will be necessary" if the witness is for pre-sentencing proceedings.[840] If the trial counsel denies defense witness requests, the defense may petition the military judge to compel the witness' appearance.

The rules in the MCM would have to be changed, and should allow, in certain circumstances, for the defense counsel to submit the request *ex parte*. In some jurisdictions, such as New York, defense requests for witnesses can be *ex parte*.[841] In Virginia, defense requests are not an *ex parte* proceeding, except in a capital murder case.[842]

The Subcommittee considers this practice a barrier to effective defense at courts-martial and recommends the military judge as the appropriate authority to decide resource requests for the defense, and when appropriate, to hear motions and rule on both government and defense requests for witnesses and experts. Allowing the judge to become the decision maker for defense witness and expert requests would correct an obvious imbalance. In addition, amending current practice would eliminate many pretrial issues that consume pretrial motion litigation and would increase the efficiency of the court-martial process and overall interests of justice.

3. Subpoena Power

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

838 MCM, *supra* note 97, R.C.M. 703(c)(1).

839 *See id.,* R.C.M. 703(c)(2)(A); *see also Transcript of RSP Public Meeting* 332 (Nov. 8, 2013) (testimony of Mr. David Court, Law Offices of Court & Carpenter, Stuttgart, Germany) ("I agree with the elimination of the requirement that the defense seek the production of witnesses through the trial counsel.").

840 MCM, *supra* note 97, R.C.M. 703(c)(2)(B).

841 New York State Criminal Procedure Law, Article 620, permits a party to apply for a material witness order and the opposing party is not entitled to notice of or to participate in the proceeding.

842 *Transcript of Comparative Systems Subcommittee Meeting* 254–55 (Mar. 11, 2014) (commentary of Mr. Harvey Bryant, Subcommittee Member).

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Finding 43-6: Some public defenders have subpoena power.[843] Military defense counsel do not have subpoena power.[844] In contrast, military trial counsel have nationwide subpoena power with rare judicial oversight.

Discussion

"The defense does not enjoy the independent right to subpoena witnesses or documentary evidence. Instead, the defense must request witnesses or documents through the prosecutor, providing a justification, which the prosecutor can deny."[845] Some military defense counsel who spoke to members on the Subcommittee site visits requested subpoena power.[846] Many states provide the defense counsel with subpoena power. However, the Subcommittee concluded that military judges should serve as the subpoena issuing authority.[847] This change would require amendments to current practice.[848] Similar to the other recommendations for the military judge to become involved before referral, this should be considered as a systemic change for all cases.

4. Article 32 Preliminary Hearing

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

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

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843 For discussion, *see Transcript of RSP Public Meeting* 373 (Dec. 12, 2013) (testimony ofMr. Porter, Training Director for the State of New Mexico Public Defender Department). Mr. Porter stated,

> I've learned from military counsel here they don't have the subpoena power and in order to actually get a subpoena you have to go seek it through the government. That's not the case in I think most states and in New Mexico an individual attorney has the subpoena power. They don't even have to go to the court to issue a subpoena.

844 *See* MCM, *supra* note 97, R.C.M. 703(e). For discussion, see *Transcript of RSP Public Meeting* 327-28 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

845 *Transcript of RSP Public Meeting* 297 (Nov. 8, 2013) (testimony of COL Peter Cullen, U.S. Army, Chief, U.S. Army Trial Defense Service).

846 *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (same); *see* Navy's Response to Request for Information 137 (Apr. 11, 2014).

847 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 234-35 (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris and Brigadier General (Ret.) Malinda Dunn, Subcommittee Members, regarding military judges serving as "check" on subpoena authority).

848 Current practice allows a subpoena to be signed by a summary court-martial officer, a trial counsel of a special or general court-martial, the president of a court of inquiry, or a deposition officer. *See* MCM, *supra* note 97, R.C.M. 703(e).

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

Discussion

There are similarities between the military's traditional Article 32 pretrial investigation and a civilian preliminary hearing. "In both a civilian preliminary hearing and an Article 32 hearing, the accused is present, represented by counsel, and may cross-examine government witnesses and call witnesses on his [or her] own behalf. The government, in both settings, must put on enough evidence to establish probable cause to believe that the defendant committed the alleged crimes."[849]

There are two major differences between the military's Article 32 hearing and the civilian preliminary hearing. First, the military's Article 32 hearing, prior to the FY14 NDAA, served as a discovery tool for defense.[850] Second, unlike a civilian preliminary hearing, the investigating officer's decision is not binding; instead, it is only a recommendation to the convening authority.

> In a civilian preliminary hearing, a judge rules on whether the government has met the probable cause standard and, if it has, binds the case over for trial. In an Article 32 hearing, an Investigating Officer (IO) hears the evidence and then prepares a written recommendation to the Convening Authority as to whether probable cause exists to believe that the accused committed crimes with which he is charged and, if such cause exists, opines on the charges. Investigating Officers are Judge Advocates, but not necessarily military trial judges. The Convening Authority may act on the IO's recommendations, but is not required to do so.[851]

Section 1702(a) of the FY14 NDAA changed the Article 32 investigation to a preliminary hearing with the narrower objectives of determining whether probable cause exists to believe an offense has been committed and that the accused committed the offense; determining whether the convening authority has court-martial jurisdiction over the offense and the accused; considering the form of the charges; and recommending the disposition that should be made in the case. An alleged victim may not be compelled to testify and the investigating officer will declare him or her unavailable at the hearing if he or she declines to participate.

The practical effect of this change is that, when the victim declines to testify, the investigating officer will consider other evidence, such as statements or, perhaps, hearsay in lieu of testimony and will not be able to assess the victim's credibility. "The accused is still allowed to submit evidence and cross-examine witnesses, but the victim does not have to testify. If the victim does elect to testify, the cross-examination is restricted to the limited purpose of the hearing."[852]

The amendments to Article 32 will not take effect until December 26, 2014; the Subcommittee is unable to assess the full impact of those changes.[853] However, it is clear that the changes narrow investigative and discovery opportunities for military defense counsel.[854]

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849 Stimson, *supra* note 777, at 3.

850 "The investigation also serves as a means of discovery." MCM, *supra* note 97, R.C.M. 405(a) disc.; *see also* 10 U.S.C. § 832(b) (UCMJ art. 32); *United States v. Garcia*, 59 M.J. 447, 451 (C.A.A.F. 2004).

851 Stimson, *supra* note 777, at 3.

852 *Id.* (citing FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013)).

853 FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

854 *Transcript of RSP Public Meeting* 309 (Nov. 8, 2013) (testimony of Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast, U.S. Navy) ("[T]he Article 32, as a thorough investigation with the right of discovery, should be maintained. I believe that a preliminary hearing under Rule 5.1 of the Federal Rules of Criminal Procedure is an inadequate substitute. I think it's

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A majority of the Subcommittee's assessment is that military judges should preside as judges, not as hearing officers, at all Article 32 hearings. Moreover, the military judge's determination that probable cause is lacking should be binding, resulting in dismissal of the charges without prejudice. This is logical considering that a judge examined the evidence and found it is insufficient to conclude there is a reasonable belief a crime occurred and that the accused committed it. In cases where the judge finds probable cause, the convening authority retains discretion on how to dispose of the allegation.

5. Depositions as a Substitute for the Victim's Article 32 Testimony

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

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

Some defense counsel told the Subcommittee they intended to request depositions of victims. Under current practice, "[a] convening authority who has the charges for disposition, or after referral, the convening authority or the military judge may order that a deposition be taken on request of a party."[855] Depositions may be ordered where witnesses are unavailable at the Article 32 proceeding.[856] The Subcommittee recommends the Judicial Proceedings Panel assess the impact of the changes to the Article 32 process on deposition practice.

F. REFERRAL OF SEXUAL ASSAULT CASES IN THE MILITARY

1. Review of Referral Decisions

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

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

ill advised to pick and choose between the Federal Rules of Criminal Procedure, selecting only those rules that put the defense at a disadvantage and that advantage the government.").

855 MCM, *supra* note 97, R.C.M. 702(b).

856 *See id.*, R.C.M. 702(a) disc.

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

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

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

Discussion

Commanders stressed repeatedly to the Subcommittee and the RSP that they were able to exercise independent judgment, with the advice and counsel of their Staff Judge Advocates, in deciding whether to refer a sexual assault case to court-martial. However, the Subcommittee recognizes that recent legislation subjects each convening authority who opts *not* to refer a case to trial to additional scrutiny, through which a superior authority essentially second-guesses his or her decision to make an alternative disposition of the potential charges. Unlawful command influence becomes a much greater issue in this atmosphere. While we understand the intent behind elevated review—to ensure every report of a sexual assault is taken seriously-- as a meaningful goal, we do not see the one-way ratchet toward prosecution as serving either the needs of victims or the search for justice. Rather than pushing the decision further up the chain of command, the processes that support that decision should continue to be improved in ways that are already occurring and that are recommended elsewhere in this Report.

2. Written Declination Procedures

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

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

Finding 45-1: If a victim makes an allegation of rape, sexual assault, forcible sodomy, or attempts of those offenses, and the convening authority decides not to refer the allegation to court-martial, Section 1744(e)(6) of the FY14 NDAA requires a superior authority review of the non-referral decision by examining the case file, which must include a written statement explaining the convening authority's decision not to refer any charges for trial by court-martial.[857] DoD has not published any guidance to date as to what that declination memorandum must contain or what entity must write the letter.

Finding 45-2: Civilian offices vary in their practices for recording decisions to decline cases. If prior to indictment, the common procedure is for the prosecutor to send the case back to the investigator to be closed. If the prosecutor declines a case after indictment, some offices informally include a note in the file, others complete a standard form, but none provide lengthy written justifications. [858] When civilian government offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect. [859]

Finding 45-3: There are no formal requirements for military investigators, judge advocates, or commanders to provide written opinions or justifications when declining to pursue criminal cases in the military, including allegations of sexual assault, at any stage in the trial process. Staff Judge Advocates provide written advice to the convening authority prior to his or her decision whether to refer a case to general court-martial. [860] In the past, if a convening authority dismissed charges or declined to prosecute a case after referral, the convening authority generally did not write a justification or declination statement. [861]

Discussion

FY14 NDAA Section 1744 requires the Secretary to review all cases under Articles 120(a), 120(b), 125, and attempts of such offenses when the SJA recommends referral, but the convening authority declines to refer charges. If the SJA and convening authority agree charges should not be referred, this provision also requires the next superior commander authorized to exercise general court-martial convening authority review the decision. This superior convening authority will then review the case file and included written declination statement.[862]

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857 Section 1744 (e)(6) of the FY14 NDAA requires a written statement explaining the reasons for the convening authority's decision not to refer any charges for trial by court-martial. FY14 NDAA, Pub. L. No. 113-66, § 1744(e)(6), 127 Stat. 672 (2013).

858 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP).

859 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 299-301 (Apr. 11, 2014) (Subcommittee deliberations discussing alternate disposition options for civilian criminal offenses).

860 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 97, R.C.M. 604 (2012).

861 *See* Services' Responses to Request for Information 69 (Nov. 21, 2013) (stating consistently that there is no formal written requirement but that they each follow general policies requiring communication between SJA and Convening Authorities). If the charges are forwarded to the general court-martial convening authority, the staff judge advocate must provide written advice on the legal sufficiency of the charges and a recommended disposition as to the charges pursuant to Article 34, UCMJ and R.C.M. 406. The general court-martial convening authority can then refer the charges to a court-martial or dismiss the charges and no further written documentation is required. Additionally, R.C.M. 604 contemplates a written declination for cases that have been withdrawn and are re-referred. Withdrawal does not automatically require written justification; however, in the event that the charges are later referred to another court-martial, the discussion to Rule for Court-Martial 604 suggests that the reasons for the withdrawal and later referral should be included in the record of the later court-martial.

862 *See* FY14 NDAA, Pub. L. No. 113-66, § 1744(e)(6), 127 Stat. 672 (2013). The case file must include: the preferral of charges, reports of investigation, the written advice of the staff judge advocate to the convening authority, a written statement explaining the reasons for the convening authority's decision not to refer any charges for trial by court-martial, and certification of compliance with victim

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

This is a change to the previous practice which required no written justification for declining cases.[863] Prior to referral to general court-martial, the staff judge advocate must provide written advice on the legal sufficiency of the charges, evidence, and jurisdiction, as well as recommend a disposition of the charges, pursuant to Article 34 of the UCMJ and Rule for Court Martial 406. Prior to the adoption of Section 1744 of FY14 NDAA, the general court-martial convening authority could then refer the charges to a court-martial, return the charges to a subordinate commander for action, or dismiss the charges, with no requirement for further documentation.

Several civilian jurisdictions, including the DOJ, document the declination decision in writing. When the DOJ closes a case without prosecution, the case file reflects the action taken and rationale.[864] In civilian jurisdictions that utilize this procedure, it is considered a best practice to limit the details of declination, protect the privacy of the individuals, avoid victim blaming language, and preserve the possibility of future prosecution.[865] Similarly, the convening authority's declination should reflect these best practices and may generally be standardized in these cases. The U.S. Attorneys' Manual cites three reasons for declining to prosecute a case: (1) no substantial Federal interest would be served by prosecution, (2) the person is subject to effective prosecution in another jurisdiction; or (3) there exists an adequate non-criminal alternative to prosecution. Standard boilerplate language, similar to DOJ's, could be helpful for convening authorities who believe it is in the military's best interest to decline a case and could serve as the basis in the newly required declination memorandum, with the option of providing additional explanation when appropriate.

The civilian practice of limiting the written justification for declining cases is beneficial for several reasons. For example, a case may not proceed to trial if a victim no longer wishes to participate or has insufficient evidence. If the victim later chooses to cooperate or additional evidence becomes available, a lengthy written justification for originally declining the case may hamper the prosecution of the case. To alleviate that concern, in some circumstances the DOJ provides a written declination letter that is limited to the basic, overarching reason for declining the case, rather than including specific factual details.[866] While some criticize the letters for their lack of detail, DOJ has explained that brevity protects the privacy of the parties involved and preserves the possibility of future prosecution.[867] Similarly, in military justice practice, detailed declination memos could impact other adverse administrative actions which the commander may take in lieu of court-martial or make information publicly discoverable through the Freedom of Information Act, causing further trauma to a victim.

Prosecutors in several civilian offices also explained how their declination procedures have evolved. It is considered a best practice for prosecutors to coordinate with investigators to ensure that when cases are closed without prosecution, documentation annotating reasons for declining a case does not contain any victim blaming language or information which could jeopardize future proceedings. Therefore, DoD should standardize the contents of the declination memo.

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rights and the victim statements.

863 *See* Services' Responses to Requests for Information 69 (Nov. 21, 2013) (stating consistently that there is no formal written requirement but that they each follow general policies requiring communication between SJA and Convening Authorities).

864 *See* U.S. Attorneys' Manual, *supra* note 801, at 9-2.001.

865 *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP).

866 *See* U.S. Attorneys' Manual, *supra* note 801, at 9-2.001.

867 *See id.* at 9-2.020; *see also* JSC-SAS Report, Appendix G (Sept. 2013) (on file at RSP).

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

Civilian prosecution offices often conduct internal reviews of individual prosecutor's declination memos to see if they agree or disagree with the decision not to prosecute.[868] This is substantially different from elevating review of the decision not to refer to the Service Secretary. Secretarial review would place an inordinate amount of pressure on a commander, jeopardizing the independent discretion of the convening authority.[869] Therefore, commanders would need to ensure a case would be legally and factually sufficient to refer to trial even prior to preferral, or refer potentially unsupportable charges to court-martial in order to avoid high level scrutiny.

The legislation may have been well intended to provide additional supervision over commanders declination decisions, however, it may have the unintended consequence of putting even more pressure on commanders to refer cases that, for a variety of reasons, may not be appropriate for trial. Additionally, the proposal to have senior trial counsel override the SJA and convening authority is inappropriate and akin to an Assistant U.S. Attorney going directly to the Attorney General.[870] We agree with the DoD position, "that elevating this review to the level of the Service Secretary is not warranted where a staff judge advocate has reviewed the case thoroughly, consulted closely with the assigned military trial counsel, and recommended non-referral."[871]

G. PLEA NEGOTIATIONS

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

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

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

Finding 46-3: In most military sexual assault cases, the accused pleads not guilty due to both evidentiary challenges and issues in proving sexual assault beyond a reasonable doubt and the requirement to register as a

868 Stimson, *supra* note 777, at 4.

869 *See* MCM, *supra* note 97, R.C.M. 401 disc.

870 *Transcript of RSP Comparative Systems Subcommittee Meeting* 386-87 (Apr. 11, 2014) (commentary of Colonel (Ret.) Stephen Henley).

871 *See* DoD VPA Letter, *supra* note 764 (listing victim protections and commenting on additional measures proposed in S. 1917, Victims Protection Act of 2014).

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sex offender if convicted. In fiscal year (FY) 2013, the accused pled not guilty in 70% of the Army's sexual assault cases and 77% of the Navy's sexual assault cases.

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

Discussion

"As in the civilian community, the military justice system depends heavily on the ability of a convening authority and an accused to enter into a pretrial agreement. Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation."[872]

The process for military plea agreements and plea hearings differs from most civilian jurisdictions. Below is an explanation of plea process in military:

> [A] pretrial agreement -- the military equivalent of a plea bargain -- is an agreement between the accused Service member and the officer who convened the court-martial. During a judge-alone guilty plea with a pretrial agreement, a military judge conducts a "providence inquiry" to ensure the defendant is really guilty, and announces a sentence without knowing the punishment limitations of the pretrial agreement between the defendant and the officer convening the court-martial. If the military judge (or the members in a members' sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant "beats the deal" and receives only what the sentencing authority has adjudged. On the other hand, if the judge sentences the defendant to more confinement time than contained in the agreement, the excess is typically either suspended or disapproved. A military judge is not permitted to remedy a pretrial agreement he perceives as too lenient but may make a clemency recommendation to the Convening Authority to reduce an adjudged sentence.[873] [sic]

Subcommittee members expressed concerns that if the military plea process was changed to be more like civilian pleas, that the number of plea deals would decrease, or the amount of confinement time would be lower than current average deals because mitigation and extenuation would already be factored into the calculated sentence. Some of the members believe that this sentencing determination allows the judge to reflect the community's interest in adjudging an appropriate sentence and acting as a balance on command authority.

If the plea process is changed to be more streamlined and binding between the parties, as found in many civilian jurisdictions, the need for a lengthy sentencing proceedings for guilty pleas would diminish and could

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872 David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice," at 2 (Nov. 2013) (submitted to Response Systems Panel Jan. 7, 2014), *currently available at* http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/05-Nov-13/WhitePaper_Propposed_Amend_to_UCMJ_DavidSchlueter_201311.pdf.

873 Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-martial,* 58 Naval L. Rev. 39, 46 (2009) (referring to R.C.M. 910(f)(3) and 1106(d)(3)); *see also* the Services' Responses to Request for Information 68 (Nov. 21, 2013). The Air Force explained in response to Request for Information 68, "The accused will get the benefit of the lesser sentence, regardless of whether it was adjudged or in the PTA. If the sentence adjudged by the military judge or members exceeds the limits of the PTA, the convening authority may only approve the lesser sentence agreed to in the PTA. If the adjudged sentence is less than the PTA cap, only the adjudged sentence may be approved."

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improve judicial economy. It also could increase victim confidence in the system because the victim would know the accused would be sentenced to the terms of the agreement.

As shown in the statistics below, many sexual assault cases are contested. Testimony indicated that this is usually because a conviction would require sex offender registration and evidence in cases is often weak.[874] Therefore, adjustments to the mechanics of military plea deals may not have a significant impact on the majority of sexual assault cases.

Subcommittee members concluded that a change to the plea process is not necessary at this time. Based on the current system, the trial counsel and special victim counsel should help manage the victim's expectations. Counsel should explain that the judge could sentence the defendant to a lower sentence; the pretrial agreement is the maximum sentence that the accused could receive.

Figure 12

Number of sexual assault cases in FY11–13 that were guilty pleas vs. contested trials[875]

Army
- FY13 401 cases arraigned, 70% contested
- FY12 310 cases arraigned, 69% contested
- FY11 242 cases arraigned, 68% contested
- FY10 239 cases arraigned, 65% contested
- FY09 196 cases arraigned, 70% contested
- FY08 173 cases arraigned, 65% contested
- FY07 198 cases arraigned, 66% contested

Air Force
- FY13 data not yet provided

Navy
- FY13: 57 of 77 cases contested, 77% contested

Marines
- FY12 - 21 guilty pleas
- FY13 - 36 guilty pleas
- Need total number to determine % contested

Coast Guard
- FY13: 2 of 9 contested, 22 % contested
- FY12: 4 of 7 contested, 57 % contested
- FY11, 4 of 9 contested, 44 % contested

874 *See* Services' Responses to Request for Information 41 (Nov. 21, 2013). Prior to FY13, several of the Services did not track the number of sexual assault cases that were guilty pleas versus contested trials.

875 Services' Responses to Request for Information 41h, dated Nov. 21, 2013. The Army was the only Service that tracked this data prior to FY 2013. The percentage of contested Army cases includes those cases that were mixed pleas and fully contested because the sexual assault offense charge is usually the contested charge. The complete breakdown of the Army numbers are:

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

H. MILITARY PANEL SELECTION AND *VOIR DIRE*

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

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

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

Discussion

The heavy emphasis on sexual assault prevention training has permeated the ranks and, in some instances, influenced the pool of panel members. For example, some counsel stated that a common misperception among Service members is that a person cannot legally consent to sexual activity if he or she has consumed even one alcoholic beverage. This concern can be addressed in two ways. First, JAG officers in each Service should review current and future sexual assault training for Service members to ensure accurate information is disseminated. Second, military judges must diligently regulate *voir dire* so that *voir dire* is not abused to give false impressions or misstate the law to potential panel members.[876]

Motions for appropriate relief based on allegations of unlawful command influence or sexual assault and sexual harassment training have increased.[877] During training for senior leaders, the convening authority or other senior official discusses the seriousness of offenses and an expectation of offender accountability, potentially compromising this pool routinely needed to serve as panel members.[878] Each of the Services provided a representative sampling of defense motions to dismiss or motions for other appropriate relief based on

		FY07	FY08	FY09	FY10	FY11	FY12	FY13
Army	Total Cases Arraigned:	198	173	196	239	242	310	401
	Guilty Plea Cases:	68	60	59	82	77	95	122
	Mixed Plea Cases:	35	18	22	18	38	43	39
	Fully Contested:	95	95	115	139	127	172	240

876 *See* Services' Responses to Request for Information 78 (Dec. 19, 2013) (detailing each Service's specific procedures for panel member selection process at trial, to include challenges and voir dire, between military judge, prosecution, and defense counsel).

877 *See* Services' Responses to Request for Information 84 (Dec. 19, 2013).

878 *See* Army's Response to Request for Information 84 (Dec. 5, 2013), specifically the Defense Motion to Dismiss in *United States v. Oscar.*

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unlawful command influence or tainted panel pools to the RSP.[879] It showed that panel member *voir dire* has resulted in dismissal of a number of potential panel members for bias in sexual assault cases.[880]

While determining whether a member should be disqualified for bias, the military judge must closely monitor the *voir dire* questioning so that qualified panel members are not misled or misinformed, as "[t]he nature and scope of the examination of members is within the discretion of the judge."[881] The discussion following Rule for Court-Martial 912(d) notes that "the opportunity for *voir dire* should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use *voir dire* to present factual matters which will not be admissible or to argue the case."[882] Article 41 of the UCMJ and Rule for Court-Martial 912 place control of *voir dire* with the military judge rather than counsel, who determines form and manner of *voir dire*, sets deadlines for service on the court of written *voir dire*, collects questions for the panel member questionnaires, establishes time limits for the questioning of witnesses, and sets other limits based on the individual requirements of the case itself.[883] While military judges have continued to monitor *voir dire*, greater diligence must be exercised to prevent the unnecessary tainting of the pool of panel members.

I. CHARACTER EVIDENCE

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

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

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

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

Finding 48-4: Section 3(g) of the VPA proposes to modify Military Rule of Evidence 404(a), regarding the character of the accused. The provision attempts to prevent the use of the accused's general military character

879 *See* Services' Responses to Request for Information 84 encls. (Dec. 19, 2013).

880 *See* Services' Responses to Request for Information 84 (Dec. 19, 2013).

881 MCM, *supra* note 97, R.C.M. 801; *see* Air Force's Response to Request for Information 78 (Dec. 19, 2013).

882 *Id.*, R.C.M. 912(d), *see also* Air Force's Response to Request for Information 78 (Dec. 19, 2013).

883 *See* Army's Response to Request for Information 78 (Dec. 19, 2013).

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from being admissible to show the probability of the accused's innocence. However, the proposal exempts evidence of military character when relevant to an element of an offense for which the accused has been charged, and relevant character evidence will continue to be admissible as long as the attorneys lay the proper foundation. While Section 3(g) of the VPA may increase victim confidence by attempting to eliminate the "Good Soldier Defense," the Subcommittee does not anticipate that it will result in any significant change to current practice at trial.

Discussion

"What is commonly referred to as the 'Good Soldier Defense' refers to an accused Service member's introduction of evidence of good military character in an attempt to convince the military judge or members that he did not commit the offense for which he is charged."[884] The Supreme Court has recognized that evidence of the character of the accused "alone, in some circumstances, may be enough to raise a reasonable doubt of guilt."[885] While it is not an affirmative defense, character evidence of the accused may be admissible during not only the sentencing, but also the merits phase of a court-martial, creating a perception that high rank and decorated service will protect a Service member from conviction.[886] That perception is especially harmful to increasing the confidence of victims of sexual assault.

Military Rules of Evidence (MRE) 404[887] and 405[888] mirror the Federal Rules of Evidence (FRE) 404 and 405 about character evidence.[889] Parallel provisions of the MREs are automatically amended 18 months following changes to the FREs unless there is an executive order to the contrary.[890] Both MRE 404(a) and FRE 404 prohibit the admissibility of character evidence to prove that a person acted in conformity with that trait, except when the character trait is pertinent to the alleged offense.[891] The key difference is the court's interpretation of this exception for pertinent traits. Prior to 1921, the Manual for Courts-Martial simply stated that the rules of evidence at courts-martial would be the same as those used by the federal district courts.[892] The first edition "to specifically provide for the introduction of character evidence was the 1928 Manual."[893] It stated, "The accused may introduce evidence of his own good character, including evidence of his military record and standing, in order to show the probability of his evidence."[894] Over time, military courts essentially created the term "Good Soldier Defense" by interpreting MRE 404(a)(1) as permitting "good military character" as a pertinent trait for

884 Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 Mil. L. Rev. 117, 118 (2001).

885 *Id.* at 119 (citing *Michelson v. United States*, 335 U.S. 469, 476 (1948)).

886 Elizabeth Lutes Hillman, Note, *The "Good Soldier" Defense: Character Evidence and Military Rank at Courts-Martial*, 108 Yale L.J. 879 (1999) (describing court-martial of Gene McKinney, highest-ranking enlistee in U.S. Army who was accused of sexual harassment, and others in which character evidence played prominent role); Katz & Sloan, *supra* note 884, at 119.

887 *See* MCM, *supra* note 97, M.R.E 404 (Character evidence; Crimes or Other Acts), *as amended by* Executive Order 12473 (effective Dec. 1, 2012).

888 *See id.*, M.R.E 405 (Methods of providing character), *as amended by* Executive Order 12473 (effective Dec. 1, 2012).

889 *See id.*, M.R.E 404, 405, *as amended by* Executive Order 12473 (effective Dec. 1, 2012); *see also* Fed. R. Evid. 404, 405.

890 *See* 10 U.S.C. § 936 (UCMJ art. 136); U.S. Dep't of Def., Directive 5500.17, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (May 3, 2003); *see also* Joint Service Committee, "Executive Summary of Proposed Amendments: Military Rules of Evidence" (2012), *available at* http://www.dod.gov/dodgc/images/exec_summary.pdf.

891 *See* MCM, *supra* note 97, M.R.E 404, 405, *as amended by* Executive Order 12473 (effective Dec. 1, 2012).

892 *See* Katz & Sloan, *supra* note 884, at 122 n.23.

893 *See id.*

894 *Id.* at 122 (quoting Manual for Courts-Martial, United States ¶ 113b (1928))..

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

character evidence.[895] Just as in civilian courts, the military court requires "a nexus between the defendant's good military character and the offense with which he is charged, but [the military courts have] been quite liberal in finding such a nexus."[896] Relevance, and therefore, admissibility, of the Good Soldier Defense has been based on the rationale that "there are additional considerations, not present in civilian courts, which military judges must take into account:"[897]

> Courts-martial are part of a disciplinary scheme relied upon to maintain good order among troops, to preserve the obedience and conformity deemed necessary to successful military action, and to eliminate from the military those individuals who pose a risk to other [Service members] or to national security itself . . . [A] broader variety of acts are deemed criminal under military law than under civilian criminal codes . . . The good soldier defense takes advantage of this special military context by emphasizing an accused's loyalty to the Armed Forces and military performance. The defense counters wrongdoing with proof that an accused has been a "good soldier" during [his]/her military career.[898]

There are generally four arguments for and against the Good Soldier Defense:[899]

Table 15

For	Against
The military is a unique society and the separate nature of military life justifies a system of military justice with considerations that differ from its civilian counterpart.	Good character defense is not available under civilian society's evidentiary rules, and thus should not be available in the military
Unique nature of certain military offenses that make character evidence especially relevant to their adjudication	The Good Soldier Defense, as applied, creates unique gender discrimination problems in sex-offense cases
Service members are constantly observed by their peers and superiors, so there is a strong foundation on which these people can base testimony regarding the military character of the accused	The Good Soldier Defense should be abolished because there is no specific, uniform standard of what constitutes a good soldier

895 *United States v. Court*, 24 M.J. 11 (C.M.A. 1987); *United States v. Vandelinder*, 20 M.J. 41 (C.M.A. 1985); *United States v. Kahakauwila*, 19 M.J. 60 (C.M.A. 1984); *United States v. McNeill*, 17 M.J. 451 (N-M. C.M.R. 1984); *United States v. Piatt*, 17 M.J. 442 (C.M.A. 1984); *United States v. Clemons*, 16 M.J. 44 (C.M.A. 1984). For an explanation of the evolution of the Good Soldier Defense, see Katz & Sloan, *supra* note 884, at 122-28; *see also* Lieutenant Colonel Paul A. Capofari, *Military Rule of Evidence 404 and Good Military Character*, 130 Mil. L. Rev. 171, 175 (1990) ("Courts-martial always have been receptive to character evidence offered by the accused, and the accused always was permitted to offer general character [evidence] not only as to a specific trait, but also as to one's general good character as a soldier.").

896 *See* Katz & Sloan, *supra* note 884, at 128.

897 *See id.* at 134.

898 *See* Katz & Sloan, *supra* note 884, at 134 (citing Hillman, *supra* note 886, at 894-900).

899 The summary of these arguments are derived from Katz & Sloan, *supra* note 884, at 134-54, and Hillman, *supra* note 886.

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

Long-standing tradition allowing service members to introduce evidence of their good character	Good Soldier Defense only benefits higher ranking officers and creates unfair advantages based on race, gender, and status.

Regardless of the opinions regarding the theory of the Good Soldier Defense, written responses from the Services and interviews with defense counsel reflected the belief that the Good Soldier Defense is not a useful approach for the defense, especially in sexual assault cases.[900] They explained that the judge or panel members may think such a decorated Service member should have never put himself or herself in the circumstances that led to the allegations in the first place. Also, "[a]n accused Service member who introduces evidence of good military character must be aware that this defense can also serve as an avenue for the prosecution to introduce negative character evidence that might not otherwise have been admissible at trial."[901] "The Supreme Court has identified this trade-off by stating that 'the price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him.'"[902]

In recent years, statute and policy have eroded the practical use of the Good Soldier Defense. In FY14 NDAA, Congress first eliminated the consideration of the accused's character and military service from the list of factors for a commander to consider in the initial disposition decision of offenses.[903] Currently, Senator McCaskill's VPA proposes modifications to MRE 404(a) to clarify that evidence of general military character of accused, the Good Soldier Defense, is not admissible to demonstrate the probability of innocence of the accused, unless that character trait is relevant to an element of a charged offense.[904] There is broad public perception that senior military rank, a long service record, or even proficient military performance creates immunity from criminal prosecution. The military justice system bears an institutional risk of inappropriately privileging rank and authority. It appears that Congress is addressing the tension by enacting Section 1708 and considering the VPA.[905]

This Subcommittee recognizes that the "Good Soldier Defense" is actually an appellate court creation which has led to controversy and questions of fairness, especially in the debate over the investigation, charging, and prosecution of sexual assault cases. The Subcommittee concluded that the MREs permit admission of the character evidence of the accused when the character trait is relevant to the charged offense. In practice, counsel must establish that character evidence meets the threshold for relevance prior to a military judge ruling the character evidence admissible. Therefore, the Subcommittee members expect that relevant character evidence will still be admitted in accordance with the rules of evidence. As a result, the Subcommittee does not

900 *See* Services' Responses to Request for Information 107 (Dec. 19, 2013); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Session, JBSA* (Dec. 13, 2013) (same).

901 *See* Katz & Sloan, *supra* note 884, at 129; *see also* Majors Long & Henley, Note, *Testing the Foundation of Character Testimony on Cross Examination*, Army Lawyer 17, 25 (Oct. 1996). ("The defense may pay a high price for testimony regarding the accused's duty performance and other evidence of good character. Such evidence may open the door to damaging cross-examination despite a careful attempt to limit the scope of the questions on direct examination.")

902 *See* Katz & Sloan, *supra* note 884, at 129 (citing *Michelson v. United States*, 335 U.S. 469, 479 (1948)).

903 Section 1708 of the FY14 NDAA eliminated "the character and military service of the accused" from the discussion of R.C.M. 306(a) in the Manual for Courts-Martial. FY14 NDAA, Pub. L. No. 113-66, § 1708, 127 Stat. 672.

904 Victims Protection Act of 2014, S. 1917, 113th Cong., § 3(g) (2014).

905 *Transcript of RSP Comparative Systems Subcommittee Meeting* 326-27, 330 (Apr. 11, 2014) (comments of Dean Hillman, Subcommittee Member).

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

anticipate that the provision in the VPA will result in any significant changes regarding the use of character evidence in courts-martial, but it may draw attention back to the issue for attorneys and military judges to consider the admissibility of the character evidence more closely.[906]

Additionally, the way in which the VPA proposal is currently written, even if the character evidence was not admissible as to one charge, like a sexual assault, it may be admissible for the other charges, such as disobeying an order or regulation, fraternization, or adultery. The VPA does not eliminate the "Good Soldier Defense" for these additional, military-specific offenses, often associated with sexual assault charges. Therefore, the character of the accused may still be relevant and admissible during a court-martial wherein a violation of Article 120 is charged.[907]

As a final point, eliminating the idiom of "Good Soldier Defense" could increase victim confidence and, in turn, increase reporting. Dispelling the common myth that being a "good soldier" will exonerate criminal conduct is a positive step to increasing victim confidence. This change would align the evidentiary rules more closely with those in civilian practice, whereby character evidence alone, absent a trait called into question, would not be relevant admissible evidence.[908] While the rules of evidence will likely continue to be applied according to the facts and circumstances of each case, the courts, attorneys, and leaders should refrain from calling it the "Good Soldier Defense" and call it what it is, character evidence relevant to the defense of the accused.

J. PROSECUTION AND CONVICTION RATES

> *. . . I've got tons of fancy spreadsheets, and I've compared and contrasted . . . and at the end of the day, I'm always left with – and I don't mean this negatively, but I'm left with somewhat of a so what? What does this tell me? Is this good, is this bad? Is it going in the right direction? And I think that's one of the things we grapple with....*[909]

1. Data Currently Collected and Reported by the Military Serves

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

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

906 *See id.* at 372-75.

907 *See id.*

908 *Transcript of RSP Comparative Systems Subcommittee Meeting* 337-38 (Apr. 11, 2014) (Subcommittee deliberations).

909 *Transcript of RSP Public Meeting* 211-13 (Dec. 12, 2013) (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force).

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

The Secretary of Defense direct the study to assess the following:

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

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

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

Finding 49-1: There are no standardized methods that DoD and the Military Services currently use to calculate prosecution or conviction rates in sexual assault or other cases.[910] The Military Services use different procedures and definitions, making meaningful comparisons of prosecution and conviction rates for sexual assault across the Military Services impracticable. In the absence of a standardized methodology, any attempt to compare military prosecution or conviction rates for sexual assault among the Services or between military and civilian jurisdictions is apt to be misleading.

Discussion

Representatives of the Service JAG Corps told the RSP they agree that the current system of calculating prosecution and conviction rates in the military "is not the model of clarity" and it is an area that "is ripe for recommendations."[911] The Services are required to collect and report a considerable amount of data to DoD SAPRO, Congress, the Service appellate courts, the Court of Appeals for the Armed Forces, the American Bar Association, and others, including the RSP. However, as one witness told the RSP, "[N]ot everything you can count counts."[912] The data the Services gather and report should be standardized, meaningful, comparable, and useful in order to draw concrete conclusions from the data annually. At this point, it is none of the above.

In particular, the Services contend that the data they must provide to DoD SAPRO is, at best, not useful and, at worst, misleading. As of December 2012, "the DoD method of tracking [prosecution and conviction rates was] flawed" for several reasons.[913]

910 *Id.* at 202 (testimony of Captain Robert Crow, Director, Criminal Law Division, U.S. Navy) ("[T]here is no uniform way on how we measure prosecution rate. There is no uniform way on how we measure conviction rate.").

911 *Id.* at 211 (testimony of Captain Jason Brown, Military Justice Officer, Military Justice Branch, Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps). Lieutenant Colonel Coyne followed Captain Brown's assessment, stating, "I agree with that." *Id.* (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force).

912 *Id.* (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force); *see also id.* at 212-13 ("So, as we struggle with this, I think that is – where you bin it is somewhat – somewhat clouds the real question of what are we getting after? And just because we can count it, does it really count? And how do we find the statistics that really help us understand where we're going, and where we can make improvements?").

913 *Id.* at 217 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

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

- The data required reflects a snapshot in time, but the numbers do not account for cases that are pending investigation and disposition and are improperly counted as "no action taken" for prosecution rate purposes.[914]

- The data DoD requires and calculates does not take into consideration whether the offender is either unknown or is a civilian beyond the military's jurisdiction.[915]

- The DoD numbers also include restricted reports, for which investigation is prohibited and there can be no disposition.[916]

- Additionally, the data the Services report covers a wide spectrum of eight separate offenses, from rape to unwanted touching, which distorts any accurate depiction of disposition decisions.[917]

The Services offered numbers and percentages for the RSP's consideration. However, each Service uses such different variables that the information provided is not comparable. The Services offered several different reasons why their numbers do not align with either one another's or DoD SAPRO's reports.[918]

One major reason data is not comparable is the Services use different procedures and definitions to "unfound" cases, as mentioned in the earlier discussion regarding investigations.[919] The Army reports a higher prosecution rate than the other Services because the convening authority is only considering cases that an attorney and MCIO investigator previously determined had probable cause, so there is a greater probability the convening authority will take some adverse action on those cases. For instance, in FY12, 118 out of 476 cases were closed by the Army CID for lack of probable cause, and the convening authority only considered 358 cases. Since an attorney already determined there was reason to believe an offense had been committed, those cases were more likely to be prosecuted, resulting in a higher prosecution rate (number of courts-martial divided by 358). If the Army's prosecution rate was based on all 476 possible cases, the prosecution rate would likely have been lower (number of courts-martial divided by 476). The Air Force and Navy MCIOs, on the other hand, presented all to the commander, and divided the number of cases preferred by all sexual assault cases, resulting in a lower percentage.[920]

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914 *Id.* at 218.

915 *Id.*

916 *Id.* at 218-19.

917 *Id.* at 219.

918 *Id.* at 207-22 (testimony of Services' representatives).

919 *Id.* at 208 (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force) ("One of the other unique differences, I think most of us, the investigating – so the MCIO, Air Force OSI does not unsubstantiated any of our cases. So, before – so, our commanders get all of our cases to adjudicate, which I think it gets factored in when you look at – and I use this very subjective, but the type of case that is presented. If you have an investigative agency that said no, we unsubstantiated this [like the Army's procedure], so you're only being presented with substantiated cases, I think you get a different type of case."). *Cf. id.* at 221-22 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army) ("Founding is a probable cause determination. The commander [in the Army] does not have a role in founding or unfounding of a case. Lawyers in coordination with investigating agencies, CID for the Army make that determination. And it is a permanent law enforcement record." *See supra* Part VII, Section J(1) (discussing standardizing investigative and disposition decision process between MCIOs, JAGs, and Commanders).

920 As illustrated in Part VII, Section J(2), *supra,* the CSS is recommending a prosecution rate that divides the number of cases preferred by the number of known offenders within the military's jurisdiction.

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

At the RSP's request, Dr. Cassia Spohn evaluated the prosecution rates the Services reported, compared them to civilian prosecution rates and presented her assessment at a public meeting. She agreed that the Services' different definitions of what constitutes an "unfounded' case and their calculation procedures impact the overall prosecution and conviction rates.[921] Dr. Spohn described her understanding of each Service's definitions and process based on the information the Services provided:

> In the Army, the decision to unfound is not made by commanders, but by the prosecutor and only cases that are deemed to be founded are presented to commanders to investigate. Moreover, in the Army, founding is a probable cause determination, not a determination that the case is false or baseless.
>
> The Air Force and the other agencies, the determinations that cases are to be unfounded are made by commanders, but the definitions of what constitutes unfounding differs somewhat. The Air Force follows the [Uniform Crime Report] guidelines in referencing cases that are false or baseless. The Coast Guard categorizes cases as unfounded if the investigation revealed that the entire allegation was fabricated which would seem to leave out those baseless complaints. And then both the Navy and the Marine Corps simply, at least in the materials I was presented, simply use the term unfounded without really defining it.[922]
>
> So again, this makes comparing data on unfounding across the Military Services problematic if they're using different definitions and different procedures. But in reality, it's not unlike the civilian system where in reality the different law enforcement agencies also may be using somewhat different interpretations of the Uniform Crime Reporting Guidelines with respect to unfounding.[923]

The Services generate different numbers for various reports which leads to additional inconsistencies and difficulties in assessing prosecution and conviction rates in sexual assault cases. For example, if the Service divides the number of preferred sexual assault cases by the total number of unrestricted reports, a low prosecution and conviction rates results. In contrast, if the Service's numbers reflect convictions of known subjects within the military's criminal jurisdiction, higher prosecution and conviction rates result.

In addition, most of the Services' conviction rate data does not specifically portray the number of convictions for sexual assault; instead, the conviction rates reflect conviction for any offense in cases that included a charged sexual assault. For example, in FY11, DoD reported an 80 percent conviction rate in sexual assault cases.[924] Eighty percent of Service members charged with a sexual assault offense were convicted of some

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921 In response to Request for Information 39, the Navy stated that "[t]he reasons unrestricted reports do not result in a commander's ability to take action include the offender is unknown, offender is a civilian not subject to military jurisdiction, civilian authorities prosecute the military offender, the victim declines to participate, the evidence is insufficient or the allegation is unfounded." Navy's Response to Request for Information 39 (Nov. 21, 2013). In response to the same question, the Marine Corps explained that NCIS does not unfound cases, and the vast majority of cases unfounded by the commander were victim recantations. Marine Corp's Response to Request for Information 39 (Nov. 21, 2013); *see also* Coast Guard's Response to Request for Information 49 (stating that "CGIS does not classify crimes as 'unfounded' at the current time").

922 *Transcript of RSP Public Meeting* 268 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

923 *Id.* at 270-71.

924 FY11 SAPRO Annual Report, *supra* note 823.

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

offense, although not necessarily a sexual assault offense, which, it is not an accurate reflection of conviction rates for sexual assaults. Dr. Spohn estimated the true conviction rate averaged about 50 percent.[925]

2. Proposal to Standardize Data Collection Across the Services

The DoD must establish "a consistent methodology for characterizing case flow or case attrition"[926] and issue clear instructions to standardize the calculations for *prosecution* and *conviction* rates, as well as cases with alternate dispositions, and those where no action was taken.[927] "The fact that the definitions and procedures are different means that the overall data for the Department of Defense is in many ways meaningless . . . a first step is that the Military Services should use a consistent definition and consistent procedures."[928]

First, the Services need to standardize the denominator for all calculations.[929] The *prosecution rate denominator* should be unrestricted reports of sexual assault with known offenders within the military's criminal jurisdiction. The *conviction rate denominator* should only be cases referred to courts-martial. Then, the Services can classify accurate data into various categories including cases preferred for the prosecution rate, cases pending, dismissed, or where other adverse action occurred. For the conviction rate numerator, the number of cases with a charged sexual assault resulting in conviction, acquittal, or other resolution such as a mistrial can easily formulate conviction rates. Any information collected captures a snapshot in time; pending and unresolved cases must be accounted for.[930] Clear standards establishing the numerators and denominators enable useful data calculations.

The DoD should require the Services to collect the following categories of information in order to calculate comparable data:[931]

- All unrestricted reports of adult sexual assault;
- Reports separated by type of offense to establish the base number for: Rape, sexual assault, sexual assault involving sleeping or intoxicated victim, or victim incapable of consent, etc.;
- Reports where command action is precluded because:

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925 *See supra* Part VII, Section J(4); *Transcript of RSP Public Meeting* 284-85 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

926 *Id.* at 296.

927 Beginning in FY13, there were proposals to revise the calculations to result in more accurate and useful data; however, as of December 2013, the Services did not have a standardized way of presenting prosecution and conviction rates.

928 *Id.* at 295.

929 *Id.* at 286; *see also id.* at 281 ("[W]e encounter a problem with respect to the appropriate denominator for calculating these rates. This is true of both [civilian and military] systems, but I think it's particularly true of the military where we could calculate prosecution rates based on all unrestricted reports, all reports involving cases that were presented to commanders for action, or only reports in which the evidence supported command action for sexual assault."). *Id.* at 279-80 ("So again, depending upon the denominator, the conclusion that one would reach with respect to the prosecution rate would be very different.").

930 *Id.* at 220 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

931 These data points are based on the Army's current practice as explained by Colonel Mulligan and Janet Mansfield, *see id.* at 220-27 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, and Ms. Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army), and the explanation of the Air Force waterfall slides provided in response to Request for Information 39, *see* Air Force's Response to Request for Information 39, at 301219 (Nov. 21, 2013).

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

- The case is being handled by civilian or foreign prosecution authorities, and track separately as:
  - Prosecuted in civilian court as a sexual assault offense,
  - Prosecuted in civilian court as a non-sexual assault offense,
  - Dismissed by civilian authorities,[932]
  - Pending;
- The subject is a civilian or foreign national;
- The offender is unknown;
- The subject died;
- The victim declined to cooperate in the investigation or prosecution;

- Remaining military cases separated into the following categories:
  - Unfounded Prior to Preferral – Allegations of sexual assault incidents deemed false or baseless;[933]
  - Preferred[934] (this the numerator for the prosecution rate, divided by the number of cases within the military's jurisdiction, as the denominator, to determine the prosecution rate);
  - Alternate Disposition (no action, NJP, adverse administrative action);
  - Victim declined to cooperate; or
- Preferred cases, classified as:
  - Alternate dispositions (resignations/ separations in lieu of courts-martial or NJP);
  - Cases not referred, and no adverse action taken;[935]

932 It may be possible for these cases to be handled by the Services, adding back into the number of cases under military jurisdiction.

933 Unfounded means false or baseless, according to the UCR definition. See U.S. Dep't of Justice, Uniform Crime Reporting Handbook 41 (2004), *available at* http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf. For recommendations on standardizing use of the term "unfounded" throughout the Services, *see supra* Part V, Section F(1).

934 The number of cases preferred divided by the number of cases within the military jurisdiction should form the prosecution rate percentage.

935 These are cases with insufficient evidence of any offense to prosecute, sometimes due to the fact that the victim declines to cooperate in investigation or prosecution, or there may not be sufficient available information to justify taking adverse action against the accused. *See Transcript of RSP Public Meeting* 226 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army) (explaining in detail that 30 soldiers were given no punishment because there was insufficient evidence).

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

- Cases referred to court-martial (this is the number that should be used to calculate conviction rates), which then should be separated into the number of:
  - Convictions,
  - Acquittals,
  - Other (mistrial, dismissed, etc.).

The **prosecution rate** is the number of cases preferred divided by the number of unrestricted reports that are within the military's criminal jurisdiction.

The **conviction rate** is the number of cases with a finding of guilty for a sexual assault offense divided by the number of cases referred to courts-martial.

Table 16

Prosecution Rate by offense type	Conviction Rate by offense type
$\frac{\text{\# Cases Preferred}}{\text{Cases within Military Criminal Jurisdiction}}$	$\frac{\text{Cases with Sexual Assault Conviction}}{\text{\# Cases Referred}}$

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

Waterfall Calculations to Standardize Prosecution and Conviction Rates

Figure 13

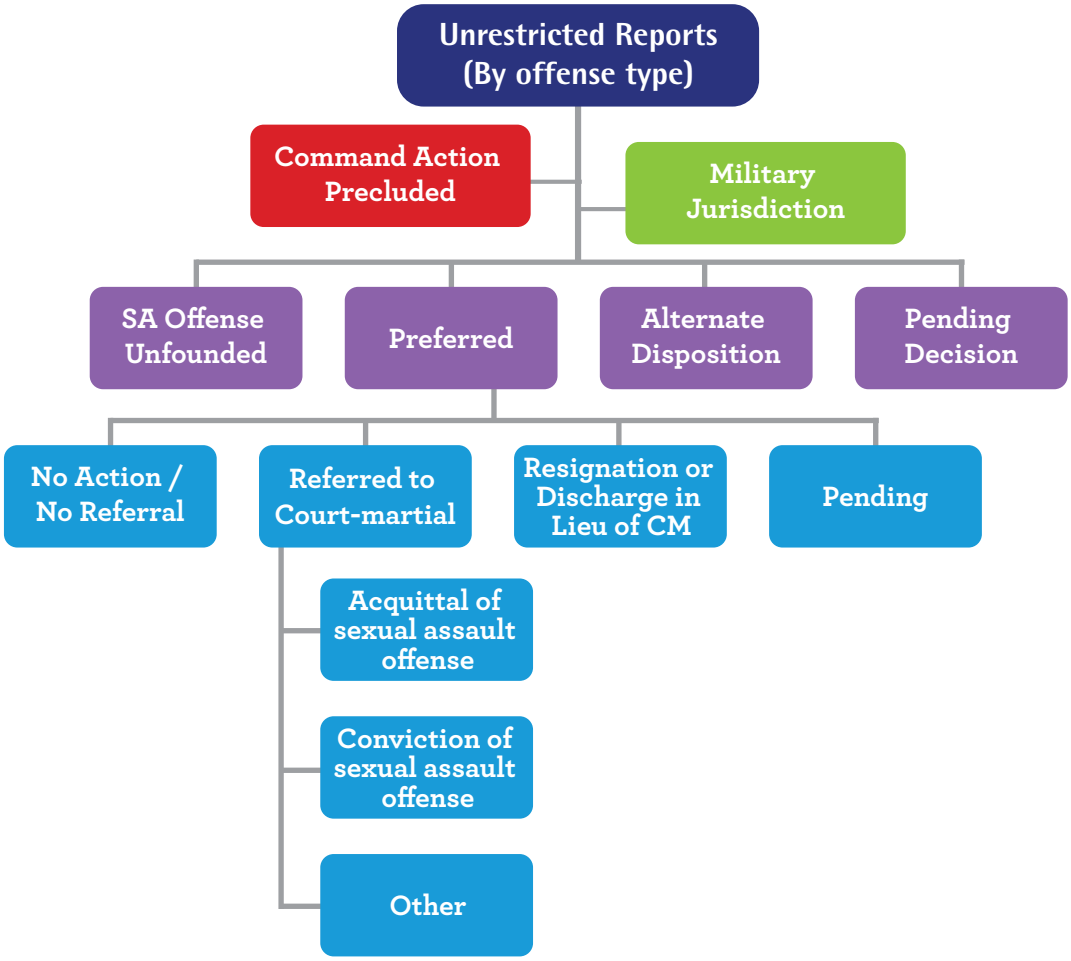
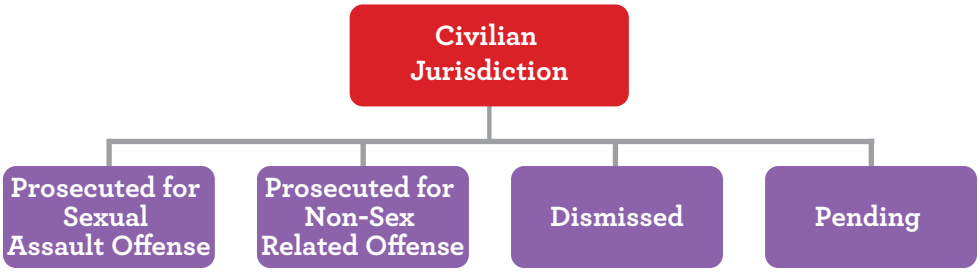


Figure 14

Keeping Track of Cases in Civilian Jurisdictions involving Military Members



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

3. "Substantiated" Sexual Assault Cases in Military Service Reports to Congress

Recommendation 50: Congress enact legislation to amend Section 1631(b)(3) of the FY11 NDAA and the related provisions in FY12 NDAA and FY13 NDAA to require the Service Secretaries provide the number of "unfounded cases," those cases that were deemed false or baseless, as well as a synopsis of all other unrestricted reports of sexual assault with a known offender within the military's criminal jurisdiction. Eliminating the requirement to provide information about "substantiated cases" [936] will result in DoD and the Services providing information that more accurately reflects the disposition of all unrestricted reports of sexual assault within the military's jurisdiction. [937]

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

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

Discussion

Congress requires the Military Services to detail, line by line, the disposition of every "substantiated" sexual assault allegation, providing transparency for those who wish to review all data. It is critical the requested information is useful. The current requirement raises two issues.

First, the annual report to Congress uses the term "substantiated" to determine whether or not to include a case in the report. However, "substantiated" is not a term otherwise used in the military's investigative or disposition process in sexual assault cases.

Second, the extensive annual report to Congress does not provide useful information that can be measured from year to year. The Services would provide more useful information utilizing the "waterfall analysis" detailed earlier detailing the actual number of cases that fell within the military's jurisdiction, resulted in court-martial or alternate dispositions broken down by nonjudicial punishment, resignation or discharge in lieu of courts-martial or other adverse action, and if taken to trial, the number of convictions and acquittals. In addition to providing raw numbers, the Services could also break the information down into percentages as an easy reference to compare the results each year to identify any trends, problems, or improvements.

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936 DoDI 5505.18, dated January 25, 2013, provides the standardized definition of substantiated, however, this is only used in the report to Congress. U.S. Dep't of Def., Instr. 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (Jan. 25, 2013). DoD defines substantiated as follows:

> An Unrestricted Report that was investigated by an MCIO, provided to the appropriate military command for consideration and action, and found to have sufficient evidence to support the command's action against the subject. Actions against the subject include court-martial charge preferral, Article 15 UCMJ punishment, administrative discharge and other adverse administrative action that result from a report of sexual assault or other associated misconduct (e.g., adultery, housebreaking, etc.).

Id., Glossary at 10.

937 "Unfounded" defined according to the UCR as reports which are baseless or false. *See also id.* ¶ 10(a) (defining "unfounded" as crime did not occur and/or it was false allegation).

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Last, Congress can have confidence in numbers and percentages that follow consistent criteria and rely on actual events. Accordingly, Congress, the Services, and the public can draw conclusions from the data to inform the debate about military sexual assault.[938]

4. Comparing Military and Civilian Prosecution Statistics

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

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

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

Discussion

Congress directed the RSP conduct a comparison of civilian and military prosecution rates and state reasons for any differences.[939] Differences in civilian and military definitions, statutes, calculations, and procedures make comparing the numbers across these two systems and their changes over time extremely difficult. The results of comparisons may be misleading.[940]

Some of the problems associated with comparing civilian and military statistics include:

- "[T]he Military Services use different definitions of outcomes, especially unfounding, and they calculate prosecution and conviction rates differently. . .."[941]

- Civilian police in many civilian jurisdictions have discretion to unfound a case without the prosecutor ever seeing it.[942] In the military, either a trial counsel is making a probable cause determination in conjunction with the investigator in the Army, or commanders are making disposition decisions in the other Services. "So not only are the definitions of unfounding different, but the procedures that are used to unfound cases are different as well"[943] which impacts the prosecution rate.

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938 *See supra* Part III.

939 FY13 NDAA, Pub. L. No. 112-239, § 576(d)(1)(E), 126 Stat. 1632 (2013).

940 This conclusion is supported by the results of Dr. Spohn's attempt to compare rates among DoD and studies of which she was aware in civilian jurisdictions. *See Transcript of RSP Public Meeting* 259 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

941 *Id.* at 262; *see also id.* at 258 ("[T]he definitions that civilian law enforcement agencies use and those used by the Department of Defense [MCIOs] are different.").

942 *Id.* at 263.

943 *Transcript of RSP Public Meeting* 268 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate

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

- DoD's data includes both restricted and unrestricted reports "which causes challenges in terms of knowing what the denominator of these rates should be."[944]

- Civilian jurisdictions generally track forcible rape as sexual assault, whereas the military term pursuant to Article 120 of the UCMJ encompasses a wide range of sex-related offenses from unwanted touching to rape that are either not criminal or are characterized as non-sexual assaults in some civilian jurisdictions. "Thus, the [civilian] rates are not directly comparable since they do not include these touching or contact offenses as well as the penetration offenses."[945]

- Civilian authorities generally only account for cases that fall within their jurisdiction, whereas the Military Services are responsible for reports for which they may not have jurisdiction at all if the suspect is a civilian, or the local civilian authorities are prosecuting a case involving a military suspect that occurred off post.[946]

- Military Services provide detailed data on the outcome of every report, but civilian authorities are not required to release that information. "[B]y contrast, there is no national data on outcomes of civilian cases that resulted in an arrest. The national data we do have are on offenses known to the police and on cases that were cleared by the police. And that clearance category has its own problems."[947]

- The military justice system offers alternate dispositions to cases that are not usually available in civilian jurisdictions, such as nonjudicial punishment, letters of reprimand, resignation or separation in lieu of courts-martial with a punitive discharge, which impact the military's prosecution and conviction rates.

Differences between civilian and military sexual assault cases start at the beginning of a case. In the civilian sector, "one of the most important and highly [sic] criticized decisions made by law enforcement officials is the decision whether to unfound the crime or the charges."[948] This decision point is critical; it determines whether investigators present an allegation to a civilian prosecutor to even factor into the civilian prosecution rate. Dr. Spohn pointed out that "technically, cases can be unfounded only if the police determine following an investigation that a crime did not occur,"[949] which meets the UCR definition of baseless. Based on her experience, however, she stated that "in reality ... the unfounding decision is used in different ways and is interpreted in different ways by different law enforcement agencies. Research has documented that unfounding can be used to clear or, in words of one researcher, erase cases in which the police are convinced that a crime did occur, but also believe that the likelihood of conviction and prosecution are low."[950] The DoD Annual

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Programs, School of Criminology and Criminal Justice, Arizona State University); *see also id.* (discussing how "the definitions of unfounding and procedures by which cases are unfounded vary among the Military Services" as well).

944 *Id.* at 260.

945 *Id.* at 274; *see also id.* at 278 (noting that "the definition of sexual assault [in the military] is broader than the definition of forcible rape used by the FBI").

946 *Id.* at 260 (noting that 16 percent of military's unrestricted reports fell outside of military jurisdiction).

947 *Id.* at 261.

948 *Id.* at 263.

949 *Id.* at 264. "[T]he FBI guidelines on clearing cases for Uniform Crime Reporting purposes state that a case can be unfounded only if it is determined through an investigation to be false or baseless." *Id.* at 265 (referring to FBI definition of "unfounded"); *see supra* note 933.

950 *Transcript of RSP Public Meeting* 264 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate

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Report on Sexual Assault in the Military defines unfounding as, "When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense or the offense was improperly reported or recorded as a sexual assault, the allegations against the subject are considered unfounded."[951]

Dr. Spohn pointed out that "there are similar problems with calculating prosecution rates for the civilian justice system" in that the denominator may vary among jurisdictions. National prosecution rates start counting when there is sufficient evidence in the case to make an arrest for rape, whereas the military prosecution rate is currently derived from all restricted and unrestricted reports of sexual assault, including instances of unwanted touching, such as a "pat on the butt."[952] Due to such vast differences, a reliable comparison between civilian and military prosecution rates is not possible. As Dr. Spohn stated, "we really are comparing apples and oranges with rapes [in civilian jurisdictions] versus all sexual assaults [in the military]."[953] Therefore, to make comparisons on current data would be misleading.[954]

Conviction rates also pose comparison challenges because civilian prosecutors and military prosecutors and commanders use different criteria to take cases to trial. Dr. Spohn used information from her recent study in Los Angeles from 2005 to 2009 to reach her conclusion.[955] She stated,

> [O]f these 486 [rape] cases, just over 80 percent of the defendants were convicted. Very few, one percent were acquitted. Charges were dismissed in just about 10 percent of the cases and in another 9 percent, the cases were still pending.
>
> If we calculate the conviction rate based on cases that had dispositions, that is, if we subtract those cases that were pending, we would come up with a conviction rate of 88.2 percent. And if we only look at cases that proceeded to trial, the conviction rate would be a whopping 98.7 percent.
>
> These data, I don't think are necessarily representative of outcomes in the civil justice department overall. And in part, I think that reflects the fact that the Los Angeles County District Attorney files charges only if there is evidence that meets the standard of proof beyond a reasonable doubt and if there is corroboration of the victim's allegations. In other words, they file charges only if they believe that they can take the case to trial and win. And the conviction rate in Los Angeles confirms that that is, in fact, what is happening there.[956]

Programs, School of Criminology and Criminal Justice, Arizona State University); *see also id.* at 267 ("The problem, of course, is that these are decisions made by individual law enforcement agencies which may not interpret the FBI guidelines in the same way.").

951 *Id.* at 268.

952 *Id.* at 287-89 (discussion between Brigadier General (Ret.) Dunn, Subcommittee Member, and Dr. Spohn in trying to compare 36.8 percent prosecution rate for all sexual related offenses in military to 50-percent prosecution rate of rape cases in civilian jurisdictions). Dr. Spohn also pointed out that the Army provided a separate prosecution for rape which was 56 percent which is comparable to the national average of 50 percent.

953 *Id.* at 290 (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

954 The Defense Task Force on Sexual Assault in the Military Services reached the same conclusion. *See* DTFSAMS, *supra* note 130.

955 *Transcript of RSP Public Meeting* 290-91 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

956 *Id.*

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

Dr. Spohn also provided State Court Processing Statistics (SCPS)[957] data, which she believes is probable the most comprehensive source of data on conviction rates in the United States,[958] and a six-city study that she and Julie Horney conducted in the early 1990s,. She concluded that comparing military and civilian conviction rates is extremely complex and unreliable due to the differences in the systems. "With these important caveats,"[959] Dr. Spohn considers military conviction rates to be generally aligned with at least some urban civilian jurisdictions.

The Subcommittee recommends that DOD focus on standardizing definitions and processes the Services use to gather data in order to generate useful information. An Army judge advocate told the RSP, after explaining why he believed the data DoD SAPRO currently required was not helpful, "I want to know where I am. I don't get better if I don't know where I am."[960]

Lastly, it is important to remember that as these stale numbers are generated year after year, each represents an individual. A victim-centered, offender-focused justice process must realize that there are real individuals behind every number.

957 For the latest information from 2009, see Bureau of Justice Statistics, "Data Collection: State Court Processing Statistics (SCPS)", *at* ("[The] SCPS provides data on the criminal justice processing of persons charged with felonies in 40 jurisdictions representative of the 75 largest counties. These counties account for nearly half of the serious crime nationwide. The program prospectively tracks felony defendants from charging by the prosecutor until disposition of their case." The website also cautions that "BJS has issued a data advisory on the State Court Processing Statistics Data Limitations. The advisory describes limitations of the data collection that must be considered when analyzing SCPS data, drawing any conclusions based on the data, and citing BJS reports."), *available at* http://www.bjs.gov/index.cfm?ty=dcdetail&tiid=282.

958 *Transcript of RSP Public Meeting* 292 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

959 *Id.* at 286.

960 *Transcript of RSP Public Meeting* 214 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army, discussing role of prosecutor in founding and unfounding offenses).

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

VIII. ADJUDICATION OF SEXUAL ASSAULT CASES

A. OVERVIEW OF CIVILIAN AND MILITARY SENTENCING

1. Purposes of Sentencing in Federal and Military Systems

Both civilian and military justice systems "pursue the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline."[961]

In the federal judicial system,[962] judges consider the statutory purposes of sentencing when fashioning a sentence.[963] Along with considering the defendant's history, characteristics, and the nature of the offense, the judge must select a sentence that:

1. reflects the seriousness of the offense,
2. promotes respect for the law,
3. provides just punishment for the offense,
4. affords adequate deterrence to criminal conduct,
5. protects the public from further crimes of the defendant,
6. provides the defendant with needed educational or vocational training, medical care, or other correctional treatment,
7. recognizes the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, and
8. recognizes the need to provide restitution to any victims of the offense.[964]

Similar imperatives underlie sentencing processes in state criminal justice systems.

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961 Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 Mil. L. Rev. 159, 161 (2000) (comparing 18 U.S.C. § 3553(a)(2) with U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook 64 (Sept. 30, 1996)).

962 The term "federal judicial system" or "federal system" refers to the U.S. Federal Courts, established by Article III of the U.S. Constitution.

963 *See* 18 U.S.C. § 3553(a)(2).

964 *Id.* at § 3553(a).

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Five considerations guide sentencing in the military's justice system: (1) rehabilitation, (2) punishment, (3) protection of society, (4) preservation of good order and discipline, and (5) deterrence of the wrongdoer and those who know of his crimes and his sentence from committing the same or similar offenses.[965] These reasons exist as a subset of the purposes of military law in the Manual for Courts-Martial: to promote justice, assist in maintaining good order and discipline in the Armed Forces, promote efficiency and effectiveness in the military establishment, and thereby strengthen the national security of the United States.[966]

In most civilian jurisdictions, the judge determines the sentence in noncapital cases.[967] In non-capital courts-martial, the sentence is determined by the military judge or by the "members"—the military equivalent of a jury[968] – based on the choice of the accused. The accused has four options: (1) plead not guilty, with trial and (if found guilty) sentencing by members; (2) plead not guilty, with trial and (if found guilty) sentencing by the military judge; (3) plead guilty with sentencing by members; and (4) plead guilty with sentencing by the military judge.[969] If the accused is absent for trial, refuses to select a forum, or the accused's request for trial by military judge alone is rejected by the military judge,[970] the default forum is trial by officer members.[971] In

965 U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, Instr. 2-5-21, at 60-61 (2014); the judge instructs the members: "You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion."

966 MCM, *supra* note 97, pt. I-1 ¶ 3.

967 The federal system and 44 states require sentencing by judge, rather than jurors, in noncapital cases. The exceptions are Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. *See* Ark Code Ann. § 5-4-103(a) (1987) ("If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter."); Ky. Rev. Stat. Ann. § 532.055(2) (2008) ("Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury."); Mo. Rev. Stat. § 557.036 (2003) ("If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed ... The jury shall assess and declare the punishment as authorized by statute."); Okla. Stat. Ann. tit. 22, § 926.1 (2003) ("In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . ."); Tex. Code Crim. Proc. Ann. § 37.07(2)(b) (2007) ("[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . ."); Va. Code Ann. § 19.2-295 (2009) ("Within the limits prescribed by law, the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury . . . .").

968 *See* MCM, *supra* note 97, R.C.M. 903 (forum selection); R.C.M. 910 (pleas). For analysis and discussion of Rules 903 and 910, see *id.,* App. 21. The Service member also has the right to know the military judge's identity before making this election. 10 U.S.C. § 816 (UCMJ art. 16). The convening authority selects members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825 (UCMJ art. 25). By default members are officers, unless the accused is enlisted and requests enlisted members; in that case, at least one-third must be enlisted, and must be from another unit. *Id.*

969 *Id; see also* MCM, *supra* note 97, R.C.M. 910 (pleas). The Service member also has the right to know the military judge's identity before making this election. *See* 10 U.S.C. § 816 (UCMJ art. 16).

970 *See* MCM, *supra* note 97, R.C.M. 903(b)(2), noting that the approval or disapproval of the request for military judge alone is at the discretion of the military judge. The discussion following R.C.M. 903(b)(2)(B) states, "A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as fact finder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record." *Id.* at R.C.M. 903(b)(2)(B) disc.

971 *Id.,* R.C.M. 903 (forum selection).

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

any case, however, the accused does *not* have the option to select trial by members and then, if convicted, sentencing by the military judge.[972]

The table below summarizes some of the differences between the civilian and military justice systems that impact sentencing.

2. Comparison of Sentencing Procedures in Civilian Courts and Courts-Martial

Table 17

	Most Civilian Jurisdictions	Military
Number of members in non-capital cases	Usually 12 jurors	Does not require 12 members; Ranges from 3 to 12 depending on the type of court-martial
Jury Verdict Requirement for Findings	Unanimous verdict in all cases	Unanimous verdict in capital cases; Usually 2/3 vote to convict by secret written ballot
Time between verdict and sentencing	Often delayed several weeks pending the completion of a presentencing report	Almost immediate
Who determines the sentence in non-capital cases?	In most civilian jurisdictions, the judge determines the sentence in noncapital cases	The sentence is determined by the military judge or by the "members"(jury) based on the choice of the accused: • Trial before members, sentencing by members • Trial by judge alone, sentencing by judge • Plead guilty, sentencing by members • Plead guilty, sentencing by judge The accused does not have the option to select trial by members and then, if convicted, sentencing by the military judge
Types of sentences	May include death, confinement, or fines, probation with completion of community service, treatment or education programs as a condition of probation	May include death, confinement, reduction in rank, reduction in pay, forfeiture of pay and allowances, separation from the military, fine, and reprimand
Sentencing per count or unitary	Receives sentence on each count for which he/she is convicted	Unitary sentencing, meaning one overall sentence

972 *Id.*

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

Sentencing by members/jury	Unanimous verdict in capital cases; Not applicable in most other cases because judge determines sentence in most jurisdictions	Unanimous verdict in capital cases; 3/4 vote for a sentence of life imprisonment or confinement for more than ten years; 2/3 vote for any other sentence
Sentencing Guidelines	20 States, District of Columbia, and federal courts have sentencing guidelines to inform the sentencing process	Each offense carries a maximum penalty
Mandatory Minimums	Exist in many states and federal system for a variety of offenses including some misdemeanors	• Dishonorable Discharge for penetrative sexual assault offenses • Confinement for life for premeditated or felony murder • Death for spying
Clemency	Governor may grant pardon at the end of the process	The Convening Authority (or superior appellate authority) may set aside findings of guilt in limited circumstances,[973] and convening authorities may not do so for "qualifying offenses," which include offenses where the maximum confinement sentence that may be adjudged does not exceed two years and the sentence adjudged does not include a punitive discharge or confinement for more than six months, and all offenses under Article 120 (a) (Rape) or 120 (b) (Sexual Assault), Article 120b (Rape and sexual assault of a child), or Article 125 (Forcible sodomy) of the UCMJ. Clemency rationale must be explained in writing. Also has rights at Service Clemency Parole Boards and a right to petition the President for Clemency.
Appeals Process	Normally not granted automatic review; offender must file for review at the next higher court	All sentences with a punitive discharge or one year or greater confinement receive automatic appellate court review; all other cases automatically reviewed by a judge advocate.

973 *See* FY14 NDAA, Pub. L. No. 113-66, § 1702(b) 127 Stat. 672 (2013). Under Section 1702 revisions to Article 60, convening authorities

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Twenty states, the District of Columbia, and the federal system have sentencing guidelines to inform the sentencing process.[974] Congress established the federal sentencing guidelines and, although not binding, judges must consider them in selecting an appropriate sentence.[975] The federal guidelines are derived from data analysis of sentences in thousands of cases[976] and are monitored and revised by the United States Sentencing Commission, which consists of seven voting members and one nonvoting member, supported by a staff of over 100.[977] The federal guidelines provide a suggested sentencing range based on the offense, including impact on the victim, as well as characteristics of the offender, including criminal history. The sentencing judge must calculate the guideline range, but may vary or depart from it with an explanation. There are no guidelines for particular offenses in courts-martial and, except for a very few specific offenses, the court-martial has unfettered discretion to adjudge any sentence from no punishment up to the prescribed maximum allowable punishment.[978]

In federal civilian courts, sentencing usually occurs weeks or months after trial or acceptance of a guilty plea.[979] The defendant (now called "offender" following adjudication of guilt) may or may not be detained during this time.[980] During this period, a probation officer (an employee of the judicial branch of the United States Government) gathers information about the offender and prepares a Presentence Report (PSR).[981] The report includes information about the circumstances of the offense(s) of conviction as well as background information about the offender, such as any prior criminal record, family, and employment history.[982] The probation officer includes an initial calculation of the appropriate sentencing "range" under the U.S. Sentencing Guidelines in the PSR.[983] The prosecution and defense have the opportunity to review the PSR and to contest matters in it.[984] Each side may also present additional evidence at a sentencing hearing; the offender has the right of allocution at that hearing. Victims may also be heard at this proceeding.[985] The procedures in most states are comparable.

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may not disapprove, commute, or suspend adjudged confinement of more than six months or that include a punitive discharge except for limited circumstances upon recommendation of the trial counsel in recognition of "substantial assistance by the accused in the investigation or prosecution of another person" or in accordance with a pretrial agreement, subject to certain limitations where the offense requires a mandatory minimum sentence.

974 *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

975 *Id.* at 152-53 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines); *see also* Fed. R. Crim. P. 32.

976 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 150-52 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

977 *See* 28 U.S.C. §§ 991-998.

978 *See, e.g.*, 10 U.S.C. 906, 918 (UCMJ art. 109, 118).

979 *See* Fed. R. Crim. P. 32.

980 *Id.*

981 *Id.*; *see also Transcript of RSP CSS Subcommittee Meeting* 158, 170-73 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing role of probation officers and federal presentence report).

982 *See* Fed. R. Crim. P. 32.

983 *Id.*; *see also Transcript of RSP CSS Subcommittee Meeting* 158, 170-73 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing role of probation officers and federal presentence report).

984 *See* Fed. R. Crim. P. 32.

985 *Id.*

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In courts-martial, the sentencing proceeding usually begins immediately after a guilty verdict is announced.[986] This promptness allows the military to deliver swift punishment, quickly remove an offender from the unit, and return court-martial panel members to operational or training duties.[987] The quick sentencing procedures result in other differences as well. There is no PSR in a court-martial.[988] The trial counsel presents evidence from the accused's personnel records; this typically includes the service record of the accused and any prior convictions or disciplinary actions.[989] Although the information in the accused's personnel record is less extensive than a PSR, it is readily available and requires no additional resources to collect.[990] The trial counsel may also present other evidence of the circumstances of the crime, including the crime's impact on the victim.[991] The defense may present evidence; the accused has the right of allocution.[992]

In federal civilian criminal proceedings, and in most states, the defendant, or offender, receives a distinct sentence for each offense of which convicted.[993] Thus, someone convicted of multiple offenses receives a sentence for each offense.[994] The sentence for each offense is limited by a statutory maximum and, in some cases, minimum for the offense, plus any applicable guidelines. The judge has some discretion (often guided or cabined by guidelines or other rules) to direct that such separate sentences be served concurrently or consecutively, and sometimes may take other action to merge sentences for closely related offenses.

By contrast, a court-martial adjudges a single sentence regardless of the number of offenses of which the accused is found guilty.[995] The maximum punishments for each offense of conviction are added together and presented to the court-martial for sentencing.[996] The court-martial then has discretion to adjudge any sentence between no punishment at all and the aggregate maximum.[997] The single sentence adjudged will not indicate what role or weight any particular offense played in determining the sentence.[998]

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986 *See* MCM, *supra* note 97, R.C.M. 1001-1007 (sentencing).

987 *Id.*

988 *Id.*

989 *See United States v. Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995) (discussing unitary sentencing and distinctions between military and federal law); *Jackson v. Taylor*, 353 U.S. 569 (1957) (discussing unitary sentence). Because a prior conviction is almost always a bar to enlistment, and because any conviction while in military service almost always leads to punitive or administrative discharge, it is relatively rare for a court-martial defendant to have a prior conviction.

990 *See* MCM, *supra* note 97, R.C.M. 1001-1007 (sentencing).

991 *Id.*

992 *Id.*

993 *See, e.g.*, Fed. R. Crim. P. 32; *see also* 18 U.S.C. § 3585 (calculating federal terms of imprisonment).

994 *See, e.g., Setser v. United States*, __ U.S. __, __ 132 S. Ct. 1463 (2012) (discussing concurrent and consecutive sentences in the context of federal and state convictions); *see also Weymouth*, 43 M.J. at 336 (discussing unitary sentencing and distinctions between military and federal law).

995 *See Weymouth*, 43 M.J. at 336; *Jackson v. Taylor*, 353 U.S. 569 (1957).

996 The maximum allowable punishments for each punitive article under the UCMJ are established by the President and are promulgated by Executive Order in accordance with 10 U.S.C. 836, UCMJ art. 36.

997 Unless any of the offenses of conviction carries a mandatory minimum sentence.

998 *See, e.g., United States v. Savala*, 70 M.J. 70 (C.A.A.F. 2011) (reversing conviction for attempted larceny, rape, unlawful entry, and adultery for which adjudged sentence was seven years of confinement, forfeiture of $898.00 pay per month for 84 months, and reduction to pay grade of E-1).

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This unitary sentence system used in courts-martial has the virtue of making sentencing proceedings and deliberations less complicated, which may be especially valuable when lay court members adjudge the sentence. However, this procedure may lead to less careful consideration of each and every offense of conviction and disparity in outcomes, as well as raising other related concerns, described below.

In cases with plea agreements, the military judge or court members, depending on the accused's election, adjudges one sentence for all offenses of conviction according to the usual procedures.[999] The judge or members do not know the agreed sentence cap between the accused and convening authority.[1000] If the sentence the court-martial adjudged exceeds the maximum sentence agreed to by the convening authority, the convening authority is required to reduce the sentence from that adjudged to at most, the agreed upon sentence cap.[1001] If the sentence adjudged is less than the agreed upon sentence cap, it becomes the sentence unless the convening authority grants clemency or an appellate authority takes action to reduce the sentence.[1002] This difference in negotiated plea procedures, through which the convicted Service member can "beat the deal" if the judge or panel adjudges a sentence lower than the negotiated maximum sentence, is the product of the convening authority's statutory authorities, including clemency authority.[1003]

In capital courts-martial, the accused may not plead guilty, an accused may not be tried or sentenced by military judge alone, and a death sentence returned by members must be unanimous.[1004] This parallels the practice in federal courts[1005] and in most state courts. In courts-martial and in federal and state proceedings, members, or a jury, are required to decide a series of specific questions, such as whether the prosecution has proven that one or more aggravating circumstances exist, as part of their determination whether to adjudge a sentence of death.[1006]

B. SENTENCING BY JUDGE OR JURY/PANEL MEMBERS

1. Scope of Inquiry and Empirical Data

The Subcommittee was asked to consider various questions relating to sentencing in courts-martial. In general, the Subcommittee determined it would be inefficient and unwise to recommend changing sentencing procedures and standards in courts-martial *only* for sexual assault offenses. For example, recommendations that may include eliminating sentencing by members or unitary sentencing are more feasible and employable if they are implemented across all types of offenses. The Subcommittee recognizes that such recommendations would exceed the scope of the Subcommittee charter, and therefore recommends further study of those

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999 *See Weymouth*, 43 M.J. at 336 (discussing unitary sentencing and distinctions between military and federal law); *Jackson v. Taylor*, 353 U.S. 569 (1957) (discussing unitary sentence).

1000 *See* MCM, *supra* note 97, R.C.M. 705 (plea agreement); R.C.M. 910 (plea inquiry); *see also* Services' Responses to Request for Information 68 (Nov. 21, 2013); Kisor, *supra* note 873, at 46.

1001 *See* MCM, *supra* note 97, R.C.M. 705 (plea agreement); R.C.M. 910 (plea inquiry).

1002 *Id.*

1003 *See generally* 10 U.S.C. §§ 857, 857a, 858a, 858b, 859, 860 (UCMJ arts. 57, 57a, 58a, 58b, 59, 60).

1004 *See* 10 U.S.C. §§ 816, 825a (UCMJ arts. 16, 25a); MCM, *supra* note 97, R.C.M. 903(a)(2); R.C.M. 1004.

1005 *See* 18 U.S.C. §§ 3591-99; Nancy J. King, *Capital Jury: How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 Ohio St. J. Crim. L. 195 (2004).

1006 *Id.*

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issues surrounding sentencing procedures. Furthermore, the Subcommittee was unable to obtain empirical or quantifiable data regarding how courts-martial sentences may be impacted by these recommendations. The lack of data is partly due to two procedures inherent in courts-martial.

First, the unitary nature of courts-martial sentences makes it difficult to isolate sentences adjudged for particular offenses, including sexual assault offenses. When courts-martial convict Service members of more than one offense, it is unclear what portion of the aggregate punishment was based on any particular offense.

Second, courts-martial procedures provides no consolidated data source, such as a PSR, to determine the circumstances of the offense(s) of conviction and the background of the accused. The more granular information that is readily available in a PSR can be ascertained, if at all, in a court-martial only by a review of the entire record in each case. The lack of standardized, consolidated sentencing data in the courts-martial system makes comparing sentencing decisions cumbersome and challenging. Comparing courts-martial sentences based solely on convicted offenses may suggest widely disparate application of sentencing principles because matters in aggravation, extenuation, and mitigation are not maintained as part of the sentencing data as they would be in a PSR. Nevertheless, better data collection reflecting convicted offenses and corresponding sentences will significantly aid any future study into modification of court-martial sentencing procedures.

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

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

Recommendation 53: The Secretary of Defense direct the Military Services to release sentencing outcomes on a monthly basis to increase transparency and promote confidence in the system.

Finding 53-1: The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all Special and General Courts-Martial to the Navy Times on a monthly basis.[1007]

Discussion

The lack of uniform, offense-specific sentencing data from military courts-martial makes meaningful comparison and analysis of sentencing outcomes in military and civilian courts difficult, if not impossible.

1007 *See, e.g.*, "Navy Releases March Court-Martial Results," Navy Times (Apr. 15, 2014); *see also* "Navy, Marine Corps to Post Offender List on Homepages," Marine Corps Times (July 18, 2013); U.S. Marine Corps, "Marine Corps General and Special Court-Martial Dispositions: Oct 13 - Mar 14" (directly accessible at Marine Corps homepage, http://www.marines.mil/ at "Courts-Martial" link at bottom right), *at* http://www.hqmc.marines.mil/portals/61/Docs/courtsmartial0314.pdf.

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Compounding this lack of uniformity is the data's relative unavailability, which can foster misunderstanding and confusion, and limits the opportunity for an impartial examination of the system. On the other hand, making sentencing data available in an intelligible, predictable manner may serve to educate outsiders about the military justice process, strengthen confidence in the system, and dispel concerns about the outcomes in controversial cases.

The DoD's Annual SAPRO Report to Congress includes individual Service reports to SAPRO, highlighting areas of improvement, changes in policy, and statistical trends, including case synopses of unrestricted reports.[1008] The Service spreadsheets contain a large amount of case information – including offenses alleged, location, grade of the subject and victim, military status of the victim, and some disposition information – about every unrestricted report filed in a given fiscal year.[1009] This data, while useful in identifying trends and risk patterns, does not contain the depth of sentencing information that is required to intelligibly inform sentencing reform in military courts-martial. For instance, the reports detail the "most serious offense" of which the accused was convicted, but does not indicate all convicted offenses. The reports only indicate whether the accused received certain punishments, like confinement, forfeitures, or reduction in rank, but not the length of confinement or the amount of the forfeiture.[1010] Without access to more detailed data, including all convicted offenses and the exact sentence adjudged, critically evaluating sentencing data remains incredibly challenging across the Services.

2. Judge Alone vs. Panel Members Sentencing

Recommendation 54: The Secretary of Defense recommend amendments to the MCM, the UCMJ, and Service regulations, respectively, to make military judges the sole sentencing authority in sexual assault and other cases in the military justice system.[1011]

Finding 54-1: In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. There are six states that allow jury sentencing in felony cases.[1012] The military retains an option for sentencing by panel members at the accused's request. [1013]

1008 *See, e.g.,* National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1631, 124 Stat. 4137 (2011); FY13 NDAA, Pub. L. No. 112-239, § 575, 126 Stat. 1632 (2013) (creating and modifying requirements for unrestricted report case synopses).

1009 FY13 SAPRO Annual Report, *supra* note 63, encls. 2-5.

1010 *Id.*

1011 *See* MCM, *supra* note 97, R.C.M. 903 (choice of forum); *see also id.,* R.C.M. 1001-1007 (sentencing).

1012 *See supra* note 967.

1013 *See* MCM, *supra* note 97, R.C.M. 903; R.C.M. 910; R.C.M. 1001-1007. The court members are called the "panel," not the "jury," which is not used in the military.

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Discussion

a. Judges' Expertise and Experience Supports Changing the Military Justice System to Judge Alone Sentencing

During site visit discussions about adult sexual assault cases, counsel raised the issue of "wildly unpredictable" sentences by panel members. The Subcommittee could not empirically verify this, for reasons discussed above, but it has long been "conventional wisdom" that members' sentences are more unpredictable.[1014] However, even without empirical data on sentencing differences or disparities, the greater expertise and experience of the military judge supports the conclusion that sentencing by military judges would be qualitatively superior and perceived with greater confidence in sexual assault and other cases, most, if not all, of the time.[1015]

b. Background

In federal court, as in forty-four states, judges exercise exclusive sentencing authority.[1016] In courts-martial, as noted above, members decide the sentence when the accused has so elected. A majority of the Subcommittee has recommended adoption in courts-martial of the practice in the large majority of civilian jurisdictions: sentencing by judge only, except in capital cases. A majority of the Subcommittee believes that this would foster greater expertise, consistency, and confidence in sentencing. These concerns are particularly acute in sexual assault cases.

Increased media and public attention, coupled with instantaneous worldwide coverage of adult sexual assault cases in the military, have magnified the scrutiny of sentences in the military justice system, particularly those in adult sexual assault cases.[1017] This may affect the views victims hold about the fairness of the military's legal system.[1018] The views victims hold of likely consequences to offenders may also affect their willingness to report; in one recent survey, fifty percent indicated that they chose not to report the incident because they "did not think anything would be done."[1019] While sentences may or may not be connected to this lack of confidence

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1014 Major General (Retired) Kenneth J. Hodson, former Judge Advocate General of the Army, testified to the 1983 Commission:

> "I dealt with many convening authorities, and none have ever complained of the findings of a court, but many have been upset by the sentence . . . Incidentally, I have never had a convening authority complain about a sentence imposed by a judge . . . Sentences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery."

See Military Justice Act of 1983 Advisory Commission, Advisory Comm'n Report 89-90 (1984) [hereinafter Comm'n Report], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf.

1015 *See, e.g.*, Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 Wash. U. J. Urb. & Contemp. L. 3, 39 (1994) (discussing jury sentencing in statistical analysis of sentences imposed by judges and juries demonstrating that jurors sentenced more severely and concluding that jurors "may be both more harsh and more erratic than judges").

1016 *See, e.g.*, Fed. R. Crim. P. 32; *see also, e.g.*, Administrative Office of the U.S. Courts, The Federal Court System in the United States: An Introduction for Judges and Judicial Administrators in Other Countries 29-30 (2010) (describing role of federal district judges in sentencing).

1017 *See, e.g.*, Matthew H. Brown, *Breaking the Silence*, Balt. Sun (Dec. 14, 2013) (noting barriers to reporting, which include skepticism about whether attackers will be punished); *see also, e.g.*, Stephanie McCrummen, *The Choice: Service Members Who Say They Were Sexually Assaulted Face Agonizing Decisions about Whether to Speak Up or Stay Silent*, Wash. Post (Apr. 12, 2014) (discussing punishment as factor in reporting decision).

1018 *See, e.g.*, U.S. Dep't of Def., 2013 Service Academy Gender Relations Focus Groups Overview Report 162 [hereinafter Focus Groups Report], *available at* http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf (discussing views of cadets indicating that some offenders believe they can get away with certain behaviors).

1019 *See* 2012 Survey Note, *supra* note 53, at 1.

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in the system, a majority of the Subcommittee concludes that entrusting sentencing to trained professionals improves the military justice system's overall credibility, as discussed further below.

Until 1969, sentencing in courts-martial was by members only in all cases. Along with other expansions of the authority and responsibility of the military judge, the option of judge-alone sentencing was added by the Military Justice Act of 1968. Military justice practitioners, academics, and others have debated the military's sentencing procedures, including sentencing by panel members.[1020] Congress directed the 1983 Advisory Commission to the Military Justice Act of 1983 to study the issue, in conjunction with enacting significant reforms in 1983.[1021] The divided Commission of nine men (five from the military) ultimately recommended retaining the practice, with two civilian members dissenting.[1022] However, the Commission did not specifically consider adult sexual assault crimes, the perspectives of victims, or public confidence in the military justice system.[1023]

Sentencing is a challenging part of the criminal trial process, even for judges with professional training.[1024] The increasing complexity of evidence in sexual assault cases, interplay of victims' rights considerations, including the Crime Victims' Rights Act[1025] and Special Victim Counsel,[1026] and serious collateral consequences for sex offense convictions[1027] may amplify the challenge. Training for military judges concentrates on issues in adult sexual assault cases, including best practices for evidence, victims' rights, and sentencing.[1028] In contrast,

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1020 *See, e.g.*, Captain Megan N. Schmid, *Military Justice Edition: This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Member Sentencing in the Military and Proposed Solutions*, 67 A.F. L. Rev. 245, 267-68 (2011) (proposing changes to improve military sentencing); *see also* Kisor, *supra* note 873 (comparing federal system to military system and proposing abolition of members sentencing, among other reforms); Immel, *supra* note 961; James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 91, 111 (2000) (discussing instructions given to court members and members' lack of familiarity with process); James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 Mil. L. Rev. 1, 29-30 (1994) (contending that option between sentencing by military judge or court members causes forum shopping).

1021 *See* Comm'n Report, *supra* note 1014. The Commission was "composed of nine members, five of whom were senior judge advocates with expertise in military justice from each Service, one who was a staff member of the United States Court of Military Appeals and three who were civilian attorneys recognized as experts in military justice or criminal law." *Id.* at V.

1022 *Id.* at 6; *see also id., Minority Report in Favor of Proposed Change to Judge-Alone Sentencing,* at 28-46 (Commissioner Christopher J. Sterritt). Since the Commission's report, Kentucky and Oklahoma have done away with jury sentencing. In the six remaining states that permit jury sentencing, two place limits on the jury. *See Murphy v. Commonwealth*, 50 S.W. 3d 173, 178 (Ky. 2001) (stating jury sentence recommendation has no mandatory effect); *see also* Okla. Stat. Ann. tit. 22, § 927.1 (2003).

1023 *See* Comm'n Report, *supra* note 1014, at 4-5 (listing reasons for decision).

1024 *See generally, e.g.*, *Rita v. United States*, 551 U.S. 338 (2007) (discussing federal sentencing guidelines and role of court); *see also United States v. Booker*, 543 U.S. 220 (2005) (same).

1025 18 U.S.C. § 3771, codified for the military through FY14 NDAA §1701(a), which incorporated the same crime victim's rights from the CVRA into Article 6b of the UCMJ. Those rights are to be implemented through changes to the Manual for Courts-Martial no later than December 26, 2014.

1026 *See* U.S. Dep't of Def., DTM 14-003, DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support 9 (Feb. 12, 2014); *see also* DoD and Services' Responses to Request for Information 50 (Nov. 21, 2013).

1027 *See, e.g.*, *Transcript of RSP Public Meeting* 356-58 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender, describing complexity of sexual assault cases and discussing varying state collateral consequences of convictions).

1028 *See* Services' Responses to Request for Information 147 (Apr. 11, 2014) (listing training and selection requirements).

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court-martial panel members have no training, no experience,[1029] and are provided few instructions[1030] for sentencing. As noted in the 1983 Commission Report's dissent, "The right to members' sentencing is no more than the right to gamble on a group of inexperienced or overly sympathetic laymen reaching a less severe sentence than a professional judge."[1031] However, one statistical analysis of civilian jury sentences indicates that such sentences are harsher, not more lenient, than those of judges—and that, in any event, jury sentences are not reliable.[1032] Further, the American Bar Association Standard 18-1.4 holds that sentencing is a judicial function that should not be performed by juries:

> Imposition of sentences is a judicial function to be performed by sentencing courts. The function of sentencing courts is to impose a sentence upon each offender that is appropriate to the offense and the offender. The jury's role in a criminal trial should not extend to determination of the appropriate sentence. [1033]

c. Arguments Supporting Changing to Judge Alone Sentencing

(1) Military Judges' Greater Training and Experience

Military judges are carefully screened and selected for their judicial temperament, legal experience, and knowledge of procedure and law.[1034] They are members of the bar of a Federal court or the highest court of a state, and certified as qualified for duty as a military judge by their TJAG.[1035] Additionally, military judges are uniformed military officers, not civilians, selected for their abilities as both lawyers and military officers.[1036]

Military judges receive specific professional training in selecting sentences that take into account all principles of sentencing.[1037] Unlike military members, judges gain experience by presiding over various types of cases,

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1029 *See, e.g.,* Young, *supra* note 1020, at 111 (describing members' concerns about lack of experience and guidance).

1030 *See, e.g., United States v. Rinehart*, 8 C.M.A. 402, 406, 24 C.M.R. 212, 216 (1957) (holding that court members are not permitted to "rummage through a treatise on military law, such as the Manual [for Courts-Martial]"); *see also* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, Instr. 2-5-21, at 60-61 (2014) (setting forth judge's instruction to members: "You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion.").

1031 *See* Comm'n Report, *supra* note 1014, *Minority Report in Favor of Proposed Change to Judge-Alone Sentencing,* at 39 (Commissioner Christopher J. Sterritt).

1032 *See* Weninger, *supra* note 1015, at 37-40.

1033 *See* American Bar Ass'n, Criminal Justice Section, Sentencing Standard 18-1.4, *available at* http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_sentencing_tocold.html.

1034 *See, e.g.,* Army's Response to Request for Information 147 (Apr. 11, 2014) (stating that military judges in Army are selected by The Judge Advocate General, upon recommendation by Chief Trial Judge, pursuant to criteria including legal and military justice experience, length of service, demonstration of mature judgment and high character, and other factors listed in Chapter 8 of JAGC Publication 1-1. U.S. Dep't of the Army, Office of The Judge Advocate General, Pub. 1-1 ("Personnel Policies") (Jan. 1, 2014) (updated Mar. 17, 2014).

1035 *Id.; see also* MCM, *supra* note 97, R.C.M. 502(c); 10 U.S.C. § 826 (UCMJ art. 26).

1036 *See* Services' Responses to Request for Information 147 (Apr. 11, 2014) (addressing selection and training of military judges).

1037 *See* Services' Responses to Request for Information 147 (Apr. 11, 2014).

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working with other judges, and participating in ongoing judicial education that incorporates best and promising practices of the judiciary.[1038]

On the other hand, military panel members are not required to have any legal experience to participate in sentencing.[1039] Most military panel members participating in sentencing, including in cases involving adult sexual assault, have never done so before.[1040] Although military panel members receive instruction about the goals of sentencing,[1041] the instruction does not equate to the training, experience, and understanding of the collateral consequences of convictions that military judges have.

Unlike the binary, structured, "not guilty/guilty" determination that members make on findings, the sentencing decision is more complex. During a trial, the question posed to panel members concerns the elements, a given standard of proof, and whether the government has carried its burden. While some charges such as conspiracy or inchoate crimes may be complex, the jury's task remains to answer one question: Did the government meet its burden of establishing guilt beyond a reasonable doubt?[1042]

Conversely, sentencing presents no such structured task. The range of potential sentencing options includes confinement, forfeitures, and fines.[1043] Selecting a fair sentence involves assessing this range of punishments, including punishments not available in the civilian judicial system such as discharge from the Service and reduction in rank.[1044] Likewise, military members have complained in the past that selecting a sentence is harder than voting on guilt or innocence.[1045] Thus, sentencing may produce confusion that, when coupled with a lack of sentencing training and experience, may lead to unwarranted disparities.[1046]

1038 *Id.*

1039 *See* 10 U.S.C. § 825 (UCMJ art. 25); *see generally, e.g.*, *United States v. Gutierrez*, 11 M.J. 122, 125 (C.M.A. 1981) (Everett, C.J., dissenting) (discussing maximum punishment advisement to members and stating about sentencing that "[w]hile court-martial members should not languish in ignorance, they should also be shielded from information which could well tend to confuse or mislead them").

1040 *See supra* notes 1021, 1037.

1041 *See generally* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, Instr. 2-5-21 (2014).

1042 It should be noted that in capital cases, both military and civilian, the decision whether to adjudge death is more like that on guilt or innocence than sentencing in other cases. This is because constitutional requirements in capital cases dictate a highly structured process in which the jury, or members, must decide specific questions applying an articulated standard of proof.

1043 Sentencing complexity may be one reason: In the military, all known offenses committed by an accused may be tried at the same time, even if the offenses are not related to each other in any way. MCM, *supra* note 97, R.C.M. 307(c)(4) ("Charges and specifications alleging all known offenses by an accused may be preferred at the same time.").

1044 Punishments not available in civilian settings include: reprimand; reduction in pay grade; restriction to specified limits; hard labor without confinement; and punitive separation. *See* MCM, *supra* note 97, R.C.M. 1006; R.C.M. 1007. Punishments typically available in the civilian setting include: the death penalty; incarceration; probation (remain at liberty but subject to certain conditions and restrictions such as drug testing or drug treatment); fines; and restitution. *See* Bureau of Justice Statistics, "The Justice System: What Is the Sequence of Events in the Criminal Justice System: Sentencing and Sanctions" *at* http://www.bjs.gov/content/justsys.cfm#sentencing.

1045 *See* Young, *supra* note 1020, at 111.

1046 *See* Immel, *supra* note 961, at 186-87 (concluding that military sentencing data indicates high degree of disparity); *see also* Kisor, *supra* note 873, at 56 (discussing sentencing disparities in military members sentencing cases).

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(2) Panel Member Sentencing May Invite Forum Shopping

Those supporting eliminating members sentencing posit that allowing the accused the choice of forum on sentence may invite consideration of which forum will provide the most lenient sentence, which the 1983 Commission Report recognized.[1047] However, as noted, civilian jury sentencing research indicates that jury sentences may in fact not be more lenient, but may instead be more severe; in any case, the study shows them to be less predictable.[1048]

As noted earlier, the Commission Report predated current law, which, since 1994, has allowed the government to insist on sentencing by military judge as a condition of obtaining a pretrial agreement.[1049] However, the fact that most adult sexual assault cases go to trial diminishes the significance of this provision.[1050]

(3) Panel Member Sentencing is Administratively Burdensome

Member sentencing requires the absence of panel members from their regular duties, disrupting ordinary military training and operations. Allowing a military judge to perform sentencing would allow panel members to return to their commands and normal duties more quickly.

(4) Members Sentencing May Undermine Victim and Public Confidence in the Military Justice System

Members are selected by the convening authority, based on that official's assessment of their qualifications.[1051] Even though convening authorities endeavor to select fair and unbiased members, the fact that the person who is deeply involved in the case and who elected to prosecute also chose the members can give rise to the perception of unfairness.[1052] Of course, an accused that fears manipulation or even unintended influence by the convening authority has the option to choose trial and sentencing by the military judge. However, a *victim* who lacks faith in the convening authority has no such option. Nevertheless, if a panel returns a lenient sentence, public confidence in the convening authority's member selection is subject to challenge, with critics suggesting the command purposefully chose lenient members. If a panel returns an extraordinarily harsh sentence, public perception of the convening authority's member selection may also be challenged, calling into question the fairness of the military justice system.

1047 *See* Comm'n Report, *supra* note 1014, at 28 ("Continuing a Service member's forum option through the sentencing phase enables an accused to 'forum shop' for the court-martial composition which is likely to award the most lenient sentence."); *see also* Lovejoy, *supra* note 1020, at 29-30 (contending option between sentencing by military judge or court members causes forum shopping).

1048 *See generally* Weninger, *supra* note 1015.

1049 *United States v.* Burnell, 40 M.J. 175, 176 (C.M.A. 1994) held that,

> [T]he Government, when considering proposing a pretrial agreement, is not prohibited from insisting that an accused waive his right to trial by members . . . Such a provision may not only originate with the Government, it may also be required by the convening authority before he or she will even consider acceptance of any pretrial agreement.

See also United States v. Andrews, 38 M.J. 650, 653 (A.C.M.R. 1993); *see also United States v. Rhule*, 53 M.J. 647 (A. Ct. Crim. App. 2000), *review denied*, 55 M.J. 52 (C.A.A.F. 2001).

1050 *See* Army's Response to Request for Information 41(h) (Nov. 21, 2013). According to the Army's response to Request for Information 41(h), the Army was the only Service that tracked the number of adult sexual assault cases that went to trial versus guilty plea before FY 2013. The FY13 contested case data shows 70% for the Army, 77% for the Navy, and 22% for the Coast Guard (with no data received from the Marine Corps).

1051 10 U.S.C. § 825 (UCMJ art. 25).

1052 Brigadier General John S. Cooke, *The Twenty Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 11, 25 (1998).

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Similarly, sentences in adult sexual assault cases may affect victim confidence in the military justice system.[1053] Victim confidence in adult sexual assault case sentencing outcomes, in turn, may affect victim reporting.[1054]

d. Arguments Favoring Retention of Members Sentencing[1055]

(1) Members Sentences Best Represent the Military Community's Perspective

Proponents of panel-member sentencing state that it represents the considered judgment of the military community; panel members can best assess the impact of a military offense on the good order and discipline of the specific command in which it occurs.[1056] In the past, this argument may have carried particular weight in a combat environment, where combat experience may have afforded particular insight into relevant circumstances.[1057] A related benefit of members sentencing is that the process may reinforce the military community's perceptions of fairness, because military members choose the sentence.

(2) Members Sentencing is an Important Right of the Accused

Supporters of panel members sentencing argue that the existence of the practice of sentencing by members is an important right for those accused of committing a crime in the military. They also contend that the number of cases in which accused Service members elects sentencing by members demonstrates its desirability.[1058] Sentencing includes uniquely military offenses such as failure to obey an order or regulation, contempt towards officials, unauthorized absence, and disrespect towards superiors.[1059]

> Members bring a 'sense of the community' that judges cannot entirely duplicate. Although that 'sense' sometimes includes considerations that some of us would think came from left field, it also includes appreciation of unique aspects of military life that can be very important, especially when dealing with certain military type offenses. This often works in the accused's favor and could be considered an important protection.[1060]

1053 *See* Marlene Higgins, Note, *The Air Force Academy Scandal: Will the "Agenda for Change" Counteract the Academy's Legal and Social Deterrents to Reporting Sexual Harassment and Assault?*, 26 Women's Rights L. Rep. 121 (2005).

1054 For a more detailed discussion of Victim's Rights, including a recommendation on the right of allocution, see the Report of the Victim Services Subcommittee to the Response Systems Panel, *supra* note 16.

1055 Subcommittee member Colonel Lawrence J. Morris's (U.S. Army, Ret.) statement appears *infra* at Part IX, and details arguments favoring retaining the current members sentencing system. Colonel (R) Morris is joined by Colonel Dawn E.B. Scholz (U.S. Air Force, Ret.) in the dissent, ultimately concluding that further study is needed. Colonel Scholz concluded, "like the change to the Art 32 hearing proposed in Recommendation 43-E, we do not have enough information as to the need for this, the larger ramifications of this change or how it might benefit DOD's response to sexual assaults. I do not think we have enough evidence of disparity of sentences and am not sure we know how this helps sexual assault victims. It does take an option away from the accused. I believe it needs further study by the JSC or the JPP before we recommend [the Secretary of Defense] recommend amendments to the MCM, the UCMJ, and Service regulations."

1056 *See, e.g.*, Comm'n Report, *supra* note 1014, at 14.

1057 However, over the past decade of deployments, military judges have deployed, and many come to the judiciary after serving in operational positions.

1058 As noted *supra*, however, because the accused Service member's choice of forum dictates the sentencing authority, others respond that this election may simply signal the desire for a trial before members, rather than any preference for sentencing.

1059 Michael I. Spak & Jonathon P. Tomes, *Courts-Martial: Time to Play Taps?*, 28 Sw. U. L. Rev. 481, 496-97 (1999).

1060 Cooke, *supra* note 1052, at 20.

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

(3) Experience for Future Commanders and Leaders

Those in favor of retaining member sentencing in the military state that direct participation in the military justice system helps to involve members of the military community in the court-martial process and to prepare future commanders and leaders. This develops their judgment, as well as their knowledge of the process. In turn, this makes them better leaders, commanders, and convening authorities. Nonetheless, participation in courts-martial *trials* satisfies these interests, and eliminating *sentencing* by members does not preclude or diminish such participation.[1061] Thus, leaving sentencing to judges preserves these interests while promoting best outcomes in sentencing, which serves to enhance the overall credibility of the military justice system.

e. Positions of Military Services on Member Sentencing

The RSP asked the Services for their positions on eliminating member sentencing. The Services' positions generally identified the arguments already listed. The Army noted that selecting a sentencing forum has been a right of the military accused for many years, and expressed hesitation at making such a change "without careful study and consideration."[1062] The Air Force "JAG Corps leadership recommends that the concept of judge-alone sentencing be forwarded to the Judicial Proceedings Panel (JPP) and the Military Justice Review Group (MJRG) for further study in the context of any other proposed changes to the court-martial process. At this point, the Air Force does not have an official position on eliminating sentencing by military panel members as a stand-alone proposition."[1063] The Marine Corps supported further study of the issue by the Judicial Proceedings Panel.[1064] The Coast Guard was undecided or favorable toward judge-alone sentencing.[1065]

f. Conclusion

There are valid arguments for and against eliminating sentencing by court members and requiring sentencing by the military judge in all cases (except capital cases). A majority of the Subcommittee concluded as a policy decision, however, that sentencing by military judges would provide greater expertise, mitigate emotional or extraneous factors, and increase confidence in courts-martial sentences in sexual assault and other cases. It would also facilitate other possible beneficial changes in sentencing such as abolishing unitary sentencing.

C. UNITARY SENTENCING PRACTICE

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

1061 Sentencing by military members after a guilty plea before a military judge is possible but seldom occurs.

1062 *See* Army's Response to Request for Information 148 (Apr. 11, 2014). However, there is no way to determine whether the "right" reflects the accused's decision for trial or sentencing by members—because forum selection governs both. The proposed recommendation does not affect an accused's choice to select a trial by members.

1063 *See* Air Force's Response to Request for Information 148 (Apr. 11, 2014).

1064 *See* Marine Corps' Response to Request for Information 148 (Apr. 11, 2014).

1065 *See* Coast Guard's Response to Request for Information 148 (Apr. 11, 2014).

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Finding 55-1: The military system uses a unitary or aggregate sentence provision for multiple specifications (counts) of conviction. [1066] In other words, a sentence is adjudged as a total for all offenses, rather than by specific offense. However, the FY14 NDAA changes to Article 60 restrict the convening authority's ability to set aside or commute findings of guilt, and specifically exclude offenses under Article 120(a) or 120(b), Article 120b, or Article 125 of the UCMJ even though convictions for these offenses often occur with convictions for other non-sexual offenses.[1067] Thus, the practice of awarding a sentence as a total, rather than specified by each offense of conviction, makes the convening authority's ability to act on these additional specifications unclear, obscures the punitive consequences of specified offenses, and makes accountability for sexual assault difficult to ascertain.

Discussion

The FY14 NDAA change to Article 60 clemency affects "unitary sentencing" because the convening authority's ability to grant clemency for certain offenses is restricted. Consequently, the convening authority must know the precise sentence awarded for each offense of conviction to effectively exercise clemency.

As noted in Finding 55-1, sentences are currently adjudged in the aggregate. The aggregate sentence may result in the need for a sentencing rehearing when appellate courts remand cases (though most of the time the appellate court reassesses in light of error). For example, consider a Service member convicted of two specifications of sexual assault and one specification of adultery who receives 15 years of confinement. A rehearing could occur if the appellate court approves only one specification of sexual assault and the appellate court determines it cannot accurately reassess the sentence. Although they are not the norm, rehearings can place post-trial burdens on victims and prevent case closure because victims have to re-appear at sentencing. Additionally, rehearings can be time consuming, costly, and logistically challenging because witnesses move, deploy, and separate from the Service.

The Military Services' provided their positions regarding proposing an amendment to discontinue unitary sentencing.[1068] The Army opposes a change without further careful study, noting that such a change could affect plea negotiations and potentially create appellate issues. The Air Force opposes the change. The Coast Guard did not take a position supporting or opposing the change, but listed perceived pros and cons. The Marine Corps supports further study.

D. SENTENCING GUIDELINES

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

Finding 56-1: There are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President, exercising his authority under the UCMJ, establishes a maximum punishment

1066 *See United States v. Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995); *Jackson v. Taylor*, 353 U.S. 569 (1957).

1067 FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).

1068 *See* Services' Responses to Request for Information 149 (Apr. 11, 2014).

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

for each offense. In contrast, the federal system, twenty states, and the District of Columbia use some form of a sentencing guideline system.

Finding 56-2: Sentencing guidelines are often complex and may require substantial infrastructure to support them, including sentencing commissions which study, develop, implement and amend the guidelines over time. For instance, to formulate baseline recommendations for federal sentencing guidelines, the United States Sentencing Commission collected and examined data from 100,000 cases that had been sentenced in federal courts—10,000 of which it studied in "great detail." [1069] Twenty-four states and the District of Columbia currently have sentencing commissions.[1070]

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

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

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

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

- The overarching goals in current state and federal sentencing guidelines vary based on the method of development, articulated purposes, structure, and application. Some common objectives include reducing sentencing disparities, achieving proportionality in sentencing, and protecting public safety.[1071]
- There are two approaches used in creating sentencing guidelines: (1) a descriptive approach, which is data-driven and used to achieve uniformity, and (2) a prescriptive approach, which is used to promote certain sentences.[1072]
- Different entities oversee sentencing guidelines in the state and federal systems, with some choosing judicial agencies and others choosing legislative agencies.[1073]

1069 *Transcript of RSP Comparative Systems Subcommittee Meeting* 149 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

1070 *Id.* at 242 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

1071 *Id.* at 242-44.

1072 *Id.* at 264 (testimony of Mr. Mark Bergstrom, Pennsylvania Commission on Sentencing).

1073 *Id.* at 247 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

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- The flexibility of sentencing guidelines varies widely in the states, ranging from mandatory to presumptively applicable to completely discretionary.[1074]

- Additional details include: (1) whether a worksheet or structured form is required, (2) whether the commission regularly reports on guidelines compliance, (3) whether compelling and substantial reasons are required for departures,(4) whether written rationales are required for departures, and (5) whether there is appellate review of defendant or government based challenges related to sentencing guidelines.[1075]

- The actual prison sentences defendants serve in jurisdictions with sentencing guidelines also varies depending on laws affecting parole and other "truth in sentencing" issues.[1076]

Discussion

The Subcommittee received background information and heard testimony from civilian experts in state and federal sentencing guidelines, including a representative from the United States Sentencing Commission (USSC), Virginia Criminal Sentencing Commission, and Pennsylvania Commission on Sentencing.[1077] The USSC representative has served at the USSC since its inception, and provided detailed information about the background of sentencing guidelines and the data collected in their creation.[1078]

Twenty states, the District of Columbia, and the federal system have sentencing guidelines.[1079] States differ in their approach to which group provides oversight of the sentencing guidelines, with some choosing judicial agencies and others legislative agencies.[1080] The USSC uses an extensive database of federal criminal trials and sentences.[1081] To create the Guidelines, the Commission collected and examined data from 100,000 cases sentenced in federal courts to create an initial sentencing database.[1082] Of those 100,000 cases, the Commission studied 10,000 in "great detail."[1083] The Commission continues to use that data, along with other information, as it formulates new sentencing policy recommendations.[1084] The Commission currently has a staff of over 100 people.

This volume of data is unlikely to be available for analysis in the military community, both because there are far fewer cases, and because of the limits on empirical information described above. Nonetheless, this suggests that considerable data collection and analysis may be required to fairly assess the issue, and this would have

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1074 *Id.* at 249-50.

1075 *Id.* at 251-52.

1076 *Id.* at 260.

1077 *See generally Transcript of RSP Comparative Systems Subcommittee Meeting* 239-342 (Feb. 11, 2014).

1078 *See* United States Sentencing Commission, "Biographical Information: L. Russell 'Rusty' Burress," *currently available at* http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions-2/20131107-3/css-20140211.

1079 *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

1080 *Id.* at 247.

1081 *Id.* at 149 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission).

1082 *Id.*

1083 *Id.*

1084 *Id.* at 149-150.

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significant resource implications. Furthermore, a guideline system could have collateral effects on other courts-martial procedures, including how evidence is collected and presented, whether to retain unitary sentencing, and courts-martial record-keeping.

Ultimately, the jurisdictions that have employed sentencing guidelines have had clearly articulated policy reasons for implementing those guidelines, and each jurisdiction's policy followed deliberate collection of quantifiable, empirical evidence.[1085] "The most frequent [reason] that's cited or articulated is to reduce sentencing disparity or increase consistency in sentencing outcomes."[1086] Though the most commonly cited reason for instituting sentencing guidelines, the goal of consistency in sentencing is often the most vulnerable to criticism. One public defender testified to the Subcommittee regarding federal sentencing guidelines, "The one thing I have discovered is that there is absolutely no uniformity as far as I can tell. Every district does the sentencing guidelines differently, and every district has its own policies [for applying the sentencing guidelines]."[1087] Because of this potential for criticism, sentencing guidelines must be carefully studied, judiciously crafted, widely trained upon implementation, and audited for general consistency in application.

E. MANDATORY MINIMUM SENTENCES

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

Finding 57-1: Mandatory minimum sentences remain controversial.[1088] Testimony and other evidence the Subcommittee gathered from civilian prosecutors, civilian defense counsel, and two victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting.[1089]

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

1085 *See generally Transcript of RSP Comparative Systems Subcommittee Meeting* (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, and Mr. Mark Bergstrom, Pennsylvania Commission on Sentencing, discussing history and development of sentencing commissions and guidelines).

1086 *Id.* at 243 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission). For further information on study and implementation of sentencing guidelines, *see also* PowerPoint Presentation of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission, to RSP Comparative Systems Subcommittee, "Virginia Criminal Sentencing Commission, Overview of State Sentencing Guidelines and Sentencing Guidelines for Sexual Assault Offenses in VA" (Feb. 11, 2014).

1087 *Transcript of RSP Comparative Systems Subcommittee Meeting* 409 (Feb. 11, 2014) (testimony of Mr. A. J. Kramer, Federal Public Defender, District of Columbia).

1088 *See, e.g.*, Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Defendants to Plead Guilty (2013) (discussing mandatory minimum sentences in context of drug crimes), *at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf.

1089 *See, e.g.*, *Transcript of RSP Comparative Systems Subcommittee Meeting* 311 (Feb. 11, 2014) (testimony of Ms. Annette Burrhus-Clay, President, National Alliance to End Sexual Violence and Executive Director, Texas Association Against Sexual Assault) ("My experience tells me that victims will be less likely to report sexual assault if we have mandatory minimums.").

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

Finding 57-3: Very few military offenses currently require mandatory minimum sentences. A DoD-directed study of military justice in combat zones recently recommended review of "whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence." [1090]

Discussion

Mandatory minimum sentences, especially if too rigid or severe, may chill victim reporting in some cases because the victim may not want to be the cause of such consequences.[1091]

The UCMJ currently requires a mandatory minimum sentence for three offenses. Spying has a mandatory minimum death sentence;[1092] premeditated murder[1093] and felony murder[1094] have a mandatory minimum of a life sentence with the possibility of parole. Additionally, Section 1705(a) of the FY14 NDAA amends Article 56 of the UCMJ to impose the mandatory minimum punishment of dismissal or dishonorable discharge for anyone convicted of rape or sexual assault (under Article 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts to commit those offenses (under Article 80). This provision becomes effective June 26, 2014 (180 days after enactment of the Act).[1095]

On September 4, 2013, the Secretary of Defense directed the Acting General Counsel to request the RSP study mandatory minimum sentences for military sex-related offenses.[1096] The Acting General Counsel subsequently

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1090 Defense Legal Policy Board, Report of the Subcommittee on Military Justice in Combat Zones 145 (May 2013), *available at* http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf.

1091 *See Transcript of RSP Comparative Systems Subcommittee Meeting* 314 (Feb. 11, 2014) (testimony of Ms. Annette Burrhus-Clay, President, National Alliance to End Sexual Violence and Executive Director, Texas Association Against Sexual Assault) ("From the perspective of the sexual assault victim, the system is broken. However, adopting mandatory minimum sentencing is unlikely to mend the justice system. The net result of this type of get tough on crime, make everybody feel better reform may very well be less reporting, fewer prosecutions for sexual assault, and ultimately a step backwards in justice for survivors."); *see also, e.g.*, Focus Groups Report, supra note 1018, at 164 ("The punishment of turning someone in is so extreme. If you were to turn someone in for touching your butt, they could honestly be sitting in confinement for the rest of the year. That's a huge punishment for probably not that big of a crime. But if you don't stop it, then it escalates. So it's a huge Catch-22, actually."). In accordance with the Smarter Sentencing Act of 2014, the Department of Justice has asked the United States Sentencing Commission to seriously consider simplifying the Sentencing Guidelines, and to conduct a review of drug sentencing, including mandatory minimums.

1092 "Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the Armed Forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death." 10 U.S.C. § 906 (UCMJ art. 106).

1093 "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill . . . ." *Id.* at § 918 (UCMJ art. 118).

1094 "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct." *Id.*

1095 FY14 NDAA, Pub. L. No. 113-66, § 1705(a), 127 Stat. 672 (2013).

1096 U.S. Dep't of Def., Memorandum from the Secretary of Defense to the Acting General Counsel of the Department of Defense (Sept. 4, 2013), *currently available at* http://responsesystemspanel.whs.mil.

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

asked the RSP to include in its review an assessment on the efficacy of mandatory minimum sentences for military sexual assault cases.[1097]

The offenses that are the subject of this study are serious and, in most cases, serious punishment, including a dishonorable discharge, is appropriate. However, almost always, there are a few cases that fall outside the "norm" and for which a punishment adjudged is widely considered to be too lenient or too severe.[1098] The question raised by mandatory minimums is how much discretion to repose in the sentencing authority to deal with unusual cases.

Given this choice, and considering the other criticisms of mandatory minimum sentences, including their potential to deter victim reporting, the Subcommittee recommends against the adoption of mandatory minimum sentences and further recommends reexamination of minimums recently adopted, as discussed below.

In response to an RSP request, the Department of Defense provided its views on establishing mandatory minimum sentences. The Department suggested that establishing mandatory minimums could increase the number of trials and decrease the number of guilty pleas for these cases.[1099] For fiscal year 2013, the U.S. Army reported 122 guilty pleas on sexual offenses, the U.S. Navy reported 17 guilty pleas on sexual offenses, and the U.S. Marine Corps reported 36 guilty pleas on sexual offenses.[1100] The DoD expressed concern about mandatory minimums increasing contested trials,[1101] and that an increase in the number of trials would "almost certainly lead to an increase in the raw number of acquittals."[1102]

The characterization of a discharge from military service carries with it collateral consequences, potentially including loss of Veteran and retirement benefits.[1103] Of note, this mandatory discharge requirement builds upon a system that already requires processing for administrative separation for those Service members convicted of adult sexual assault offenses (if they did not receive a punitive discharge at the court-martial).[1104]

1097 Letter from the Acting General Counsel of the Department of Defense to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), *currently available at* http://responsesystemspanel.whs.mil.

1098 In a 2010 poll of federal judges by the U.S. Sentencing Commission, approximately 60 to 70 percent responded that they liked having discretion in applying sentencing guidelines. Only about 20 percent responded in favor of employing mandatory minimums within those guidelines. *See Transcript of RSP Comparative Systems Subcommittee Meeting* 154 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission). Mr. Burress also testified that the U.S. Sentencing Commission data noted there were 121 cases where the sexual abuse guideline was used in federal courts in 2013. In 65 cases, judges stayed within the guidelines. In 36 cases, judges departed from the guidelines and returned a lower sentence with the prosecutor's recommendation. In 37 additional cases, the judge gave a lower sentence with no support from the prosecutor. *See id.* at 214-15.

1099 DoD Response to Request for Information 110 (Nov. 21, 2013); *see also, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 497 (Feb. 11, 2014) (testimony of Colonel John Baker, U.S. Marine Corps) ("[O]ne thing that I know, both statistically and more anecdotally, is since we've had the advent of the sexual assault registration requirement, that our assault cases have been increasingly contested. . . . [A]nd when you put more contested cases into the process, there's going to be more acquittals.").

1100 *See* Service Responses to Request for Information 41h (Nov. 1, 2013). The U.S. Air Force does not track this data.

1101 *See also Lafler v. Cooper*, __ U.S. __, __, 132 S. Ct. 1376, 1388 (2012) (noting that "criminal justice today is for the most part a system of pleas, not a system of trials").

1102 DoD Response to Request for Information 110 (Nov. 21, 2013).

1103 *See generally, e.g.*, John W. Brooker, et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 Mil. L. Rev. 1 (2012).

1104 FY13 NDAA, Pub. L. No. 112-239, § 572 (a)(2), 126 Stat. 1632 (2013).

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

Even Service members acquitted of adult sexual assault crimes may be sent to administrative board proceedings for potential separation from the Service.[1105] Additionally, mandatory sex-offender registration, which is already a consequence in many jurisdictions resulting from a military conviction for adult sexual assault crimes, is tantamount to a mandatory minimum sentence.[1106]

F. CLEMENCY OPPORTUNITIES AND CHANGES TO ARTICLE 60

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

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

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

Finding 58-3: Post-trial relief may be effectively foreclosed for convicted Service members who do not receive punitive discharges or confinement for more than one year. Those Service members have limited access to appellate review, with the only avenue a review by the Office of The Judge Advocate General pursuant to Article 69 of the UCMJ.

1.Post-trial Responsibilities of Commanders and Convening Authorities

Discussion

A court-martial sentence of confinement begins immediately after the announcement of the sentence, and some sentences are completely served before the case receives appellate review. Rule for Courts-Martial 1101 requires notification to the accused's immediate commander and the convening authority of the findings and sentence immediately following the announcement of the sentence.[1107] The accused may petition the convening authority to defer the effective date of any sentence to confinement, forfeitures, or reduction in grade which have not been ordered executed.[1108] This request may be submitted any time prior to the convening authority's initial action on the court-martial findings and sentence. If granted, the deferment ends when the sentence is

1105 *See* Services' Response to Request for Information 113 (Nov. 21, 2013).

1106 *See, e.g.*, *Transcript of RSP Public Meeting* 356-58 (Dec. 12, 2013) (testimony of Ms. Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender,); *see also* Brooker, *supra* note 1103.

1107 10 U.S.C. § 860 (UCMJ art. 60); MCM, *supra* note 97, R.C.M. 1101.

1108 MCM, *supra* note 97, R.C.M. 1101; 10 U.S.C. §§ 857, 857a (UCMJ arts. 57, 57a).

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ordered executed by the convening authority, or may be rescinded by the convening authority at any time prior to action.[1109] After the record of trial is prepared and authenticated by the military judge, the record is served on the accused with a copy of the Staff Judge Advocate's post-trial recommendation. The accused, with the advice of counsel, has ten days (up to thirty days with an extension request), to submit additional clemency matters to the convening authority.[1110] Under FY14 NDAA amendments, the victim may also submit matters for consideration by the convening authority within ten days (up to thirty days with an extension request) from receipt of the record and SJA post-trial recommendation.[1111] The convening authority is not required to act on the findings.[1112]

The convening authority must act on the sentence and order the execution of any approved sentence provisions.[1113] Following action on the sentence, the record of trial is either reviewed by a judge advocate under Articles 66 and 69 of the UCMJ, or transmitted to the Judge Advocate General of the Service for appellate action in accordance with Articles 66 and 69 of the UCMJ, respectively.[1114] After the record of trial and convening authority action has been forwarded, the convening authority may not modify the action unless directed to do so by an appellate review authority.[1115] Representatives from the Services testified that, in almost all cases, administrative review boards do not provide clemency relief until after completion of the appellate process.[1116]

Prior to the FY14 NDAA revisions, the convening authority had unfettered discretion in disapproving or commuting findings of guilt in a court-martial, and approving, disapproving, suspending, or commuting a court-martial sentence.[1117] Following implementation of the FY14 NDAA, however, the convening authority's ability to commute or otherwise disapprove both findings and sentences is significantly reduced.

2. Section 1702(b), Revision of Article 60, Uniform Code of Military Justice

Section 1702(b) of the FY14 NDAA amends Article 60 of the UCMJ, to curtail a convening authority's ability to alter findings and sentences post-trial. These changes are effective June 26, 2014.[1118]

Under the new law, a commander with convening authority may act (i.e., set aside a finding of guilty or change a finding of guilty to guilty of a lesser included offense) on the findings of a court-martial only for qualified offenses – that is, offenses for which the maximum sentence of confinement that may be adjudged does not exceed two years; and the sentence actually adjudged does not include dismissal, a dishonorable or bad conduct discharge, or confinement for more than six months. Rape and Sexual Assault (Articles 120(a) and 120(b) of

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1109 10 U.S.C. § 857(a)(2) (UCMJ art. 57(a)(2)); MCM, *supra* note 97, R.C.M. 1101(c)(7).

1110 MCM, *supra* note 97, R.C.M. 1103; R.C.M. 1104; R.C.M. 1105; *see also* FY14 NDAA Pub. L. No. 113-66, § 1706, 127 Stat. 672 (2013) (prohibiting the convening authority from considering "submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial.").

1111 FY14 NDAA, Pub. L. No. 113-66, § 1706, 127 Stat. 672 (2013).

1112 10 U.S.C. § 860 (UCMJ art. 60); FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).

1113 MCM, *supra* note 97, R.C.M. 1107.

1114 10 U.S.C. § 865 (UCMJ art. 65).

1115 *See United States v. Alexander*, 63 M.J. 269 (C.A.A.F. 2006).

1116 Transcript Feb 11 p 98 Mr. Bruce Brown, U.S. Air Force Clemency and Parole Board.

1117 10 U.S.C. § 860 (UCMJ art. 60); MCM, *supra* note 97, R.C.M. 1107.

1118 FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).

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

the UCMJ), Rape and sexual assault of a child (Article 120b of the UCMJ) and Forcible Sodomy (Article 125 of the UCMJ) are specifically excluded from the list of qualifying offenses. Thus, a convening authority may not change the findings in cases with these expressly excluded qualified offenses.

In cases in which a convening authority modifies the findings or sentence of a court-martial, the convening authority must prepare a written explanation which is made part of the trial record. Additionally, the convening authority may not reduce a sentence to less than a mandatory minimum, except on the recommendation of trial counsel due to the substantial assistance of the accused in the investigation or prosecution of another person who has committed an offense.[1119] The Subcommittee recommends the convening authority be permitted to delay the imposition of automatic forfeitures when necessary to protect and support dependents of the convicted Service members, who may themselves have been victims in sexual assault cases.

Conclusion

As noted previously, the Subcommittee has recommended changes to promote transparency, offender accountability, and clarity in in adult sexual assault case sentences. Additionally, sentences that articulate the precise punishment awarded for each offense of conviction serve the important public interest of making sexual assault case outcome information intelligible for dissemination and comparison with data from civilian jurisdictions.

1119 *Id.*

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

IX. SEPARATE STATEMENT

May 12, 2014

Response Systems to Adult Sexual Assault Crimes Panel
Comparative Systems Subcommittee

Separate Statement

by
Colonel, U.S. Army (Retired) Lawrence J. Morris,
General Counsel, The Catholic University of America

Joined by
Colonel, U.S. Air Force (Retired) Dawn Scholz

I write in respectful disagreement with my colleagues, who recommend that the military adopt judge-alone sentencing in the hope that it would improve the administration of justice in cases of sexual assault. I believe that the proposed change has no relationship to the trial of sexual assault cases, is not based on any supporting data, and undermines long-validated processes unique to the military justice system that balance the rights of the accused with the needs of the military, protect against unlawful command influence, and ensure command input and community involvement in punishing criminal behavior. For similar reasons I disagree with the recommendation that only military judges serve as Article 32 investigating officers: no data support the change, and it further removes the non-lawyer perspective from the judicial process, with the related costs to system integrity and reduced rank and file confidence.

The Subcommittee should squarely and forthrightly state the basis for such a fundamental change to the military justice system: the removal of lay[1120] participation in sentencing and expanding even further the role of the military judge. To support such changes, the Subcommittee should be able to identify trends or particular circumstances that establish that military panels are unable to administer justice fairly during the sentencing phase of trial. Proponents should be able to cite information that prompts a concern about justice – e.g., sentences that are unexplainably higher or lower than the "norm," if that norm is defined by similar cases that are presented to military judges. If there are no data, which I believe our Subcommittee concedes, then the Subcommittee should recommend the careful development of such data or, in the alternative it must be able to cite systemic factors that drive such a change, i.e. that juries are inherently incapable of administering sentences – or at least so much less capable than judges that justice compels removing such authority from

1120 By "lay" involvement I mean members of the military who are not lawyers or judge advocates.

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

these panels.[1121] Furthermore, for this recommendation to be within the Subcommittee's charge, there should be some information that juries are particularly unsuited for administering sentences in cases of sexual assault – and again there is none. The Subcommittee is left with similarly unsubstantiated speculation about whether such juries would tend to give higher sentences (perhaps reflecting unlawful command influence) or lower sentences (perhaps reflecting their imperviousness to command influence, perhaps an insufficient appreciation of the seriousness of the offense). Regardless, we generally hear the conclusory statement that such juries tend to produce "outliers," a vague term that can be applied casually to any sentence with which an observer disagrees. These "disagreements" tend to be defined by the perspective of those who know *something* from *some* source but that source did not have the information or responsibility that the jury did.[1122]

The system assumes that military panels can sort out matters of tremendous complexity and gravity under appropriate pressure – and the "system" is confident enough to permit a two-thirds vote from a jury as small as five persons to determine that a Service member is a felon; a three-fourths majority of the same panel can sentence a Service member to life in prison.[1123] We trust that panel to untangle competing versions of facts and to evaluate evidence on issues such as the presence of THC in a urine sample, DNA on a swab, or striations from a bullet – and we trust them to follow judges' instructions on sophisticated matters such as conspiracy, principals, expert testimony, and mental responsibility. These juries then must use both the law and their instincts – their knowledge of the ways of the world, their evaluation of witness credibility, bias and prejudice – to reach their verdict. We trust them to follow the judge's instructions and, having been selected according to the criteria intended to screen for wisdom[1124], to reach just and independent conclusions on the merits. The "we" who trust military lay court members with these responsibilities includes the Supreme Court of the United States, which has twice in the last 20 years upheld 9-0 the most serious and consequential aspects of military justice—capital case procedures. But the Subcommittee concludes that these same jurors are incompetent to sentence someone whom they have convicted.

Some critics suggest that the two stages of trial are not comparable because the merits phase, though daunting in its complexity, is guided by judge-delivered instructions that keep the jury within the law; conversely, some argue the sentencing phase is less rigorous and the five generally recognized sentencing factors[1125] leave too much to juries' discretion. This critique credits the jury's inherent capabilities on the merits and should counsel more modest and targeted tinkering with the sentencing phase – clearer instructions and the like – rather than removal of jury authority to sentence. The critique also does not address two significant aspects of the military sentencing process: its reliance on trial advocates and its careful screening of potentially sentence-distorting information and perspectives.

1121 While a "panel" is the correct term for military juries (and "members" for those who serve on such panels), I will use the terms jury and jurors because they are more familiar to all audiences and often used informally in the military as well.

1122 For every "outlier" from a juror an observer can point to a similarly puzzling sentence from a judge, including a couple of recent sexual assault cases in which many observers, including me, considered military judges not to have appreciated the gravity of the offense.

1123 *See* MCM, supra note 97, R.C.M. 501 (listing composition of courts-martial), R.C.M. 921(describing voting requirements).

1124 *See* 10 U.S.C. § 825 (UCMJ art. 25) (requiring a convening authority to select "best qualified" jurors, based on "age, education, training, experience, length of service, and judicial temperament").

1125 *See* U.S. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, Instr. 2-5-21, at 60-61 (2014); the judge instructs the members: "You should bear in mind that our society recognizes five principal reasons for the sentence of those who violate the law. They are rehabilitation of the wrongdoer, punishment of the wrongdoer, protection of society from the wrongdoer, preservation of good order and discipline in the military, and deterrence of the wrongdoer and those who know of (his) (her) crime(s) and (his) (her) sentence from committing the same or similar offenses. The weight to be given any or all of these reasons, along with all other sentencing matters in this case, rests solely within your discretion." *Id.*

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

The sentencing phase of a court-martial, though operating under "relaxed rules,"[1126] generally has the procedural rigor and transparency of the merits phase of trial, one of many differences from most civilian jurisdictions. Normally, sentencing immediately follows the merits and all documents and testimony are presented in public and on the record. The rules place significant limits on information that the government can introduce.[1127] The defense can cross-examine government witnesses, object to proffered documents, and present its own evidence. This sentencing procedure is a significant contrast to most civilian courts where various versions of pre-sentence reports are used. Typically, civilian pre-sentence reports are unilaterally assembled by the government, often full of hearsay and evidence that would not be admissible in court, subject to minimal opportunity for the defense meaningfully to object, and often not addressed or presented in open court. In contrast, the military depends on both parties to present and argue evidence in open court and on the record. Such rigor enhances justice as well as confidence in a system that can be observed and scrutinized by any observer. The Subcommittee cites the heavy majority of states in which juries do not have sentencing authority, but those states neither permit small juries to convict nor do they have juries who are screened according to the criteria of Article 25.

Advocates of removing the right to member sentences would leave the system with the ultimate paradox, i.e., that military juries would be prevented from administering sentences – except for death penalty cases where such sentencing is mandatory.[1128]

If there is a problem, either in fact or perception, then the medicine should fix the disease but *only* the disease. If fact or theory were to suggest dissatisfaction with juror sentencing, then lesser alternatives should be explored before abolishing the option. The Committee has not seriously evaluated whether other options such as sentencing guidelines (perhaps establishing a sentencing range rather than merely a maximum punishment) or more detailed instructions by military judges would represent a less radical, but sufficient, solution to the problem that the Subcommittee perceives. Even permitting juries to recommend a non-binding sentence to the judge, which some states employ,[1129] would honor the community's involvement in the sentence process while permitting a judge, perhaps supported by on-the-record special findings, to deviate from the jury's recommendation. I do not think such a change is warranted, but it represents one of several places on the sentencing continuum that should be analyzed and discarded before reaching abolition. Such a change would respect the role of the members in sentencing while tempering their discretion.

Advocates of abolition acknowledge that the current option of jury sentencing respects the community's stake in the sentence. That remains a singular justification for preserving this option, and candid judges will acknowledge that regularly hearing members' sentences gives them valuable perspective and sometimes nudges their sentences in one direction or another, in light of that opportunity for reflection.

There is much richness and subtlety in the sentencing options available to the military. Wise and dispassionate representatives of that community have a comprehension of the interplay between the range of sanctions available and the sentencing characteristics explained by the judge. In that sense all sentences are "subjective,"

1126 MCM, *supra* note 97, at R.C.M. 1001(c).

1127 *Id.* at R.C.M. 1001(b).

1128 *Id.* at R.C.M. 1003(b)(9), R.C.M. 1004.

1129 *See, e.g.*, *Murphy v. Commonwealth*, 50 S.W. 3d 173, 178 (Ky. 2001) (holding jury sentence recommendation has no mandatory effect); *see also Vines v. Muncy*, 553 F.2d 342 (4th Cir.), *cert. denied*, 434 U.S. 851 (1977) (holding that in Virginia, a jury sentencing verdict merely fixes maximum punishment judge may later award); *see also* Okla. Stat. Ann. 22, § 927.1 (2003) (designating judge as sentencing authority when jury fails to agree on punishment).

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

in that they represent the best judgment of the community or the judge, in light of the specific offense and the specific evidence offered during the sentencing phase. Were this not a subjective process, a judge would consult a sentencing chart and "justice" would be dispensed. The conscience and sensibilities of the community are rightly a part of the sentencing process – and perhaps nowhere more so than in cases of sexual assault. In analyzing the military's sentencing process and outcomes, critics should avoid the trap of focusing only on the term of confinement. It is the most universal element of sentencing and provides for the easiest – but sometimes superficial – comparisons. A military sentence rightly includes other major elements that we expect a panel to take into account, as each has a punitive aspect to it: reduction in rank, forfeitures of pay and allowances, and discharge.[1130] While reduction in rank is generally automatic in cases of confinement, juries are expected to consider it a discrete element of punishment and to adjudge it expressly, even when it is automatic (and juries may adjudge interim reductions in certain circumstances, reinforcing the independent judgment that the system expects to go into each sentencing option).[1131] Forfeitures also tend to be automatic in most cases of significant confinement, a relatively recent and healthy change that came from critical civilian analysis of the system,[1132] but juries deliberate and separately adjudge them as an element of every sentence. Finally, the discharge options also are a significant and independent punitive element. Juries are instructed that such discharges must be independently deliberated and adjudged, that they should be neither automatic nor administrative in nature[1133] – and analysts of the system must recognize that a sentence's "harshness" or "legitimacy" should also be evaluated with a consciousness of the intended ignominy and disabling impact that a punitive discharge carries for the military defendant. [1134] Members of the military community, custodians of the honorable discharge and steeped in appreciation of the significance and impact of such discharges, are especially suited to evaluating this and each sentencing element and crafting a sentence appropriate for each accused Service member.

In recommending a change of this consequence the Subcommittee should pay more than passing attention to the increased expectations it places on military judges. The Subcommittee also has recommended, also by a nearly unanimous vote, that judges serve as the exclusive Article 32 investigating officers.[1135] It has been less than a year since Congress fundamentally altered the Article 32 investigation by requiring that only judge advocates serve as hearing officers, while also reducing the hearing's function as a discovery vehicle for the defense. For this Subcommittee to type over that moist ink when there has been insufficient experience even to begin to evaluate the effects of the change is precipitous. It further reflects three sentiments: (1) that lay Service members are incompetent to manage that process, (2) that the perspective and experience of a line officer as Article 32 investigating officer does not add value to the system, and (3) that, on top of its already-truncated

1130 *See* MCM, *supra* note 97, at R.C.M. 1003(b)(4), R.C.M. 1003(b)(2), R.C.M. 1003(b)(8).

1131 *Id.* at R.C.M. 1003(b)(4); *see also* 10 U.S.C. § 858 (UCMJ art. 58) (automatic forfeitures).

1132 *See* MCM, *supra* note 97, at R.C.M. 1003(b)(2); 10 U.S.C. § 858 (UCMJ art. 58) (automatic forfeitures); *see also* Christopher P. Beall, Note, *The Exaltation of Privacy Doctrines over Public Information Law*, 45 Duke L.J. 1249 (1996) (discussing Dayton Daily News' coverage "Military Secrets" published Oct. 1 through Oct. 5, 1995).

1133 *See* MCM, *supra* note 97, at R.C.M. 1003(b)(8) (punitive discharge); *United States v. Horner*, 22 M.J. 294 (C.M.A. 1986) (limiting opinion testimony regarding punitive discharge); *United States v. Ohrt*, 28 M.J. 301, 303 (C.M.A. 1989) (discussing at length interplay between an opinion on rehabilitative potential, a punitive discharge, and an administrative discharge).

1134 The difference between the bad-conduct discharge and dishonorable discharge, both of which can be adjudged to enlisted Service members, represents a gradation of punishment that the sentencing authority carefully considers, as each carries a different connotation regarding service and carries different post-discharge costs regarding matters such as benefits eligibility. *See* MCM, *supra* note 97, R.C.M. 1003(b)(8); *see generally, e.g.*, John W. Brooker, et al., *Beyond "T.B.D.": Understanding VA's Evaluation of a Former Servicemember's Benefit Eligibility Following Involuntary or Punitive Discharge from the Armed Forces*, 214 Mil. L. Rev. 1 (2012).

1135 *See* Recommendation 43-E, *supra*.

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discovery function, the Article 32 investigation need not serve as a brake on potential command influence. The system should have the time to absorb and evaluate the monumental change so recently made before making yet another.[1136] While Congress no doubt considered the costs of removing lay involvement from the Article 32 process, there is no evidence to suggest that the additional measure of restricting this investigation solely to military judges would somehow be "even better."

The expanded role of such judges should prompt reflection on the Services' model for the selection, training, evaluation, and independence of the judge. It is typical for judges to have been judge advocates for about 15 years, and while it is common that they will have had a couple of tours in the courtroom, it also is typical that they have practiced a wide variety of law – administrative, claims, operational, wills, and taxes – they may not have practiced criminal recently or intensively. Still, the system entrusts the judging function to them because it generally considers a range of characteristics – perhaps age, education, training, experience, length of service, and judicial temperament – that the system believes, combined with a 100-hour certification course[1137] and a sort of "soft" tenure,[1138] make them qualified to manage the courtroom.[1139] Other than the required certification course, each Service has its own non-binding criteria for judicial selection and management; therefore the tremendous expansion of judges' consequential role in the system calls for critical evaluation. Factors to consider include who might be attracted to or recruited to the judiciary, whether a tier of "starter" judges might handle Article 32s, how to ensure judges do not self-select out of the mainstream of their JAG Corps or their military service, how to guarantee their independence, and whether the new judge-heavy system might invite a new and subtle form of command influence or presage growing leader indifference to the judicial process. The greatest irony regarding the issue of who should be an Article 32 officer is that the Article 32 hearing that drew the most opprobrium from critics and the media was conducted by a hearing officer who was not only a judge advocate (before the recent legislation mandating same) but also a military trial judge.[1140]

It can be argued that the military in recent times has become complacent about unlawful command influence, the mortal enemy of the military justice system.[1141] Command influence in the past was often manifested in dramatic ways and intuitively understood by all who experienced it. While leaders have become acculturated to the most common and enticing forms of command influence (a product of sustained lawyer-leader collaboration), policy makers must never forget the unique challenges that face a military accused: he has been accused of a crime almost always by a charge sheet sworn out by one of his leaders, each level of his command has endorsed the charges, the leader has selected the members of the jury, that jury is senior in rank and can convict most often by two-thirds vote and adjudge sentences of less than 10 years by the same ratio. For generations, and certainly since the Uniform Code of Military Justice took effect in 1951, the system has sought

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1136 I am not the first to observe that the most publicized case that led to the change to judge advocates serving as Article 32 investigating officers, involving sexual assault at the United States Naval Academy – involved a judge advocate as the investigating officer. *See infra* note 1140.

1137 *See* Services' Responses to Request for Information 147(b) (Apr. 11, 2014) (describing training of military judges as three-week course at the Judge Advocate General's Legal Center and School); *see also, e.g.*, Fredric I. Lederer and Barbara S. Hundley, *Needed: An Independent Military Judiciary – A Proposal to Amend the Uniform Code of Military Justice*, 3 Wm. & Mary Bill of Rts. J. 629 (1994).

1138 *See* Services' Responses to Request for Information 147(c) (Apr. 11, 2014) (listing military judge terms as three-year tour length).

1139 A sentiment COL(R) Scholz agrees with.

1140 *See* Annys Shin, *Two Ex-Navy Football Players to Go on Trial in Rape Case Despite Judge's Recommendation*, Wash. Post (Oct. 10, 2013), *available at* http://www.washingtonpost.com/local/two-of-three-ex-navy-football-players-charged-in-alleged-rape-will-face-court-martial/2013/10/10/0544abaa-31ae-11e3-8627-c5d7de0a046b_story.html.

1141 *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986) (discussing unlawful command influence as the "mortal enemy" of military justice).

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to wring command influence out of the system, but command influence, as often out of ignorance as venality, tends to arise and mutate in unforeseen ways. If members of the rank and file do not trust the system, it will not be effective.[1142]

When an accused knows that he at least has the *option* of being sentenced by members of the community (and when he is enlisted he can insist that one-third of that jury be enlisted members) that provides a powerful bulwark against the potential steamroller of command and governmental authority. That jury might produce one of those "outlier" sentences, but that sentence by definition *is* a product of justice, because it is adjudged by members who have been selected and instructed by the processes we have mentioned – so one observer's "outlier" is another's affirmation that the system has lawfully spoken. To remove this option for unsubstantiated reasons is to continue the process of chipping away at measures that protect the accused and enhance confidence in the system.

While I raise some concerns about how the Subcommittee reached the conclusion that decades of practice should be altered on the notion that the change will improve military justice, it is possible that a careful examination of our systems, processes, and results *will* reveal the need for change. It is possible that there are enough data to suggest inequity in the sexual assault area that is significant enough to mandate changing the historic practice. It is possible that commanders, who were not consulted on this issue during the Subcommittee's extensive and excellent hearings and deliberations, might support it – or offer a perspective worth including in the discussion. At a minimum, however, it would be appropriate for the Subcommittee to recommend careful study of the practice, controlling as much as possible for the many variables in sexual assault cases, so that at least it has information and not just a theory on which to determine what if any change is warranted.

Occasions such as this study naturally prompt all of us to examine the entire system and to recommend changes; in fact, many members have spent many years thinking about the system while working in or near it. We should be careful, however, not to become like the omnibus Congressional bill where there is the temptation to "fill the tree"[1143] with all sorts of provisions that might not be germane to the original bill, adding post offices and tax breaks to a transportation or agriculture bill. We should fix the problem before us, and to that end the Subcommittee has made many stark and appropriate recommendations – but we should focus policy makers on those justified changes and resist tinkering unrelated to our charter. Discarding jury sentencing in light of concerns expressed about leadership on this issue is akin to a ballplayer pulling a hamstring but ultimately having Tommy John elbow surgery.

The changes to the Article 32 process and removing the option of jury sentencing represent a major break from a system that has had confidence in the integral involvement of commanders, leaders, and non-lawyers in the administration of justice – not a heedless confidence, but a confidence that was appropriately bridled by Art. 25 selection criteria, the requirement for independent advice of the SJA to the convening authority, major limitations on government advocacy during the sentencing phase of trial, the secret written ballot, extreme sanctions for unlawful command influence, early and comprehensive clemency opportunities, and many other

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1142 *See generally* Francis A. Gilligan & Fredric Lederer, 1 Court-Martial Procedure § 1-20.00, at 2 (1991) ("Insofar as our fundamental goal is concerned, it is clear that military criminal law in the United States is justice based. This is not, however, incompatible with discipline. Congress has, at least implicitly, determined that discipline within the American fighting force requires that personnel believe that justice will be done. In short, the United States uses a justice-oriented system to ensure discipline; in our case, justice is essential to discipline.").

1143 *See* Hobnob Blog, "Amendment Tree / Filling the Tree," *at* https://hobnobblog.com/2012/03/filling-the-amendment-tree-congressional-glossary/.

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factors. The recommended changes reflect not a careful calibration of the system, like those in 1968 and 1983, but a mis-aimed attempt to quash a terribly serious problem with procedural changes that do not relate to sexual assault. Nor do the proposed changes begin to address the underlying cultural problem which, if not solved, will not be fixed by a cascade of changes to the justice process.

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Appendix A:
TERMS OF REFERENCE

These terms of reference establish the Secretary of Defense (SecDef) objectives for an independent subcommittee review of military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. At SecDef direction, the Comparative Systems Subcommittee ("the Subcommittee") has been established under the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) to conduct this assessment.

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

Issue Statement: Section 576(d)(1) of the FY 2013 National Defense Authorization Act provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). This includes a comparison of military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses. In addition, the Subcommittee should identify systems or methods for strengthening the effectiveness of military systems. Additionally, Section 1731 of the FY 2014 National Defense Authorization Act establishes additional tasks for the Response Systems Panel.

Objectives and Scope: The Subcommittee will address the following specific objectives.

- Assess the effectiveness of military systems, including the administration of the UCMJ, for the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.

- Compare military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes.

- Examine advisory sentencing guidelines used in civilian courts in adult sexual assault cases to assess whether it would be advisable to promulgate sentencing guidelines for use in courts-martial. Such assessment should include a study of the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy, and the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates).

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- Compare and assess the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, to the training level of prosecution and defense counsel for similar cases in the Federal and State court systems.

- Assess and compare military court-martial conviction rates for adult sexual assault crimes with those in the Federal and State courts for similar offenses and the reasons for any differences.

- Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.

- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

- An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel only for the purposes of identifying individuals who are subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report of sexual assault in those cases in order to facilitate increased prosecutions, particularly of serial offenders. The assessment should include an evaluation of the appropriate content to be included in the database, as well as the best means to maintain the privacy of those making a restricted report.

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

The Subcommittee shall develop conclusions and recommendations on the above matters and report them to the Response Systems Panel.

Methodology:

1. The Subcommittee assessment will be conducted in compliance with the Federal Advisory Committee Act (FACA).

2. The Subcommittee is authorized to access, consistent with law, documents and records from the Department of Defense and military departments, which the Subcommittee deems necessary, and DoD personnel the Subcommittee determines necessary to complete its task. Subcommittee participants may be required to execute a non-disclosure agreement, consistent with FACA.

3. The Subcommittee may conduct interviews as appropriate.

4. As appropriate, the Subcommittee may seek input from other sources with pertinent knowledge or experience.

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Deliverable:

The Subcommittee will complete its work and report to the Response Systems Panel in a public forum for full deliberation and discussion. The Response Systems Panel will then report to the Secretary of Defense.

Support:

1. The DoD Office of the General Counsel and the Washington Headquarters Services will provide any necessary administrative and logistical support for the Subcommittee.

2. The DoD, through the DoD Office of the General Counsel, the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, will support the Subcommittee's review by providing personnel, policies, and procedures required to conduct a thorough review of civilian and military systems used to investigate, prosecute, and adjudicate adult sexual assault crimes.

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

Appendix B:

MEMBERS AND STAFF OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE

ELIZABETH L. HILLMAN, CHAIR, PROVOST AND ACADEMIC DEAN, UC HASTINGS COLLEGE OF THE LAW

Elizabeth Hillman is Provost & Academic Dean and Professor of Law, University of California Hastings College of the Law. Her scholarship focuses on military law and legal history, and she has taught at UC Hastings, Rutgers University School of Law-Camden, Yale University, and the U.S. Air Force Academy. She has published two books, Military Justice Cases and Materials (2d ed. 2012, LexisNexis, with Eugene R. Fidell and Dwight H. Sullivan) and Defending America: Military Culture and the Cold War Court-Martial (Princeton University Press, 2005), and many articles addressing military law and culture. She is a Director of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide, and Co-Legal Director of the Palm Center, a think tank that seeks to inform public policy on issues of gender, sexuality, and the military. Dean Hillman attended Duke University on an Air Force ROTC scholarship, earned a degree in electrical engineering, and served as a space operations officer and orbital analyst in Cheyenne Mountain Air Force Base, Colorado Springs.

HONORABLE BARBARA JONES, U.S DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at Zuckerman Spaeder, LLP (law firm). She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering and terrorism. Prior to her nomination to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County. In that role she supervised community affairs, public information and oversaw the work of the Homicide Investigation Unit. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an assistant U.S. Attorney, as chief of the General Crimes Unit and chief of the Organized Crime Unit in the Southern District of New York.

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BRIGADIER GENERAL MALINDA DUNN, U.S. ARMY (RETIRED)

Brigadier General (Retired) Malinda Dunn is executive director of the American Inns of Court. Previously, BG(R) Dunn served 28 years in the U.S. Army as a judge advocate, including assignments as Assistant Judge Advocate General for Military Law and Operations, Commander of the U.S. Army Legal Services Agency, and Chief Judge of the Army Court of Criminal Appeals. While serving as Staff Judge Advocate of XVIII Airborne Corps, she served tours of duty in both Afghanistan and Iraq. During her career with the Army, BG(R) Dunn performed some ground breaking assignments. She was the first female staff judge advocate of the 82nd Airborne Division, with which she did two tours. She was also the first female chief of personnel for the Army JAG Corps, the first female staff judge advocate of the XVIII Airborne Corps, and the first woman selected as a general officer in the active duty Army Judge Advocate General's Corps.

BRIGADIER GENERAL JOHN COOKE, U.S. ARMY (RETIRED)

Brigadier General (Retired) John Cooke is the Deputy Director at the Federal Judicial Center. Brigadier General Cooke retired after twenty-six years in the U.S. Army Judge Advocate General's Corps. His last position in the Army was as Chief Judge, U.S. Army Court of Criminal Appeals and Commander of the U.S. Army Legal Services Agency. His preceding assignments include: Judge Advocate, U.S. Army Europe; Deputy Commandant and Director, Academic Department, The Judge Advocate General's School; Chief, Personnel, Plans and Training Office, Office of the Judge Advocate General; and Staff Judge Advocate, 25th Infantry Division.

HARVEY BRYANT, FORMER COMMONWEALTH'S ATTORNEY, CITY OF VIRGINIA BEACH

For almost 14 years Harvey Bryant led a 90 member office prosecuting approximately 16,000 criminal charges per year in Virginia's largest city. He retired at the end of 2013. Since elected Commonwealth's Attorney in Virginia Beach he has served as Virginia Association of Commonwealth's Attorneys' president, Commonwealth's Attorneys' Services Council chairman, and served on the board of directors of both organizations for 13 years, representing the Second Congressional District. He has served as chairman of the Criminal Law Section of the Virginia State Bar Association and represented Virginia on the National District Attorneys' Association board of directors. He is a gubernatorial appointee to Virginia's Criminal Sentencing Commission and serves on the board of directors for the Virginia Criminal Justice Foundation. He served as chairman of the Governor's task force on asset forfeiture in 2012 and on Virginia's Attorney General's advisory committee on restoration of civil rights in 2013. He was awarded the Human Rights Award for Achievement in Government by the Virginia Beach Human Rights Commission in 2013. From 1987-2000 he was a supervisor in the Criminal Division of the U.S. Attorney's Office, Eastern District of Virginia, Norfolk and Newport News Divisions, which duties included supervising Special Assistant United States Attorneys from every branch of the service. After graduating from the College of William and Mary, he served in the U.S. Army for three years followed by five years in the Army Reserves. He graduated from the University Of Richmond School Of Law, was in private practice for nine years and was a prosecutor for over 30 years.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

COLONEL STEPHEN HENLEY, U.S. ARMY (RETIRED)

Colonel (Retired) Stephen R. Henley is currently an Administrative Law Judge (ALJ) with the Department of Labor in Washington, D.C. Before assuming his current position in May 2012, he was an ALJ with the Social Security Administration in Fayetteville, North Carolina. Prior to his appointment as an ALJ, Judge Henley served nearly 30 years in the U.S. Army. COL(R) Henley retired from the Army as Chief Trial Judge of the U.S. Army Judiciary. COL(R) Henley spent two years as a medical service corps officer prior to participating in the FLEP program and transferring to the JAG Corps. He served in a variety of assignments as a JAG officer to include: both trial and defense counsel, SAUSA for the District of Columbia, Chief of Administrative Law at West Point, and vice-chair of the Criminal Law Department at The Judge Advocate General Legal Center and School. COL(R) Henley also served as a military judge at Ft. Hood, Texas, Mannheim, Germany, and Fort Bragg, North Carolina, and the Military Commissions in Guantamano Bay, Cuba He also formerly served as an Adjunct Professor at The George Washington University Law School.

COLONEL DAWN SCHOLZ, U.S. AIR FORCE (RETIRED)

Colonel (Retired) Dawn Scholz is an Administrative Law Judge with the Social Security Administration. Prior to this position, she was the Deputy Associate General Counsel for General Law in the Office of General Counsel, Headquarters, Department of Homeland Security where she provided legal counsel on labor and employment law matters, appropriations and fiscal law issues, general tort claims, environmental law issues and also oversaw the U.S. Coast Guard's Board of Correction of Military Records. COL(R) Scholz served 30 years in the Air Force first as a section commander and after attending law school under the Funded Legal Education Program as a JAG officer. Her past JAG assignments include: Chief of the Air Force's Environmental Law and Litigation Division, Senior Appellate Judge on the Air Force Court of Criminal Appeals and serving as a Judge on the U.S. Court of Military Commission Review, which hears appeals of Guantanamo detainees. She also served three tours as a Staff Judge Advocate, culminating her military career as the Staff Judge Advocate for the Pacific Air Forces at Hickam Air Force Base, Hawaii.

COLONEL LARRY MORRIS, U.S. ARMY (RETIRED)

Colonel (Retired) Lawrence J. Morris is General Counsel, The Catholic University of America. COL(R) Morris served 27 years on active duty as an Army judge advocate (JA), including assignments as: the head of the Criminal Law department of the U.S. Army Judge Advocate General's Legal Center and School; Staff Judge Advocate to the Superintendent of the United States Military Academy at West Point; Staff Judge Advocate for the 10th Mountain Division, Fort Drum, NY; Chief of the U.S. Army Trial Defense Service, where he was responsible for the work and professional training of all uniformed Army defense attorneys; and Chief Prosecutor of the Guantanamo military commissions, tasked with the prosecution of suspected 9/11 terrorists. He spent most of the first part of his career in alternating tours as a prosecutor, defense counsel, and chief prosecutor at posts in the U.S. and Europe. He also served in Bosnia-Herzegovina and Iraq. After retiring, COL(R) Morris was the Chief of Advocacy, Headquarters, U.S. Army, responsible for training Army prosecutors and defense counsel with an emphasis on the handling of sexual offenses. He is the author of Military Justice: A Guide to the Issues, published in 2010.

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RHONNIE JAUS, FORMER DIVISION CHIEF, SEX CRIMES/CRIMES AGAINST CHILDREN DIVISION, KINGS COUNTY DISTRICT ATTORNEY'S OFFICE

Rhonnie Jaus was the Division Chief of the Sex Crimes/Crimes Against Children Division in the Kings County District Attorney's Office in Brooklyn, New York. Her Division specializes in the investigation and prosecution of all sexual assault, child abuse, child homicide and sex trafficking offenses in the county. She has extensive experience in handling cases involving sexual abuse in religious institutions, schools and organized sports team. She also developed specialized programs for sexually exploited teens, special needs victims, cyber-predators, a child advocacy center and a John School for people arrested for prostitution related offenses. Prior to being the Division Chief, she was the Bureau Chief of the Sex Crimes/Special Victims Bureau, where she has been working since 1987. She also served as a senior trial attorney in the Major Offense Prosecution Program prior to specializing in sex crimes. She is currently an Adjunct Professor of Law at both New York Law School and St. John's University Law School, where she teaches courses on sexual assault, child abuse and domestic violence. She is also a consultant with C&J Strategy Consulting, which specializes in sexual misconduct investigations, training and litigation support.

RUSSELL W. STRAND, CHIEF OF THE U.S. ARMY MILITARY POLICE BEHAVIORAL SCIENCES EDUCATION AND TRAINING DIVISION

Russell W. Strand is currently the Chief of the U.S. Army Military Police School Behavioral Sciences Education &Training Division. Mr. Strand is a retired U.S. Army CID Federal Special Agent with an excess of 38 year's law enforcement, investigative, and consultation experience. Mr. Strand has specialized expertise, experience and training in the area of domestic violence intervention, critical incident peer support, and sexual assault, trafficking in persons and child abuse investigations. He has established, developed, produced, and conducted the U.S. Army Sexual Assault Investigations, Domestic Violence Intervention Training, Sexual Assault Investigations and Child Abuse Prevention and Investigation Techniques courses and supervised the development of the Critical Incident Peer Support course. Mr. Strand has also assisted in the development and implementation of Department of Defense (DOD) training standards, programs of instruction, and lesson plans for Sexual Assault Response Coordinators (SARC), victim advocates, chaplains, criminal investigators, first responders, commanders, and health professionals. He is a member of the Defense Family Advocacy Command Assistance Team and Department of the Army Fatality Review Board. He is also recognized as a national/DoD subject matter expert and consultant in the area of spouse and child abuse, critical incident peer support and sexual violence.

SUBCOMMITTEE STAFF

Lieutenant Colonel Kelly McGovern, U.S. Army, Supervising Attorney

Ms. Janice Chayt, Investigator

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Ms. Shannon Green, Legislative Analyst

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Ms. Laurel Prucha Moran, Graphic Designer

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Appendix C:
GLOSSARY OF ACRONYMS AND TERMS

ACRONYMS:

A

AASVTP: Advanced Adult Sexual Violence Training Program

ACSC: Advanced Crime Scene Course

ADC: Area Defense Counsel

AFJAG: Air Force Judge Advocate General

AFJAGS: Air Force Judge Advocate General's School

AFI: Air Force Instruction

AFOSI: Air Force Office of Special Investigation

AGCIC: Advanced General Criminal Investigation Course

AMEDD: Army Medical Department

AOR: Area of Responsibility

AR: Army Regulation

ASALC: Advanced Sexual Assault Litigation Course

ASAP: Adult Sexual Assault Program

ASI: Additional Skill Identifier

ATAC: Advanced Trial Advocacy Course

B

BJS: Bureau of Justice Statistics

BLC: Basic Lawyer Course

BUMED: Bureau of Medicine

C

CA: Convening Authority

CAAF: United States Court of Appeals for the Armed Services

CAPIT: Child Abuse Prevention and Investigation Course

CDC: Center for Disease Control and Prevention

CDC: Chief Defense Counsel

CDLA: Criminal Defense lawyers Association

CENTCOM: Central Command

CGIS: Coast Guard Investigative Service

CID: Army Criminal Investigation Command

CIDSAC: Criminal Investigation Division Special Agents Course

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

CITP: Criminal Investigator Training Program

CLE: Continuing Legal Education

CMA: Court of Military Appeals

CNSTAT: National Research Council Committee on National Statistics

CODIS: Combined DNA Index System

COL: Colonel

CPDA: California Public Defender Association

CSS: Comparative Systems Subcommittee

CTT: Complex Trial Team

D

DC: Defense Counsel

DCAP: Defense Counsel Assistance Program

DIBRS: Defense Incident-Based Reporting System

DFSC: Defense Forensics Science Center

DNA: Deoxyribonucleic Acid

DMDC: Defense Manpower Data Center

DOC: Defense Orientation Course

DOD: Department of Defense

DODI: Department of Defense Instruction

DODIG: Department of Defense Inspector General

DODD: Department of Defense Directive

DODM: Department of Defense Manual

DOJ: Department of Justice

DON: Department of Navy

DNA: Deoxyribonucleic acid

DSAID: Defense Sexual Assault Incident Database

DSO: Defense Service Office

DTFMSA: Defense Task Force on Sexual Harassment & Violence at the Military Service Academies

DTFSAMS: Defense Task Force on Sexual Assault in the Military Services

DTM: Directive Type Memorandum

DVIC: Domestic Violence Intervention Course

E

ESSAP: Effective Strategies for Sexual Assault Prosecution

EVAWI: End Violence Against Women International

F

FAP: Family Advocacy Program

FAPM: Family Advocacy Program Manager

F&SV: Family and Sexual Violence

FBI: Federal Bureau of Investigation

FETI: Forensic Experiential Trauma Interview

FLETA: Federal Law Enforcement Training Accreditation

FLETC: Federal law Enforcement Training Center

FOIA: Freedom of Information Act

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

FRCP: Federal Rules of Criminal Procedure

FRE: Federal Rules of Evidence

FSVI: Family and Sexual Violence Investigator

FY: Fiscal Year

G

GAO: Government Accountability Office

GBI: Georgia Bureau of Investigations

GCM: General Courts-Martial

GCMCA: General Court-Martial Convening Authority

H

HQE: Highly Qualified Experts

I

IACP: International Association of Chiefs of Police

IDA: Initial Disposition Authority

IO: Investigating Officer

ITAC: Intermediate Trial Advocacy Course

J

JAG: Judge Advocate General

JAOBC: Judge Advocate Officer Basic Course

JASOC: Judge Advocate Staff Officer Course

JBSA: Joint Base San Antonio

JBLM: Joint Base Lewis-McChord

JMJAT: Joint Military Judges' Annual Training

JPP: Judicial Proceedings Panel

JSC-SAS: Joint Service Committee-Sexual Assault Subcommittee

L

LAPD: Los Angeles Police Department

LCSW: Licensed Clinical Social Worker

LCDR: Lieutenant Commander

LL.M.: Master of Laws

LTC: Lieutenant Colonel (Army)

LtCol: Lieutenant Colonel (Air Force)

M

MCIO: Military Criminal Investigative Organization

MCM: Manual for Courts-Martial

MG: Major General

MJ: Military Justice

MJIA: Military Justice Improvement Act

MJLCT: Military Justice Litigation Career Track

MOA: Memorandum of Agreement

MOU: Memorandum of Understanding

MP: Military Police

MPIC: Military Police Investigations Course

MRE: Military Rules of Evidence

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

MTF: Military Treatment Facility

MTI: Military Training Instructor

N

NAC: National Advocacy Center

NACDL: National Association of Criminal Defense Lawyers

NCIS: Naval Criminal Investigative Service

NCMEC: National Center for Missing and Exploited Children

NCVS: National Crime Victim Survey

NDAA: National Defense Appropriations Act

NDAA: National District Attorneys Association

NIBRS: National Incident Based Reporting System

NISVS: National Intimate Partner and Sexual Violence Survey

NJC: National Judicial College

NJP: Non-Judicial Punishment

NJS: Naval Justice School

NLADA: National Legal Aid and Defenders Association

NPC: New Prosecutor's Course

NYSDA: New York State Defender Association

O

OCDLA: Oregon Criminal Defense Lawyer Association

OJT: On the Job Training

OMB: Office of Management and Budget

P

PD: Police Department

PDS: Professional Development Standards

PERF: Police Executive Research Forum

PSARC: Philadelphia Sexual Assault Response Center

PSR: Presentence Report

PTA: Pre-trial Agreement

R

RCM: Rules for Courts-Martial

RDC: Regional Defense Counsel

RDD: Random Digital Dialing

RFI: Request for Information

RILO: Resignation in Lieu of Court-Martial

RLSO: Region Legal Service Office

ROI: Report of Investigation

RSP: Response Systems to Adult Sexual Assault Crimes Panel

RTC: Regional Trial Counsel

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

S

SABTP: Special Agent Basic Training Program

SAFE: Sexual Assault Forensic Exam

SAFE: Sexual Assault Forensic Examiner

SALT: Special Agent Laboratory Training

SAMFE: Sexual Assault Medical Forensic Examiner

SANE: Sexual Assault Nurse Examiner

SAPR: Sexual Assault Prevention and Response

SAPRO: Sexual Assault Prevention and Response Office

SARB: Sexual Assault Review Board

SARC: Sexual Assault Response Coordinator

SART: Sexual Assault Response Team

SARRT: Sexual Assault/Abuse Response and Resource Team

SASC: Senate Armed Services Committee

SATAC: Sexual Assault Trial Advocacy Course

SCITP: Sex Crimes Investigation Training Program

SF: Security Forces

SHARP: Sexual Harassment/Assault Response and Prevention

SJA: Staff Judge Advocate

SME: Subject Matter Expert

SORNA: Sex Offender Registration and Notification Act

SPCMCA: Special Court-Martial Convening Authority

STC: Senior Trial Counsel

SVC: Special Victim Counsel

SVC: Special Victim Capability

SVP: Special Victim Prosecutor
SVTC: Special Victim Trial Counsel

SVU: Special Victims Unit

SVUI: Special Victim Unit Investigator

SVUIC: Special Victim Unit Investigations Course

T

TCAP: Trial Counsel Assistance Program

TDAC: Trial and Defense Advocacy Course

TDS: Trial Defense Service

TFRCV: Task Force Report on Care for Victims of Sexual Assault

TJAG: The Judge Advocate General

TJAGLCS: The Judge Advocate General's Legal Center and School's

U

UCMJ: Uniform Code of Military Justice

UCR: Uniform Crime Reports

USACIL: United States Army Criminal Investigation Laboratory

USCCR: United States Commission on Civil Rights

USAMPS: United States Army Military Police School

USC: United States Code

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

USC: Unwanted sexual contact

USMC: United States Marine Corps

USN: United States Navy

USSC: United States Sentencing Commission

V

VA: Victim Advocate

VAW: Violence Against Women

VLC: Victim Legal Counsel

VPA: Victim Protection Act

W

WGRA: Workplace and Gender Relations Survey of Active Duty Members

WGRS: Workplace Gender Relations Survey

WOAR: Women Organized Against Rape

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

TERMS

Administrative Separation: Early termination of military service based upon conduct on the part of the Service Member. A Service member may be administratively separated based on a pattern of misconduct, drug abuse, or convenience of the government.

Collateral misconduct: Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident. Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders). *See* DODI 6495.02.

Confidential Reporting: For the purposes of the policies and procedures of the SAPR Program, confidential reporting is restricted reporting that allows a Service member to report or disclose to specified officials that he or she has been the victim of a sexual assault. This reporting option gives the member access to medical care, counseling, and victim advocacy, without requiring those specific officials to automatically report the matter to law enforcement or initiate an official investigation.

Convening authority: Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. *See* Rule for Courts-Martial 504(b) and discussion.

Credible Information: Information disclosed to or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate that criminal activity has occurred and would cause a reasonable investigator under similar circumstances to pursue further the facts of the case to determine whether a criminal act occurred or may have occurred. *See* AR 195-2, p. 41.

Criminal intelligence: Information compiled and analyzed in an effort to anticipate, prevent, or monitor possible or potential criminal activity or terrorist threats directed at or affecting the U.S. Army operations, material, activities personnel or installations. (AR 195-2, p. 41)

Dark Figure: Information of instances that were not reported through official channels, the things that were not reported to the police.

Defense Forensic Science Center: Department of Defense forensic science center of excellence, delivering full-spectrum, forensic services around the globe and across the entire range of military operations, providing training and conducting research to further forensic science.

Defense Incident-Based Reporting System: Department of Defense crime reporting system designed to collect statistical information on criminal incidents in the Department of Defense

Defense Sexual Assault Incident Database (DSAID): A DoD database that captures uniform data provided by the Military Services and maintains all sexual assault data collected by the Military Services. *See* DODD 6496.01.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

General Court-Martial: A court-martial consisting of a military judge and usually at least five members and having authority to impose a sentence of dishonorable discharge or death.

Healthcare provider: Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a military treatment facility, or who provide such care at a deployed location or otherwise in an official capacity.

Joint Basing: A location at which the 2005 Base Closure and Realignment Committee directed that installation management functions be consolidated between two or more Military Services operating at two or more locations within close proximity.

Judge advocate: An officer of the Judge Advocate General's Corps of the Army, Air Force, Marine Corps, Navy, and the United States Coast Guard who is designated as a judge advocate.

Judge Advocates General: Severally, the Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

Law enforcement: Includes all DoD law enforcement units, security forces, and military criminal investigative organizations.

Military Criminal Investigative Organization (MCIO): Refers to the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (OSI).

Military judge: The presiding officer of a general or special court-martial detailed in accordance with Article 26 of the UCMJ to the court-martial to which charges in a case have been referred for trial.

Military Training: Structured training to enhance the capacity of Service Members to understand issues and concepts, as well as to perform specific tasks.

National Incident Based Reporting System: Incident-based reporting system in which agencies collect data on each crime occurrence. Data comes from local, state, and federal automated systems.

Panel: Military equivalent of a jury; short for court-martial panel or members panel.

Permanent Change of Station (PCS): To permanently move from an assignment at one military installation to an assignment at another installation.

Preferral: Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the UCMJ. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. *See* Rule for Courts-Martial 307.

Referral: The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorized to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. *See* Rule for Court-Martial 601(a) and discussion.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Reprisal: Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication. (DODI 6495.02)

Reserve Component: Reserve Components of the Armed Forces of the United States, which include the National Guard (Army and Air Force) and Reserve (Army, Air Force, Navy, Marine Corps, and Coast Guard).

Responders: Includes first responders, who are generally composed of personnel in the following disciplines or positions: SARCs, SAPR VAs, healthcare personnel, law enforcement, and MCIOs. Other responders are judge advocates, chaplains, and commanders, but they are usually not first responders. *See* DODI 6495.02.

Restricted Reporting: A process used by a Service Member to report or disclose that he or she is the victim of a sexual assault to specified officials on a requested confidential basis. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, or a VA will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under DODD 6495.01.

Re-victimization: Process by which a victim experiences acts of violence, power, or control imposed by systems, professionals, peers, or others, causing the victim to be traumatized after the original incident.

SAFE Kit: The medical and forensic examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process and the collection, handling, analysis, testing, and safekeeping of any bodily specimens and evidence meet the requirements necessary for use as evidence in criminal proceedings. *See* DODD 6495.01.

Sexual Assault Forensic Examiner/Sexual Assault Medical Forensic Examiner: A healthcare provider who has completed specialized education and clinical preparation in the collection of evidence for a sexual assault forensic examination kit.

Sexual Assault Nurse Examiner: Registered nurse who has completed specialized education and clinical preparation in the medical forensic care of the patient who has experienced sexual assault or abuse.

Sexual assault prevention and response (SAPR) program: A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault.

Sexual Assault Prevention and Response Office (DoD SAPRO): Serves as the DoD's single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.

SAPR victim advocate (VA): A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. Provides liaison assistance with other organizations on victim care matters and reports directly to the SARC when performing victim advocate duties.

Service: A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Sexual assault response coordinator (SARC): The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Sexual Assault: Intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts. "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct as issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct as issue shall not constitute consent.

Sexual Assault Forensic Examination (SAFE): The medical examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process, and the collection, handling, analysis, testing, and safekeeping of any bodily specimens meet the requirements necessary for use as evidence in criminal proceedings.

Sexual Assault Prevention and Response (SAPR) Program: A DOD program for the Military Departments and the DOD Components that establishes sexual assault prevention and response policies to be implemented worldwide. The program objective establishes an environment and military community free of sexual assault.

Sexual Assault Response Coordinator (SARC): Military personnel or DOD civilian employees under the senior commander's supervision, who: Serves as the central point of contact at an installation or within a geographic area to oversee sexual assault awareness, prevention and response training. Ensures appropriate care is coordinated and provided to victims of sexual assault; and tracking the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Sexual Harassment: A form of discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that create an intimidating, hostile, or offensive environment.

Sexual Violence: A term without a specific federal legal meaning, but widely used to denote sexual acts of force against the will of victims.

Special Court-Martial: A court-martial that consists of at least three officers, a military judge, a trial counsel, and a defense counsel and that has authority to impose a limited sentence and hear only noncapital cases.

Special Victim Capability: A distinct, recognizable group of appropriately skilled professionals, including MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel, who work collaboratively to (1) investigate and prosecute allegations of child abuse (involving sexual assault and/or aggravated assault with grievous bodily harm), domestic violence (involving sexual assault and/or aggravated assault with grievous bodily harm), and adult sexual assault (not involving domestic offenses) and to (2) provide support for the victims of such offenses. *See* DODI 6495.02.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Special Victim Counsel: An attorney, provided at no charge to the victim, who will represent the victim's interest throughout the course of the legal proceedings that might follow the report of a sexual assault.

Staff judge advocate (SJA): A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy, Coast Guard, or joint force command who is a judge advocate.

Summary Court-Martial: Lowest level court-martial in terms of punishment authority. The court-martial is composed of one commissioned officer who need not be an attorney. A Service Member can be represented by a civilian attorney but has not right to representation by a military counsel.

Telescoping: A temporal displacement of events, bringing events from outside of the reference period into the reference period.

Titling: Placing the name, and other identifying data, of an individual or entity on the subject block of an investigative report and central index, for the potential retrieval and analysis for law enforcement and security purposes.

Trial Defense Counsel: A judge advocate who represents a Service Member in any adverse action, such as a court-martial, administrative separation, or nonjudicial punishment proceedings.

Unfounded: False or baseless

Unitary Sentencing: In a court-martial, the sentencing authority (military judge or court-martial members) adjudges a single sentence for all the offenses of which the accused was found guilty. A court-martial may not impose separate sentences for each finding of guilt, but may impose only a single, unitary sentence covering all of the guilty findings in their entirety, no matter how many such findings there may be.

Unrestricted Reporting: A process a Service Member used to disclose, without requesting confidentiality or restricted reporting, that he or she is the victim of a sexual assault. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, a VA, command authorities, or persons are reportable to law enforcement and may be used to initiate the official investigative process.

US Army Criminal Investigation Laboratory (USACIL): Located within the Defense Forensic Science Center at Fort Gillem, Georgia, provides forensic laboratory services to DOD investigative agencies and other federal law enforcement agencies.

Victim: A person who asserts direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault. *See* DODD 6405.01.

Victim Advocate (VA): Military personnel, DOD civilian employees, DOD contractors, or volunteers who facilitate care for victims of sexual assault under the SAPR Program, and who, on behalf of the sexual assault victim, provide liaison assistance with other organizations and agencies on victim care matters, and report directly to the SARC when performing victim advocacy duties.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Appendix D:

PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

JUNE 27, 2013 **RSP Public Meeting**
U.S. District Court, Washington, D.C.

- Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society
- Ms. Delilah Rumburg, Executive Director, Pennsylvania Coalition Against Rape
- Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)
- Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO
- Mr. Fred Borch, Army JAG Corps Regimental Historian
- Captain Robert Crow, Joint Service Committee Representative, U.S. Navy

AUG. 1, 2013 **RSP Preparatory Session**
One Liberty Center, Arlington, VA

- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office
- Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program
- Major Jaclyn Grieser, Army Special Victim Prosecutor
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program
- Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch
- Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command
- Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service
- Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director
- Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager
- Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

AUG. 5, 2013 **RSP Preparatory Session**
One Liberty Center, Arlington, VA

- Professor Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (via telephone)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, British Army (via telephone)
- Major General William Mayville, Jr., U.S. Army
- Colonel Dan Brookhart, U.S. Army
- Colonel Jeannie Leavitt, U.S. Air Force
- Lieutenant Colonel Debra Luker, U.S. Air Force
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral William Baumgartner, U.S. Coast Guard
- Captain P.J. McGuire, U.S. Coast Guard
- Air Commodore Cronan, Director General, Australia Defence Force Legal Service (via telephone)

AUG. 6, 2013 **RSP Preparatory Session**
One Liberty Center, Arlington, VA

- LTC Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS), U.S. Army
- Dr. David Lisak, Professor, University of Massachusetts-Boston
- Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice
- Dr. Jim Lynch, former Director of the Bureau of Justice and current Chair, Department of Criminology and Criminal Justice at the University of Maryland

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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SEPT. 24, 2013 **RSP Public Meeting**
U.S. District Court, Washington, D.C.

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Lord Martin Thomas of Gresford QC, Chair of the Association of Military Advocates in the United Kingdom
- Professor Amos Guiora, University of Utah College of Law and prior judge advocate in the Israeli Defense Forces
- Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces
- Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command
- Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service
- Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom
- Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army
- Senator Kirsten Gillibrand (New York)
- Senator Claire McCaskill (Missouri)

SEPT. 25, 2013 **RSP Public Meeting**
U.S. District Court, Washington D.C.

- Lieutenant General Michael Linnington, U.S. Army
- Colonel Corey Bradley, U.S. Army
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- General Edward Rice, U.S. Air Force
- Colonel Polly S. Kenny, U.S. Air Force
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral Thomas Ostebo, U.S. Coast Guard
- Commander William Dwyer, U.S. Coast Guard
- Brigadier General Richard C. Gross, Legal Counsel, Chairman of the Joint Chiefs of Staff
- Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army
- Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy
- Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force
- Major General Vaughn A. Army, Staff Judge Advocate to the Commandant of the Marine Corps
- Rear Admiral Frederick J. Kenney, Judge Advocate General and Chief Counsel, U.S. Coast Guard

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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NOV. 7, 2013

RSP Public Meeting
U.S. District Court, Washington, D.C.

- Major General Gary S. Patton, Director, DoD SAPRO
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force SAPR Office
- Rear Admiral Maura Dollymore, Director of Health, Safety and Work-Life, U.S. Coast Guard
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Dr. Christine Altendorf, Director, U.S. Army Sexual Harassment/ Assault Response & Prevention Office
- Master Sergeant Carol Chapman, SHARP Program Manager, 7th Infantry Division, U.S. Army
- Ms. Christa Thompson, Victim Witness Liaison, Fort Carson, Colorado
- Dr. Kimberly Dickman, Sexual Assault Response Coordinator, National Capitol Region, U.S. Air Force
- Master Sergeant Stacia Rountree, Victim Advocate, National Capitol Region, U.S. Air Force
- Ms. Liz Blanc, U.S. Navy Sexual Assault Response Coordinator, National Capitol Region
- Ms. Torie Camp, Deputy Director, Texas Association Against Sex Assault
- Ms. Gail Reid, Director of Victim Advocacy Services, Baltimore, Maryland
- Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County & City of Falls Church, Virginia
- Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia
- Ms. Nancy Parrish, President, Protect our Defenders
- Ms. Miranda Peterson, Program and Policy Director, Protect our Defenders
- Mr. Greg Jacob, Policy Director, Service Women's Action Network
- Mr. Scott Berkowitz, President, Rape, Assault, and Incest Network
- Dr. Will Marling, Executive Director, National Organization for Victim Assistance
- Ms. Donna Adams (Public Comment)

NOV. 8, 2013

RSP Public Meeting
U.S. District Court, Washington, D.C.

- Command Sergeant Major Julie Guerra, U.S. Army
- Mr. Brian Lewis
- Ms. BriGette McCoy
- Ms. Ayana Harrell
- Ms. Sarah Plummer
- Ms. Marti Ribeiro
- Colonel James McKee, Special Victims' Advocate Program, U.S. Army
- Colonel Carol Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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- Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel, U.S. Navy
- Captain Sloan Tyler, Director, Office of Special Victims' Counsel, U.S. Coast Guard
- Colonel Dawn Hankins, Chief, Special Victims' Counsel Division, U.S. Air Force
- Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C.
- Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia
- Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York
- Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona
- Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center
- Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service
- Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization
- Captain Charles Purnell, U.S. Navy Defense Service Office
- Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force
- Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard
- Mr. David Court of Court and Carpenter, Stuttgart, Germany
- Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas
- Ms. Bridget Wilson, Attorney, San Diego, California

NOV. 14, 2013 **Preparatory Session**
Defense Forensic Science Center (DFSC)/
United States Army Criminal Investigations Laboratory (USACIL), Atlanta, GA

- Dr. Jeff Salyards, Exec. Director, DFSC
- Mr. Robert Abernathy, Chief of Staff, DFSC
- Ms. Lauren Reed, Dir. USACIL
- Mr. Mike Hill, Operations Officer, USACIL
- Mr. Scott Larson, Chief, Security, Plans and Operations
- Ms. Jennifer Coursey, Supervisory Biologist-DNA Branch
- Ms. Debra E. Glidewell, Chief, DNA-Branch
- Ms. Anece l. Baxter-White, Attorney Advisor
- Ms. Donna Ioannidis, DNA Examiner
- Ms. Elizabeth D. Johnson, CODIS
- Dr. Kim E. Mooney, Acting Chief, Trace Evidence
- Mr. Michael A. Villarreal, Trace Evidence Examiner
- Mr. William G. Doyne, Technical leader, Latent Prints
- Ms. Monica Garcia, Latent Print Examiner
- Mr. Garold Warner, Office of the Chief Scientist
- Dr. Brigid F. O'Brien, Research Physical Scientist

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

NOV. 14, 2013 **Preparatory Session**
Georgia Bureau of Investigations Lab, Atlanta, GA

- Mr. Mark R. Maycock, Assistant Deputy Director, GBI
- Ms. Kathryn P. Lee, Assistant Deputy Director, GBI
- Mr. Cleveland Miles, Forensic Biology Manager, GBI
- Ms. Tammy Jergovich, Trace Evidence Manager, GBI
- Mr. Jim Sebestyn, Forensic Biology, GBI

NOV. 19, 2013 **Comparative Systems Subcommittee Meeting**
Arlington, VA

- Mr. Scott Russell, Director of the Violent Crime Division, DoD Inspector General
- Mr. Guy Surian, HQ, U.S. Army Criminal Investigation Command
- Ms. Donna Ferguson, U.S. Army Military Police School
- Mr. Kevin Poorman, Office of Special Investigations, U.S. Air Force, Quantico Headquarters
- Mr. Robert Vance, Programs and Policy, Naval Criminal Investigative Service
- Chief Warrant Officer Five Shannon Wilson, Marine Corps Investigator
- MAC Amy Pearson, Naval Investigator
- Commander Kristie Robson, Department Head of Clinical Programs and Sexual Assault Medical Program Manager, U.S. Navy Bureau of Medicine and Surgery
- Colonel Todd Poindexter, Chief of Clinical Operations, Air Force Medical Support Agency, Office of The Surgeon General
- Ms. Carol Haig, Army Sexual Assault Clinical Provider, Office of the Surgeon General
- Major Gwendolyn Foster, SAFE, Andrews Air Force Base, U.S. Air Force
- Dr. Sue Rotolo, Ph.D., SANE, Inova Fairfax Hospital
- Major Martin Bartness, Baltimore City Police Department
- Detective Lanis Geluso, Virginia Beach Police Department
- Lieutenant Joe Carter, Falls Church City Police Department
- Detective Missy Elliott, Falls Church City Police Department
- Lieutenant Paul Thompson, Assistant Commander, Major Crimes Division, Fairfax County Police Department
- Lieutenant Mark Kidd, Sex Squad, Fairfax County Police Department
- Detective Stephen Wallace, Sex Squad, Fairfax County Police Department
- Detective Greg Sloan, Arlington Police Department

DEC. 10, 2013 **Preparatory Session**
Fort Hood, TX

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

DEC. 11, 2013 **RSP Public Meeting**
Austin, TX

- Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School
- Major Ryan Oakley, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense (Personnel & Readiness), U.S. Air Force
- Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs)
- Captain Jason Brown, Military Justice Officer, Military Justice Branch (JAM), Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service
- Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service
- Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation
- Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command
- Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau
- Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit
- Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police
- Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations
- Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research
- Dr. Kim Lonsway, Director of Research for End Violence Against Women International

DEC. 12, 2013 **RSP Public Meeting**
Austin TX

- Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office
- Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
- Captain Jason Brown, Military Justice Officer, Military Justice Branch (JAM), Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps
- Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, Air Force Legal Operations Agency, U.S. Air Force
- Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia
- Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
- Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
- Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, U.S. Army Trial Defense Service, U.S. Army
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force
- Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
- Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
- Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
- Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program, U.S. Army
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Anne Munch, Owner, Anne Munch Consulting, Inc.
- Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
- Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office
- Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
- Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
- Commander Aaron Rugh, Director, U.S. Navy Trial Counsel Assistance Program, U.S. Navy
- Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
- Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
- Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
- James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
- Lieutenant Colonel Devin Winklosky, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School, U.S. Marine Corps

DEC. 13, 2013 **Preparatory Session**
Joint Base San Antonio, Lackland AFB/37th, San Antonio, TX

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

JAN. 7, 2014 **Comparative Systems Subcommittee Meeting**
Arlington, VA

- Colonel (Retired) Francis Gilligan, Director of Training for of Military Commission Prosecutors
- Candace Mosley, Director of Programs, National District Attorneys Association
- Viktoria Kristiansson, AEquitas
- Lisa Wayne, former President, NACDL and Training Director of Colorado State Public Defender System
- Yvonne Younis, Defender Association of Philadelphia
- Lieutentant Colonel Matthew Calarco, Chair, Criminal Law Department, U.S. Army
- Colonel Vance Spath, Director, Training and Readiness, U.S. Air Force
- Lieutenant Commander Justin McEwen, Military Justice Department Head, Naval Justice School
- Lieutenant Colonel George Cadwalader, Executive Officer, Naval Justice School
- Ms. Bridget Ryan, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program
- Ms. Sandra Tullius, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program
- Mr. Ron White, Subject Matter Expert, consultant U.S. Army Trial Defense Services
- Mr. Edward O'Brien, Army DCAP,
- Colonel Ken Theurer, Commandant, Air Force Judge Advocate General's School
- Mr. David M. Houghland, Chief of Education & Training Development, Training and Readiness Directorate, HQ USAF/JAI
- Mr. Neal Puckett, Highly Qualified Expert, Naval Defense Counsel Assistance Program
- Ms. Teresa Scalzo, Deputy Director, Navy Judge Advocate General, Trial Counsel Assistance Program (TCAP)
- Ms. Kathleen Coyne, USMC, Highly Qualified Expert-Defense
- Ms. Claudia Bayliff, Attorney at Law

JAN. 30, 2014 **RSP Public Meeting**
George Washington University Law School, Washington, D.C.

- General (Retired) Ann Dunwoody, U.S. Army
- General (Retired) Roger Brady, U.S. Air Force
- Vice Admiral (Retired) Mike Vitale, U.S. Navy*
- Lieutenant General (Retired) James Campbell, U.S. Army
- Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force*
- Major General (Retired) Martha Rainville, U.S. Air Force*
- Brigadier General (Retired) Pat Foote, U.S. Army
- Rear Admiral (Retired) Marty Evans, U.S. Navy*
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard
- Captain (Retired) Lory Manning, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps*
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Ms. Melissa Davis, Public Comment
- Ms. Ginny Lee, Public Comment
- Ms. Sara Zak, Public Comment

FEB. 5, 2014 **Preparatory Session**
Bremerton Naval Station and Joint Base Lewis McChord, WA

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

FEB. 6, 2014 **Preparatory Session**
Dawson's Place, Everett, WA

- Brittany Blancarte - CAP Therapist, Compass Health
- Linda Lasz - CAP Supervisor, Compass Health
- Heidi Scott - Child Interview Specialist, Dawson Place Child Advocacy Center
- Lisa Paul - Lead Deputy Prosecuting Attorney, Snohomish County Prosecutor's Office
- Sgt. Rob Barnett -SIU Supervisor, Snohomish County Sheriff's Office
- Lori Vanderburg - Director, Dawson Place & CAP Manager, Compass Health
- Paula Newman-Skomski - ARNP, Providence Intervention Center for Assault & Abuse
- Alicia Coragiulo - Advocate Specialist, Providence Intervention Center for Assault & Abuse
- Kristine Petereit - Fund Development Coordinator, Dawson Place Child Advocacy Center
- Mark Roe - County Prosecutor, Snohomish County Prosecutor's Office
- Annette Tupper - Victim Advocate, Snohomish County Prosecutor's Office
- Vicki Steffen - Office Manager II, Dawson Place Child Advocacy Center

FEB. 11, 2014 **Comparative Systems Subcommittee Meeting**
Arlington, VA

- Colonel (Ret.) Francis Gilligan, Office of Military Commission
- Colonel (Ret.) Steve Andraschko, Army Clemency & Parole Board
- Colonel John Baker, U.S. Marine Corps
- Mark Bergstrom, Pennsylvania State Sentencing Commission
- Bruce Brown, Air Force Clemency & Parole Board
- L. Russell Burress, U.S. Sentencing Commission
- Annette Burrhus-Clay, National Alliance to End Sexual Violence (NAESV)
- Lieutenant Colonel Craig Burton, U.S. Air Force
- Captain Robert Crow, U.S. Navy
- Meredith Farrar-Owens, Virginia State Sentencing Commission
- Molly Gill, Families Again Mandatory Minimums (FAMM)
- Lieutenant Commander Stuart Kirkby, U.S. Navy
- A.J. Kramer, Civilian Defense Counsel
- Michael LoGrande, Air Force Review Boards Agency

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at http://responsesystemspanel.whs.mil/

- Colonel Michael Mulligan, U.S. Army
- Michael Nachmanoff, Civilian Defense Counsel
- Jonathan Wroblewski, U.S. Department of Justice

FEB. 20, 2014 **Preparatory Session**
Norfolk, VA

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

FEB. 20, 2014 **Preparatory Session**
Philadelphia, PA

- Mr. Michael Boyle, PSARC Director
- Captain Johan Darby, Commanding Officer, SVU Philadelphia PD
- Dr. Ralph Riviello, Drexel University College of Medicine
- Pat Roussell, Sexual Assault Nurse Examiner (SANE)
- Erin O'Brien, Assistant District Attorney, Family Violence & Sexual Assault Section

FEB. 25, 2014 **Comparative Systems Subcommittee Meeting**
Arlington, VA

- Dr. Robin Wilson, Ph.D. ABPP
- David Prescott. LICSW
- LTC David Johnson, M.D. Program Director, Center for Forensic Behavioral Sciences (CFBS), U.S. Army
- Dr. Jennifer Yeaw Psy.D. CFBS (Phone)

MAR. 5, 2014 **Preparatory Session**
Quantico Marine Corps Base, Quantico, VA

(To encourage open and frank discussion, the Subcommittee followed a strict non-attribution policy during this site visit which precludes the release of any of the names of the participants.)

APR. 11, 2014 **Comparative Systems Subcommittee Meeting**
Arlington, VA

- Dr. Jim Lynch, Former Director, Bureau of Justice Statistics (BJS), Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland
- Dr. Bill Sabol, Acting Director BJS
- Dr. Allen Beck, BJS Senior Statistical Advisor

MAY 5, 2014 **RSP Public Meeting**
George Washington University Law School, Washington, D.C.

- Major General Jeffrey J. Snow, Director of DoD SAPRO

(This list does not reflect presenters to other subcommittees)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Appendix E:
SOURCES CONSULTED

1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

a. Enacted Federal Statutes

National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, 124 Stat. 4137 (2011)

National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011)

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2012)

b. Proposed Federal Statutes

Furthering Accountability and Individual Rights within the Military Act of 2014, H.R. 4485, 113th Cong., § 4 (2014)

Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013)

National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong., § 534 (2014)

Victims Protection Act of 2014, S. 1917, 113th Cong. (2014)

c. Reports of Congress

Senate Report No. 113-44 (2013)

3. JUDICIAL DECISIONS

Supreme Court

Jackson v. Taylor, 353 U.S. 569 (1957)

Lafler v. Cooper, __ U.S. __, 132 S. Ct. 1376 (2012)

Rita v. United States, 551 U.S. 338 (2007)

Setser v. United States, __ U.S. __, 132 S. Ct. 1463 (2012)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

United States v. Booker, 543 U.S. 220 (2005)

b. Court of Appeals for the Armed Forces

United States v. Alexander, 63 M.J. 269 (C.A.A.F. 2006)

United States v. Care, 18 C.M.A. 535, 40 C.M.R. 247 (1969)

United States v. Clemons, 16 M.J. 44 (C.M.A. 1983)

United States v. Court, 24 M.J. 11 (C.M.A. 1987)

United States v. Garcia, 59 M.J. 447 (C.A.A.F. 2004)

United States v. Gutierrez, 11 M.J. 122 (C.M.A. 1981)

United States v. Kahakauwila, 19 M.J. 60 (C.M.A. 1984)

United States v. Piatt, 17 M.J. 442 (C.M.A. 1984)

United States v. Rinehart, 8 C.M.A. 402, 24 C.M.R. 212 (1957)

United States v. Savala, 70 M.J. 70 (C.A.A.F. 2011)

United States v. Vandelinder, 20 M.J. 41 (C.M.A. 1985)

United States v. Weymouth, 43 M.J. 329 (C.A.A.F. 1995)

c. Service Courts of Criminal Appeals

United States v. Andrews, 38 M.J. 650 (A.C.M.R. 1993)

United States v. McNeill, 17 M.J. 451 (N-M. C.M.R. 1984)

United States v. Rhule, 53 M.J. 647 (A.C. Crim. App. 2000), *review denied*, 55 M.J. 52 (C.A.A.F. 2001)

d. State Courts of Last Resort

Murphy v. Commonwealth, 50 S.W. 3d 173 (Ky. 2001)

4. RULES AND REGULATIONS

a. Executive Order

Federal Rules of Civil Procedure

Federal Rules of Criminal Procedure

Manual for Courts-Martial, United States (2012), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf

b. Department of Defense

DoD Directive 5505.03, Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice (May 3, 2003), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550017p.pdf

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

DoD Instruction 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations (Mar. 24, 2011), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf

DoD Instruction 5525.07, Implementation of the Memorandum of Understanding (MOU) Between the Departments of Justice (DoJ) and Defense Relating to the Investigation and Prosecution of Certain Crimes (June 18, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/552507p.pdf

DoD Instruction 5525.18, Law Enforcement Criminal Intelligence (CRIMINT) in DoD ¶ 3 (Oct. 18, 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/552518p.pdf

DoD Directive 6495.01, Sexual Assault Prevention and Response (SAPR) Program (Jan. 23, 2012), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf

DoD Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf

DoD Manual 7730.47-M-Volume 1, Defense Incident-Based System (DIBRS): Data Segments and Elements (Dec. 7, 2010), *available at* https://www.dmdc.osd.mil/dwp/docs/DIBRS.pdf

c. Services

Department of the Army Regulation 190-53, Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes (Nov. 3, 1986)

Department of the Army, Office of The Judge Advocate General, Publication 1-1 (Jan. 1, 2014) (updated Mar. 17, 2014)

Department of the Air Force, Instruction 44-102, Medical Care Management (Jan. 20, 2012), *available at* http://static.e-publishing.af.mil/production/1/af_sg/publication/afi44-102/afi44-102.pdf

5. MEETINGS AND HEARINGS[1]

a. Public Meetings of the Response Systems Panel

Transcript of RSP Public Meeting (June 27, 2013)

Transcript of RSP Public Meeting (Sept. 24, 2013)

Transcript of RSP Public Meeting (Sept. 25, 2013)

Transcript of RSP Public Meeting (Nov. 7, 2013)

Transcript of RSP Public Meeting (Nov. 8, 2013)

Transcript of RSP Public Meeting (Dec. 11, 2013)

Transcript of RSP Public Meeting (Dec. 12, 2013)

Transcript of RSP Public Meeting (Jan. 30, 2014)

1 Unless otherwise indicated, the materials pertaining to the meetings of the Response Systems Panel and its Subcommittees are currently available at http://responsesystemspanel.whs.mil/index.php/meetings.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

b. Meetings of the RSP Subcommittees

Transcript of Role of the Commander Subcommittee Meeting (Sept. 25, 2013)

Transcript of Role of the Commander Subcommittee Meeting (Oct. 23, 2013)

Transcript of Comparative Systems Subcommittee Meeting (Nov. 19, 2013)

Transcript of Comparative Systems Subcommittee Meeting (Jan. 7, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Jan. 15, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 11, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 25, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Mar. 11, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Mar. 25, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 11, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 24, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 25, 2014)

Transcript of Comparative Systems Subcommittee Meeting (May 2, 2014)

c. Preparatory Sessions (on file at Response Systems Panel)

Minutes of RSP Preparatory Session, Arlington, VA (Aug. 1, 2013)

Minutes of RSP Preparatory Session, Arlington, VA (Aug. 6, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Defense Forensic Science Center (DFSC) / U.S. Army Criminal Investigation Laboratory (USACIL) (Nov. 14, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Georgia Bureau of Investigation (GBI) (Nov. 14, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX (Dec. 10, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (Dec. 13, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (Feb. 5, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC) (Feb. 20, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Norfolk, VA (Feb. 20, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

d. Presentations and Materials Provided by Presenters

i. June 27, 2013 Public Meeting of the Response Systems Panel

PowerPoint Presentation of Dr. Lynn Addington, American University, "Overview of Sexual Assault Victimization Data"

PowerPoint Presentation of DoD SAPRO

ii. August 6, 2013 Preparatory Session of the Comparative Systems Subcommittee

PowerPoint Presentation of Dr. Cassia Spohn, Arizona State University, "Police and Prosecutorial Decision Making in Sexual Assault Cases: Lessons from Los Angeles"

iii. October 23, 2013 Meeting of the Role of the Commander Subcommittee

PowerPoint Presentation of DoD SAPRO (Oct. 23, 2013)

iv. November 14, 2013 Preparatory Session of the Comparative Systems Subcommittee

PowerPoint Presentation of Defense Forensic Science Center, "Overview of the DFSC/USACIL Capabilities and Sexual Assault Examination Caseload"

v. November 19, 2013 Meeting of the Comparative Systems Subcommittee

PowerPoint Presentation of Military Criminal Investigative Organizations

PowerPoint Presentation of United States Army Military Police School, "Sexual Assault Special Agent & First Responder Training"

United States Military Police School, Information Paper: United States Army Military Police School (USAMPS) Sexual Assault Investigations Education, Training and Consultation Program"

Written Statement of Ms. Carol Haig, Office of the U.S. Army Surgeon General

PowerPoint Presentation of Dr. Suzanne Rotolo, Dr. Rotolo Consulting, "Best Practices for Sexual Assault Nurse Examiners"

vi. December 10, 2013 Meeting of the Comparative Systems Subcommittee

PowerPoint Presentation, "Fort Hood Sexual Assault Information"

Written Submission of Mr. Russell Strand, U.S. Army Military Police School, "The Forensic Experiential Trauma Interview (FETI)" (2013)

vii. December 11, 2013 Public Meeting of the Response Systems Panel

Written Submission of Lieutenant Colonel Devin Winklosky, The U.S. Army Judge Advocate General's Legal Center and School, "Article 120 and Sex Crimes Comparisons" (2013)

Ashland Police Department, "'You Have Options Program' Program: A Campaign to Increase Sexual Assault Reporting within the City of Ashland"

American Bar Association, "Ten Principles of a Public Defense Delivery System"

Washington State Bar Association, "Performance Guidelines for Criminal Defense Representation"

PowerPoint Presentation of Deputy Chief Kirk J. Albanese, Los Angeles Police Department, "Sexual Assault Crimes Executive Summary"

Austin Police Department, "Sex Crimes Detective Operational Manual 2013-2014" (Sept. 2013)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Written Statement of Major Ryan Oakley, Office of the Undersecretary of Defense for Personnel and Readiness

Written Statement of Mr. Guy Surian, U.S. Army Investigation Command

Written Statement of Mr. Darrell Gilliard, Naval Criminal Investigative Service

Written Statement of Mr. Neal Marzloff, U.S. Coast Guard Criminal Investigative Service

PowerPoint Presentation of Ms. Joanne Archambault and Dr. Kimberly A. Lonsway, End Violence Against Women International (EVAWI), "Academics Regarding Civilian Police Response and Handling of Sexual Assault"

PowerPoint Presentation of Dr. Noël Busch-Armendariz, University of Texas at Austin

The Innocent Warrior Project, "Sex Assault Hysteria and Grandstanding Politicians Undermine Military Justice" (June 2013)

viii. December 12, 2013 Public Meeting of the Response Systems Panel

PowerPoint Presentation of Anne Munch, Anne Munch Consulting, Inc., "Sexual Assault: Naming the Unnamed Conspirator"

Written Submission of Anne Munch, Anne Munch Consulting, Inc., "Sexual Assault: Naming the Unnamed Conspirator"

PowerPoint Presentation of Lieutenant Colonel Devin A. Winklosky, The U.S. Army Judge Advocate General's Legal Center and School, "Overview of Article 120, UCMJ"

U.S. Army Waterfall Slide (presented by Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army)

Written Statement of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army

U.S. Air Force Waterfall Slide (presented by Lieutenant Colonel Mike Lewis, Military Justice Division, and Erik Coyne, Office of The Judge Advocate General, U.S. Air Force)

U.S. Navy Waterfall Slide (presented by Captain Robert Crow, Criminal Law Division, U.S. Navy)

U.S. Marine Corps Waterfall Slide (presented by Captain Jason Brown, Judge Advocate Division, U.S. Marine Corps)

U.S. Coast Guard Waterfall Slide (presented by Captain Stephen McCleary, Office of Legal Policy and Program Development, U.S. Coast Guard)

U.S. Coast Guard, "Sexual Assault Statistics: FY07-13"

PowerPoint Presentation of Dr. Cassia Spohn, Arizona State University, "Statistical Analysis of Waterfall Slides"

Written Statement of Commander Don King, Defense Counsel Assistance Program, U.S. Navy

Written Statement of Lieutenant Colonel Fansu Ku, Defense Counsel Assistance Program, U.S. Army

Written Statement of Captain Scott (Russ) Shinn, Defense Counsel Assistance Program, U.S. Marine Corps

Course Outlines and Schedules from the U.S. Army Judge Advocate General School

Written Statement of Mr. Bill Montgomery, Maricopa County Attorney

Written Statement of Ms. Kim Hendrick, Victim, Survivor, and Educator

ix. January 7, 2014 Meeting of the Comparative Systems Subcommittee

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Written Submission of Mr. Francis Gilligan, Office of Military Commission, "NDAA 2014 Changes to UCMJ and Roles of SJA, Prosecutor, Convening Authority, Defense Counsel and Sexual Assault Victim's Counsel"

National Center for the Prosecution of Violence Against Women, Information Paper

PowerPoint Presentation of Kristina M. Korobov, "Who Are They to Judge? The Jury, That's Who: Jury Selection in Sexual Assault Cases"

David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice" (Nov. 2013)

National Center for Prosecution of Child Abuse, "Rape Child Statutes: As of March 2011"

Written Statement of Ms. Teresa Scalzo, U.S. Navy Trial Counsel Assistance Program

Written Statement of Mr. Neal Puckett, U.S. Navy Defense Counsel Assistance Program

Written Statement of Ms. Kathleen Coyne, U.S. Marine Corps Defense Services Organization

x. February 11, 2014 Meeting of the Comparative Systems Subcommittee

Lauren Galik & Julian Morris, "Smart on Sentencing, Smart on Crime: An Argument for Reforming Louisiana's Determinate Sentencing Laws (Oct. 2013)

PowerPoint Presentation of Mr. Bruce T. Brown, U.S. Air Force Clemency and Parole Board

Families Against Mandatory Minimums, "Smarter Sentencing Act"

Written Statement of Mr. Steven Andraschko, U.S. Army Clemency and Parole Board

PowerPoint Presentation of Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission, "Virginia Criminal Sentencing Commission, Overview of State Sentencing Guidelines and Sentencing Guidelines for Sexual Assault Offenses in VA"

"Selected Sentencing Statistics for Fiscal Year 2012 for the Federal Sentencing Guidelines for Criminal Sexual Abuse (Rape) (§2A3.1) and Abusive Sexual Contact (§2A3.4)" (submitted by Mr. L. Russell Burress)

xi. February 25, 2014 Meeting of the Comparative Systems Subcommittee

PowerPoint Presentation of Dr. Robin J. Wilson, Wilson Psychological Services, "Sexual Abuse: Who Are the Offenders and How Do We Assess Them?"

PowerPoint Presentation of David S. Prescott, "Success: What Do We Do and How Do We Get There?"

PowerPoint Presentation of Lieutenant Colonel Dr. Jennifer Yeaw, Center for Forensic Behavioral Sciences, "DoD Expert Witness in Sexual Assault Courts-Martial"

xii. April 11, 2014 Meeting of the Comparative Systems Subcommittee

PowerPoint Presentation of Dr. James P. Lynch, University of Maryland, "Measuring Rape and Sexual Assault: In Self-Report Surveys"

PowerPoint Presentation of Dr. William J. Sabol and Allen Beck, Bureau of Justice Statistics, "Appearance before the Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel"

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

6. OFFICIAL REPORTS

Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2012 to September 30, 2013, *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf

Bureau of Justice Statistics, Special Report on Female Victims of Sexual Violence, 1994-2010 (Mar. 2013), *available at* http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4594

Defense Legal Policy Board, Report of the Subcommittee on Military Justice in Combat Zones (May 2013), *available at* http://www.caaflog.com/wp-content/uploads/20130531-Subcommittee-Report-REPORT-OF-THE-SUBCOMMITTEE-ON-MILITARY-JUSTICE-IN-COMBAT-ZONES-31-May-13-2.pdf

Defense Manpower Data Center, Survey Note: 2012 Workplace and Gender Relations Survey of Active Duty Members (Mar. 2013), *available at* http://www.sapr.mil/public/docs/research/2012_workplace_and_gender_relations_survey_of_active_duty_members-survey_note_and_briefing.pdf

Report of the Defense Task Force on Sexual Assault in the Military Services (Dec. 2009), *available at* http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf

Report of the Defense Task Force on Sexual Harassment & Violence at the Military Service Academies (June 2005), *available at* http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf

Department of the Army Judge Advocate General, Military Justice Review (2004) (unpublished) (on file at Response Systems Panel)

Department of Defense, FY08 Annual Report on Sexual Assault in the Military, *available at* http://www.sapr.mil/public/docs/reports/dod_fy08_annual_report_combined.pdf

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Appendix F:
EXCERPTS FROM THE MANUAL FOR COURTS-MARTIAL, UNIFORM CODE OF MILITARY JUSTICE, AND LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS

EXCERPTS FROM THE MCM AND UCMJ

Uniform Code of Military Justice (UCMJ)

Art. 13 Punishment prohibited before trial

Art. 15 Commanding Officer's nonjudicial punishment

Art. 16-21 Court-martial jurisdiction

Art. 22-29 Composition of court-martial

Art. 31 Compulsory self-incrimination prohibited

Art. 32 Investigation

Art. 34 Advice of staff judge advocate and reference for trial

Art. 37 Unlawfully influencing action of court

Art. 41 Challenges

Art. 46 Opportunity to obtain witnesses and other evidence

Art. 48 Contempts

Art. 49 Depositions

Art. 51 Voting and rulings

Art. 52 Number of votes required

Art. 66 Review of Court of Criminal Appeals

Art. 67 Review by Court of Appeals for the Armed Forces

Art. 69 Review in the Office of the Judge Advocate General

Punitive Articles

Article 80 Attempts

Article 92 Failure to obey order or regulation

Article 98 Noncompliance with procedural rules

Article 120 Rape and sexual assault

- Amendment to Art. 120, dated May 15, 2013
- Art. 120 (after June 28, 2012)
- Art. 120 (during the period of October 1, 2007 through June 27, 2012)
- Art. 120 (prior to October 1, 2007)

Article 125 Sodomy

Article 134 (Fraternization)

Rules for Courts-Martial (RCM)

RCM 104 Unlawful Command Influence

RCM 304 Pretrial restraint

RCM 305 Pretrial confinement

RCM 306 Initial disposition

RCM 307 Preferral of charges

RCM 404 Action by commander exercising special CM jurisdiction

RCM 405 Pretrial Investigation

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

RCM 501 Composition and Personnel of Court-martial

RCM 502 Qualifications and duties of personnel of courts-martial

RCM 503 Detailing members, military judges, and counsel

RCM 601 Referral

RCM 701 Discovery

RCM 702 Depositions

RCM 703 Production of witnesses and evidence

RCM 704 Immunity

RCM 705 Pretrial agreements

RCM 801 Military judge's responsibilities; other matters

RCM 903 Accused's elections on composition of court-martial

RCM 910 Pleas

RCM 912 Challenge of selection of members

RCM 921 Deliberations and voting on findings

RCM 1002 Sentence determination

RCM 1003 Punishments

RCM 1004 Capital cases

RCM 1006 Deliberations and voting on sentence

RCM 1007 Announcement of sentence

Military Rules of Evidence (MRE) (As of May 15, 2013)

MRE 305 Warnings about rights

MRE 404 Character evidence

MRE 412 Sex offense cases

MRE 413 Evidence of similar crimes in sexual assault cases

MRE 501 General Rule

MRE 502 Lawyer-client privilege

MRE 503 Communications to clergy

MRE 504 Husband-wife privilege

MRE 513 Psychotherapist-patient privilege

MRE 514 Victim advocate-victim privilege

MRE 703 Bases of an Expert's Opinion Testimony

LIST OF CURRENT OR PENDING LEGISLATION RELEVANT TO ISSUES CONSIDERED BY CSS:

FY13 NDAA RSP Original Tasking

Sec 576 (d) (1) Response System Panel

FY14 NDAA

Sec 1702 Revision of Article 32 and Article 60

Sec 1704 Defense counsel interview of victim

Sec 1705 Discharge of dismissal for certain sex-related offenses

Sec 1706 Participation of victim in clemency phase

Sec 1708 Modification of MCM to eliminate factors relating to Character

Sec 1721 Tracking Compliance of commander officers in conducting organizational climate assessments for purposes of preventing and responding to sexual assault

Sec 1725(b) Availability of Sexual Assault Nurse Examiners

Sec 1731 Independent reviews and assessments of UCMJ and judicial proceedings of sexual assault cases

Sec 1732 Review and policy regarding DoD investigative practices

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Sec 1742 Commanding officer action on reports of sexual assault involving members of the Armed Forces.

Sec 1744 Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.

Sec 1752 Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the UCMJ through courts-martial

Sec 1753 Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.

Victims Protection Act of 2014

Sec 2 Inclusion of Senior Trial Counsel determinations of referral of cases to trial by court-martial in cases reviewed by Secretaries of Military departments

Sec 3(b) Consultation with Victims regarding Preference in Prosecution

Sec 3(g) Modification of MRE relating to admissibility of general Military Character

Sec 5 Collaboration between DoD and DoJ in efforts to prevent and respond to sexual assault

Furthering Accountability and Individual Rights within the Military Act of 2014 (Fair Military Act)

Sec 4 Modification of MRE 404 relating to Admissibility of General Military Character Toward Probability of Innocence

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

certain specified limits. Confinement is the physical restraint of a person.

(b) An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to this chapter. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of his command or subject to his authority into arrest or confinement.

(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

(d) No person may be ordered into arrest or confinement except for probable cause.

(e) Nothing in this article limits the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority may be notified.

§ 810. Art. 10. Restraint of persons charged with offenses

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.

§ 811. Art. 11. Reports and receiving of prisoners

(a) No provost marshal, commander or a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.

(b) Every commander of a guard or master at arms to whose charge a prisoner is committed shall, within twenty-four hours after that commitment or as soon as he is relieved from guard, report to the commanding officer the name of the prisoner, the offense charged against him, and the name of the person who ordered or authorized the commitment.

§ 812. Art. 12. Confinement with enemy prisoners prohibited

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces.

§ 813. Art. 13. Punishment prohibited before trial

No person, while being held for trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances required to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline.

§ 814. Art. 14. Delivery of offenders to civil authorities

(a) Under such regulations as the Secretary concerned may prescribe, a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial.

(b) When delivery under this article is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender after having answered to the civil authorities for his offense shall, upon the request of competent military authority, be returned to military custody for the completion of his sentence.

SUBCHAPTER III. NON-JUDICIAL PUNISHMENT

§ 815. Art. 15. Commanding Officer's non-judicial punishment

(a) Under such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned, limitations may be placed on the powers granted by this article with respect to the kind and amount of punishment authorized, the categories of commanding officers and warrant officers exercising command authorized to exercise those powers, the applicability of this article to an accused who demands trial by court-martial, and the kinds of courts-martial to which the case may be referred upon such a demand. However, except in the case of a member attached to or embarked in a vessel, punishment may not be imposed upon any member of the armed forces under this article if the member has, before the imposition of such punishment, demanded trial by court-martial in lieu of such punishment. Under similar regulations, rules may be prescribed with respect to the suspension of punishments authorized hereunder. If authorized by regulations of the Secretary concerned, a commanding officer exercising general court-martial jurisdiction or an officer of general or flag rank in command may delegate his powers under this article to a principal assistant.

(b) Subject to subsection (a) any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses without the intervention of a court-martial—

(1) upon officers of his command

(A) restriction to certain specified limits, with or without suspension from duty, for not more than 30 consecutive days;

(B) if imposed by an officer exercising general court-martial jurisdiction or an officer of general or flag rank in command

(i) arrest in quarters for not more than 30 consecutive days;

(ii) forfeiture of not more than one-half of one month's pay per month for two months;

(iii) restriction to certain specified limits, with or without suspension from duty, for not more than 60 consecutive days;

(iv) detention of not more than one-half of one month's pay per month for three months;

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

SUBCHAPTER IV. COURT-MARTIAL JURISDICTION

Sec. Art.

816. 16. Courts-martial classified.
817. 17. Jurisdiction of courts-martial in general.
818. 18. Jurisdiction of general courts-martial.
819. 19. Jurisdiction of special courts-martial.
820. 20. Jurisdiction of summary courts-martial.
821. 21. Jurisdiction of courts-martial not exclusive.

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members or, in a case in which the accused may be sentenced to a penalty of death, the number of members determined under section 825a of this title (article 25a); or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

(A) not less than three members; or

(B) a military judge and not less than three members; or

(C) only a military judge, if one has been detailed to the court, and the accused under the same conditions as those prescribed in clause (1)(B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

§ 817. Art. 17. Jurisdiction of courts-martial in general

(a) Each armed force has court-martial jurisdiction over all persons subject to this chapter. The exercise of jurisdiction by one armed force over personnel of another armed force shall be in accordance with regulations prescribed by the President.

(b) In all cases, departmental review after that by the officer with authority to convene a general court-martial for the command which held the trial, where that review is required under this chapter, shall be carried out by the department that includes the armed force of which the accused is a member.

§ 818. Art. 18. Jurisdiction of general courts-martial

Subject to section 817 of this title (article 17), general courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter. General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war. However, a general court-martial of the kind specified in section 816(1)(B) of this title (article 16(1)(B)) shall not have jurisdiction to try any person for any offense for which the death penalty may be adjudged unless the case has been previously referred to trial as a noncapital case.

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishable by this chapter and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dishonorable discharge, dismissal, confinement for more than one year, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than one year. A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) was detailed to represent the accused, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed.

§ 820. Art. 20. Jurisdiction of summary courts-martial

Subject to section 817 of this title (article 17), summary courts-martial have jurisdiction to try persons subject to this chapter, except officers, cadets, aviation cadets, and midshipmen, for any noncapital offense made punishable by this chapter. No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto. If objection to trial by summary court-martial is made by an accused, trial may be ordered by special or general court-martial as may be appropriate. Summary courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay.

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

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Excerpts from the MCM and UCMJ

SUBCHAPTER V. COMPOSITION OF COURTS-MARTIAL

Sec.	Art.
822.	22. Who may convene general courts-martial.
823.	23. Who may convene special courts-martial.
824.	24. Who may convene summary courts-martial.
825.	25. Who may serve on courts-martial.
826.	26. Military judge of a general or special courts-martial.
827.	27. Detail of trial counsel and defense counsel.
828.	28. Detail or employment of reporters and interpreters.
829.	29. Absent and additional members.

§ 822. Art. 22. Who may convene general courts-martial

(a) General courts-martial may be convened by—

(1) the President of the United States;

(2) the Secretary of Defense;

(3) the commanding officer of a unified or specified combatant command;

(4) the Secretary concerned;

(5) the commanding officer of an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;

(6) the commander in chief of a fleet; the commanding officer of a naval station or larger shore activity of the Navy beyond the United States;

(7) the commanding officer of an air command, an air force, an air division, or a separate wing of the Air Force or Marine Corps;

(8) any other commanding officer designated by the Secretary concerned; or

(9) any other commanding officer in any of the armed forces when empowered by the President.

(b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

§ 823. Art. 23. Who may convene special courts-martial

(a) Special courts-martial may be convened by—

(1) any person who may convene a general court-martial;

(2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;

(3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

§ 824. Art. 24. Who may convene summary courts-martial

(a) Summary courts-martial may be convened by—

(1) any person who may convene a general or special court-martial;

(2) the commanding officer of a detached company or other detachment of the Army;

(3) the commanding officer of a detached squadron or other detachment of the Air Force; or

(4) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) When only one commissioned officer is present with a command or detachment he shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases brought before him. Summary courts-martial may, however, be convened in any case by superior competent authority when considered desirable by him.

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member of an armed force on active duty who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.

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(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

§ 825a. Art. 25a. Number of members in capital cases

In a case in which the accused may be sentenced to a penalty of death, the number of members shall be not less than 12, unless 12 members are not reasonably available because of physical conditions or military exigencies, in which case the convening authority shall specify a lesser number of members not less than five, and the court may be assembled and the trial held with not less than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general court-martial. Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

§ 827. Art. 27. Detail of trial counsel and defense counsel

(a)

(1) Trial counsel and defense counsel shall be detailed for each general and special court-martial. Assistant trial counsel and assistant and associate defense counsel may be detailed for each general and special court-martial. The Secretary concerned shall prescribe regulations providing for the manner in which counsel are detailed for such courts-martial and for the persons who are authorized to detail counsel for such courts-martial.

(2) No person who has acted as investigating officer, military judge, or court member in any case may act later as trial counsel, assistant trial counsel, or, unless expressly requested by the accused, as defense counsel or assistant or associate defense counsel in the same case. No person who has acted for the prosecution may act later in the same case for the defense, nor may any person who has acted for the defense act later in the same case for the prosecution.

(b) Trial counsel or defense counsel detailed for a general court-martial—

(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; or must be a member of the bar of a Federal court or of the highest court of a State; and

(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

(c) In the case of a special court-martial—

(1) the accused shall be afforded the opportunity to be represented at the trial by counsel having the qualifications prescribed under section 827(b) of this title (article 27(b)) unless counsel having such qualifications cannot be obtained on account of physical conditions or military exigencies. If counsel having such qualifications cannot be obtained, the court may be convened and the trial held but the convening authority shall make a detailed written statement, to be appended to the record, stating why counsel with such qualifications could not be obtained;

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(2) if the trial counsel is qualified to act as counsel before a general court-martial, the defense counsel detailed by the convening authority must be a person similarly qualified; and

(3) if the trial counsel is a judge advocate or a member of the bar of a Federal court or the highest court of a State, the defense counsel detailed by the convening authority must be one of the foregoing.

§ 828. Art. 28. Detail or employment of reporters and Interpreters

Under such regulations as the Secretary concerned may prescribe, the convening authority of a court-martial, military commission, or court of inquiry shall detail or employ qualified court reporters, who shall record the proceedings of and testimony taken before that court or commission. Under like regulations the convening authority of a court-martial, military commission, or court of inquiry may detail or employ interpreters who shall interpret for the court or commission.

§ 829. Art. 29. Absent and additional members

(a) No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.

(b) Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below five members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than five members. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.

(c) Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below three members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than three members. The trial shall proceed with the new members present as if no evidence had previously been introduced at the trial, unless a verbatim record of the evidence previously introduced before the members of the court or a stipulation thereof is read to the court in the presence of the military judge, if any, the accused and counsel for both sides.

(d) If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of section 8 16(l)(B) or (2)(C) of this title (article 16(1)(B) or (2)(C)), after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced or a stipulation thereof is read in court in the presence of the new military judge, the accused, and counsel for both sides.

SUBCHAPTER VI. PRE-TRIAL PROCEDURE

Sec.	Art.
830.	30. Charges and specifications.
831.	31. Compulsory self-incrimination prohibited.
832.	32. Investigation.
833.	33. Forwarding of charges.
834.	34. Advice of staff judge advocate and reference for trial.
835.	35. Service of charges.

§ 830. Art. 30. Charges and specifications

(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

§ 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

§ 832. Art. 32. Investigation

(a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

(b) The accused shall be advised of the charges against him and of his right to be represented at that investigation by counsel. The accused has the right to be represented at that investigation as

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provided in section 838 of this title (article 38) and in regulations prescribed under that section. At that investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation, and the investigation officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides and a copy thereof shall be given to the accused.

(c) If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b), no further investigation of that charge is necessary under this article unless it is demanded by the accused after he is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in his own behalf.

(d) If evidence adduced in an investigation under this article indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense without the accused having first been charged with the offense if the accused—

(1) is present at the investigation;

(2) is informed of the nature of each uncharged offense investigated; and

(3) is afforded the opportunities for representation, cross-examination, and presentation prescribed in subsection (b).

(e) The requirements of this article are binding on all persons administering this chapter but failure to follow them does not constitute jurisdictional error.

§ 833. Art. 33. Forwarding of charges

When a person is held for trial by general court-martial the commanding officer shall, within eight days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the Investigation and allied papers, to the officer exercising general court-martial jurisdiction. If that is not practicable, he shall report in writing to that officer the reasons for delay.

§ 834. Art. 34. Advice of staff judge advocate and reference for trial

(a) Before directing the trial of any charge by general court-martial, the convening authority shall refer it to his staff judge advocate for consideration and advice. The convening authority may not refer a specification under a charge to a general court-martial for trial unless he has been advised in writing by the staff judge advocate that—

(1) the specification alleges an offense under this chapter;

(2) the specification is warranted by the evidence indicated in the report of investigation under section 832 of this title (article 32) (if there is such a report); and

(3) a court-martial would have jurisdiction over the accused and the offense.

(b) The advice of the staff judge advocate under subsection (a) with respect to a specification under a charge shall include a written and signed statement by the staff judge advocate

(1) expressing his conclusions with respect to each matter set forth in subsection (a); and

(2) recommending action that the convening authority take regarding the specification.

If the specification is referred for trial, the recommendation of the staff judge advocate shall accompany the specification.

(c) If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made.

§ 835. Art. 35. Service of charges

The trial counsel to whom court-martial charges are referred for trial shall cause to be served upon the accused a copy of the charges upon which trial is to be had. In time of peace no person may, against his objection, be brought to trial or be required to participate by himself or counsel in a session called by the military judge under section 839(a) of this title (article 39(a)), in a general court-martial case within a period of five days after the service of charges upon him or in a special court-martial within a period of three days after the service of the charges upon him.

SUBCHAPTER VII. TRIAL PROCEDURE

Sec.	Art.	
836.	36.	President may prescribe rules.
837.	37.	Unlawfully influencing action of court.
838.	38.	Duties of trial counsel and defense counsel.
839.	39.	Sessions.
840.	40.	Continuances.
841.	41.	Challenges.
842.	42.	Oaths.
843.	43.	Statute of limitations.
844.	44.	Former jeopardy.
845.	45.	Pleas of the accused.
846.	46.	Opportunity to obtain witnesses and other evidence.
847.	47.	Refusal to appear or testify.
848.	48.	Contempts.
849.	49.	Depositions.
850.	50.	Admissibility of records of courts of inquiry.
850a.	50a.	Defense of lack of mental responsibility.
851.	51.	Voting and rulings.
852.	52.	Number of votes required.
853.	53.	Court to announce action.
854.	54.	Record of trial.

§ 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district

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courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

§ 837. Art. 37. Unlawfully influencing action of court

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel.

(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at an investigation under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define "reasonably available" for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committees on Armed Services of the Senate and House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860 of this title (article 60); and

(3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of

this title (article 35), call the court into session without the presence of the members for the purpose of—

(1) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(2) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members of the court;

(3) if permitted by regulations of the Secretary concerned, holding the arraignment and receiving the pleas of the accused; and

(4) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

(b) Proceedings under subsection (a) shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29). If authorized by regulations of the Secretary concerned, and if at least one defense counsel is physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology (such as videoteleconferencing technology).

(c) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and in cases in which a military judge has been detailed to the court, the military judge.

(d) The findings, holdings, interpretations, and other precedents of military commissions under chapter 47A of this title—

(1) may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial under this chapter; and

(2) may not form the basis of any holding, decision, or other determination of a court-martial.

§ 840. Art. 40. Continuances

The military judge or a court-martial without a military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

§ 841. Art. 41. Challenges

(a)(1) The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge, or, if none, the court, shall determine the relevance and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(2) If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.

(b)(1) Each accused and the trial counsel are entitled initially to one peremptory challenge of the members of the court. The military judge may not be challenged except for cause.

(2) If exercise of a peremptory challenge reduces the court below the minimum number of members required by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

(As amended Nov. 5, 1990, Pub. L. 101–510, Div. A, Title V, § 541(b)–(d), 104 Stat. 1565.)

§ 842. Art. 42. Oaths

(a) Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully. The form of the oath, the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary concerned. These regulations may provide that an oath to perform faithfully duties as a military judge, trial counsel, assistant trial counsel, defense counsel, or assistant or associate defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty, and if such an oath is taken it need not again be taken at the time the judge advocate, or other person is detailed to that duty.

(b) Each witness before a court-martial shall be examined on oath.

§ 843. Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, with murder, rape, or rape of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2)(A) A person charged with having committed a child abuse offense against a child is liable to be tried by court-martial if the sworn charges and specifications are received during the life of the child or within five years after the date on which the offense was committed, whichever provides a longer period, by an officer exercising summary court-martial jurisdiction with respect to that person.

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(B) In subparagraph (A), the term "child abuse offense" means an act that involves abuse of a person who has not attained the age of 16 years and constitutes any of the following offenses:

(i) Any offense in violation of section 920, 920a, 920b, or 920c of this title (article 120, 120a, 120b, or 120c). [Note: *See* Appendix 23 about the amendment of Article 43(b)(2)(B)(i)]

(ii) Maiming in violation of section 924 of this title (article 124).

(iii) Sodomy in violation of section 925 of this title (article 125).

(iv) Aggravated assault or assault consummated by a battery in violation of section 928 of this title (article 128).

(v) Kidnapping, assault with intent to commit murder, voluntary manslaughter, rape, or sodomy, or indecent acts in violation of section 934 of this title (article 134).

(C) In subparagraph (A), the term 'child abuse offense' includes an act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapter 110 or 117, or under section 1591, of title 18.

(3) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

(c) Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this section (article).

(d) Periods in which the accused was absent from territory in which the United States has the authority to apprehend him, or in the custody of civil authorities, or in the hands of the enemy, shall be excluded in computing the period of limitation prescribed in this article.

(e) For an offense the trial of which in time of war is certified to the President by the Secretary concerned to be detrimental to the prosecution of the war or inimical to the national security, the period of limitation prescribed in this article is extended to six months after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(f) When the United States is at war, the running of any statute of limitations applicable to any offense under this chapter—

(1) involving fraud or attempted fraud against the United States or any agency thereof in any manner, whether by conspiracy or not;

(2) committed in connection with the acquisition, care, handling, custody, control, or disposition of any real or personal property of the United States; or

(3) committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation, or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or Government agency;

is suspended until three years after the termination of hostilities as proclaimed by the President or by a joint resolution of Congress.

(g)(1) If charges or specifications are dismissed as defective or insufficient for any cause and the period prescribed by the applicable statute of limitations—

(A) has expired; or

(B) will expire within 180 days after the date of dismissal of the charges and specifications, trial and punishment under new charges and specifications are not barred by the statute of limitations if the conditions specified in paragraph (2) are met.

(2) The conditions referred to in paragraph (1) are that the new charges and specifications must—

(A) be received by an officer exercising summary court-martial jurisdiction over the command within 180 days after the dismissal of the charges or specifications; and

(B) allege the same acts or omissions that were alleged in the dismissed charges or specifications (or allege acts or omissions that were included in the dismissed charges or specifications).

§ 844. Art. 44. Former jeopardy

(a) No person may, without his consent, be tried a second time for the same offense.

(b) No proceeding in which an accused has been found guilty by court-martial upon any charge or specification is a trial in the sense of this article until the finding of guilty has become final after review of the case has been fully completed.

(c) A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article.

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may, if permitted by regulations of the Secretary concerned, be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

§ 846. Art. 46. Opportunity to obtain witnesses and other evidence

The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States

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having criminal jurisdiction may lawfully issue and shall run to any part of the United States, or the Commonwealths and possessions.

§ 847. Art. 47. Refusal to appear or testify

(a) Any person not subject to this chapter who—

(1) has been duly subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board, or has been duly issued a subpoena duces tecum for an investigation pursuant to section 832(b) of this title (article 32(b));

(2) has been provided a means for reimbursement from the Government for fees and mileage at the rates allowed to witnesses attending the courts of the United States or, in the case of extraordinary hardship, is advanced such fees and mileage; and

(3) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally subpoenaed to produce;

is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on indictment or information in a United States district court or in a court of original criminal jurisdiction in any of the Commonwealths or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be fined or imprisoned, or both, at the court's discretion.

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, board, or convening authority file an information against and prosecute any person violating this article.

(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.

§ 848. Art. 48. Contempts

(a) *Authority to punish contempt*. A judge detailed to a court-martial, a court of inquiry, the United States Court of Appeals for the Armed Forces, a military Court of Criminal Appeals, a provost court, or a military commission may punish for contempt any person who—

(1) uses any menacing word, sign, or gesture in the presence of the judge during the proceedings of the court-martial, court, or military commission;

(2) disturbs the proceedings of the court-martial, court, or military commission by any riot or disorder; or

(3) willfully disobeys the lawful writ, process, order, rule, decree, or command of the court-martial, court, or military commission.

(b) *Punishment*. The punishment for contempt under subsection (a) may not exceed confinement for 30 days, a fine of $1,000, or both.

(c) *Inapplicability to military commissions under Chapter 47a*. This section does not apply to a military commission established under chapter 47A of this title.

§ 849. Art. 49. Depositions

(a) At any time after charges have been signed as provided in section 830 of this title (article 30), any party may take oral or written depositions unless the military judge or court-martial without a military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause. If a deposition is to be taken before charges are referred for trial, such an authority may designate commissioned officers to represent the prosecution and the defense and may authorize those officers to take the deposition of any witness.

(b) The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition.

(c) Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the United States or by the laws of the place where the deposition is taken to administer oaths.

(d) A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence before any military court or commission in any case not capital, or in any proceeding before a court of inquiry or military board, if it appears

(1) that the witness resides or is beyond the State, Commonwealth, or District of Columbia in which the court, commission, or board is ordered to sit, or beyond 100 miles from the place of trial or hearing;

(2) that the witness by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of trial or hearing; or

(3) that the present whereabouts of the witness is unknown.

(e) Subject to subsection (d), testimony by deposition may be presented by the defense in capital cases.

(f) Subject to subsection (d), a deposition may be read in evidence or, in the case of audiotape, videotape, or similar material, may be played in evidence in any case in which the death penalty is authorized but is not mandatory, whenever the convening authority directs that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial.

§ 850. Art. 50. Admissibility of records of courts of inquiry

(a) In any case not capital and not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial or military commission if the accused was a party before the court of inquiry and if the same

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issue was involved or if the accused consents to the introduction of such evidence.

(b) Such testimony may be read in evidence only by the defense in capital cases or cases extending to the dismissal of a commissioned officer.

(c) Such testimony may also be read in evidence before a court of inquiry or a military board.

§ 850a. Art. 50a. Defense of lack of mental responsibility

(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge, or the president of a court-martial without a military judge, shall instruct the members of the court as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—

(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

(2) in the case of court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

§ 851. Art. 51. Voting and rulings

(a) Voting by members of a general or special court-martial on the findings and on the sentence, and by members of a court-martial without a military judge upon questions of challenge, shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge and, except for questions of challenge, the president of a court-martial without a military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused, or by the president of a court-martial without a military Judge upon any question of law other than a motion for a finding of not guilty, is final and constitutes the ruling of the court. However, the military judge or the president of a court-martial without a military judge may change his ruling at any time during the trial. Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title (article 52), beginning with the junior in rank.

(c) Before a vote is taken on the findings, the military judge or the president of a court-martial without a military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

§ 852. Art. 52. Number of votes required

(a)(1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b)(1) No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter expressly made punishable by death.

(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.

(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.

(c) All other questions to be decided by the members of a general

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or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member challenged. A tie vote on a motion for a finding of not guilty or on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

§ 853. Art. 53. Court to announce action

A court-martial shall announce its findings and sentence to the parties as soon as determined.

§ 854. Art. 54. Record of trial

(a) Each general court-martial shall keep a separate record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by that of a member if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. In a court-martial consisting of only a military judge the record shall be authenticated by the court reporter under the same conditions which would impose such a duty on a member under the subsection.

(b) Each special and summary court-martial shall keep a separate record of the proceedings in each case, and the record shall be authenticated in the manner required by such regulations as the President may prescribe.

(c)(1) A complete record of the proceedings and testimony shall be prepared—

(A) in each general court-martial case in which the sentence adjudged includes death, a dismissal, a discharge, or (if the sentence adjudged does not include a discharge) any other punishment which exceeds that which may otherwise be adjudged by a special court-martial; and

(B) in each special court-martial case in which the sentence adjudged includes a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months.

(2) In all other court-martial cases, the record shall contain such matters as may be prescribed by regulations of the President.

(d) A copy of the record of the proceedings of each general and special court-martial shall be given to the accused as soon as it is authenticated.

(e) In the case of a general or special court-martial involving a sexual assault or other offense covered by section 920 of this title (article 120), a copy of all prepared records of the proceedings of the court-martial shall be given to the victim of the offense if the victim testified during the proceedings. The records of the proceedings shall be provided without charge and as soon as the records are authenticated. The victim shall be notified of the opportunity to receive the records of the proceedings.

SUBCHAPTER VIII. SENTENCES

Sec.	Art.	
855.	55.	Cruel and unusual punishments prohibited.
856.	56.	Maximum limits.
856a.	56a.	Sentence of confinement for life without eligibility for parole.
857.	57.	Effective date of sentences.
857a.	57a.	Deferment of sentences.
858.	58.	Execution of confinement.
858a.	58a.	Sentences: reduction in enlisted grade upon approval.
858b.	58b.	Sentences: forfeiture of pay and allowances during confinement.

§ 855. Art. 55. Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

§ 856. Art. 56. Maximum limits

The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.

§ 856a. Art. 56a. Sentence of confinement for life without eligibility for parole

(a) For any offense for which a sentence of confinement for life may be adjudged, a court-martial may adjudge a sentence of confinement for life without eligibility for parole.

(b) An accused who is sentenced to confinement for life without eligibility for parole shall be confined for the remainder of the accused's life unless—

(1) the sentence is set aside or otherwise modified as a result of—

(A) action taken by the convening authority, the Secretary concerned, or another person authorized to act under section 860 of this title (article 60); or

(B) any other action taken during post-trial procedure and review under any other provision of subchapter IX;

(2) the sentence is set aside or otherwise modified as a result of action taken by a Court of Criminal Appeals, the Court of Appeals for the Armed Forces, or the Supreme Court; or

(3) the accused is pardoned.

§ 857. Art. 57. Effective date of sentences

(a)

(1) Any forfeiture of pay or allowances or reduction in grade that is included in a sentence of a court-martial takes effect on the earlier of—

(A) the date that is 14 days after the date on which the sentence is adjudged; or

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upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial.

§ 864. Art. 64. Review by a judge advocate

(a) Each case in which there has been a finding of guilty that is not reviewed under section 866 or 869(a) of this title (article 66 or 69(a)) shall be reviewed by a judge advocate under regulations of the Secretary concerned. A judge advocate may not review a case under this subsection if he has acted in the same case as an accuser, investigating officer, member of the court, military judge, or counsel or has otherwise acted on behalf of the prosecution or defense. The judge advocate's review shall be in writing and shall contain the following:

(1) Conclusions as to whether—

(A) the court had jurisdiction over the accused and the offense;

(B) the charge and specification stated an offense; and

(C) the sentence was within the limits prescribed as a matter of law.

(2) A response to each allegation of error made in writing by the accused.

(3) If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

(b) The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the person exercising general court-martial jurisdiction over the accused at the time the court was convened (or to that person's successor in command) if—

(1) the judge advocate who reviewed the case recommends corrective action;

(2) the sentence approved under section 860(c) of this title (article 60(c)) extends to dismissal, a bad-conduct or dishonorable discharge, or confinement for more than six months; or

(3) such action is otherwise required by regulations of the Secretary concerned.

(c)(1) The person to whom the record of trial and related documents are sent under subsection (b) may—

(A) disapprove or approve the findings or sentence, in whole or in part;

(B) remit, commute, or suspend the sentence in whole or in part;

(C) except where the evidence was insufficient at the trial to support the findings, order a rehearing on the findings, on the sentence, or on both; or

(D) dismiss the charges.

(2) If a rehearing is ordered but the convening authority finds a rehearing impracticable, he shall dismiss the charges.

(3) If the opinion of the judge advocate in the judge advocate's review under subsection (a) is that corrective action is required as a matter of law and if the person required to take action under subsection (b) does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of trial and action thereon shall be sent to Judge Advocate General for review under section 869(b) of this title (article 69(b)).

§ 865. Art. 65. Disposition of records

(a) In a case subject to appellate review under section 866 or 869(a) of this title (article 66 or 69(a)) in which the right to such review is not waived, or an appeal is not withdrawn, under section 861 of this title (article 61), the record of trial and action thereon shall be transmitted to the Judge Advocate General for appropriate action.

(b) Except as otherwise required by this chapter, all other records of trial and related documents shall be transmitted and disposed of as the Secretary concerned may prescribe by regulation.

§ 866. Art. 66. Review by Court of Criminal Appeals

(a) Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing court-martial cases, the court may sit in panels or as a whole in accordance with rules prescribed under subsection (f). Any decision of a panel may be reconsidered by the court sitting as a whole in accordance with such rules. Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians, each of whom must be a member of a bar of a Federal court or the highest court of a State. The Judge Advocate General shall designate as chief judge one of the appellate military judges of the Court of Criminal Appeals established by him. The chief judge shall determine on which panels of the court the appellate judges assigned to the court will serve and which military judge assigned to the court will act as the senior judge on each panel.

(b) The Judge Advocate General shall refer to a Court of Criminal Appeals the record in each case of trial by court-martial—

(1) in which the sentence, as approved, extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more; and

(2) except in the case of a sentence extending to death, the right to appellate review has not been waived or an appeal has not been withdrawn under section 861 of this title (article 61).

(c) In a case referred to it, the Court of Criminal Appeals may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

(d) If the Court of Criminal Appeals sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) The Judge Advocate General shall, unless there is to be further action by the President, the Secretary concerned, the Court of Appeals for the Armed Forces, or the Supreme Court, instruct the

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convening authority to take action in accordance with the decision of the Court of Criminal Appeals. If the Court of Criminal Appeals has ordered a rehearing but the convening authority finds a rehearing impracticable, he may dismiss the charges.

(f) The Judge Advocates General shall prescribe uniform rules of procedure for Courts of Criminal Appeals and shall meet periodically to formulate policies and procedure in regard to review of court-martial cases in the office of the Judge Advocates General and by Courts of Criminal Appeals.

(g) No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

(h) No member of a Court of Criminal Appeals shall be eligible to review the record of any trial if such member served as investigating officer in the case or served as a member of the court-martial before which such trial was conducted, or served as military judge, trial or defense counsel, or reviewing officer of such trial.

§ 867. Art. 67. Review by the Court of Appeals for the Armed Forces

(a) The Court of Appeals for the Armed Forces shall review the record in—

(1) all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death;

(2) all cases reviewed by a Court of Criminal Appeals which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces for review; and

(3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.

(b) The accused may petition the Court of Appeals for the Armed Forces for review of a decision of a Court of Criminal Appeals within 60 days from the earlier of—

(1) the date on which the accused is notified of the decision of the Court of Criminal Appeals; or

(2) the date on which a copy of the decision of the Court of Criminal Appeals, after being served on appellate counsel of record for the accused (if any), is deposited in the United States mails for delivery by first class certified mail to the accused at an address provided by the accused or, if no such address has been provided by the accused, at the latest address listed for the accused in his official service record. The Court of Appeals for the Armed Forces shall act upon such a petition promptly in accordance with the rules of the court.

(c) In any case reviewed by it, the Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals. In a case which the Judge Advocate General orders sent to the Court of Appeals for the Armed Forces, that action need be taken only with respect to the issues raised by him. In a case reviewed upon petition of the accused, that action need be taken only with respect to issues specified in the grant of review. The Court of Appeals for the Armed Forces shall take action only with respect to matters of law.

(d) If the Court of Appeals for the Armed Forces sets aside the findings and sentence, it may, except where the setting aside is based on lack of sufficient evidence in the record to support the findings, order a rehearing. If it sets aside the findings and sentence and does not order a rehearing, it shall order that the charges be dismissed.

(e) After it has acted on a case, the Court of Appeals for the Armed Forces may direct the Judge Advocate General to return the record to the Court of Criminal Appeals for further review in accordance with the decision of the court. Otherwise, unless there is to be further action by the President or the Secretary concerned, the Judge Advocate General shall instruct the convening authority to take action in accordance with that decision. If the court has ordered a rehearing, but the convening authority finds a rehearing impracticable, he may dismiss the charges.

§ 867a. Art. 67a. Review by the Supreme Court

(a) Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28. The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review.

(b) The accused may petition the Supreme Court for a writ of certiorari without prepayment of fees and costs or security therefor and without filing the affidavit required by section 1915(a) of title 28.

§ 868. Art. 68. Branch offices

The Secretary concerned may direct the Judge Advocate General to establish a branch office with any command. The branch office shall be under an Assistant Judge Advocate General who, with the consent of the Judge Advocate General, may establish a Court of Criminal Appeals with one or more panels. That Assistant Judge Advocate General and any Court of Criminal Appeals established by him may perform for that command under the general supervision of the Judge Advocate General, the respective duties which the Judge Advocate General and a Court of Criminal Appeals established by the Judge Advocate General would otherwise be required to perform as to all cases involving sentences not requiring approval by the President.

§ 869. Art. 69. Review in the office of the Judge Advocate General

(a) The record of trial in each general court-martial that is not otherwise reviewed under section 866 of this title (article 66) shall be examined in the office of the Judge Advocate General if there is a finding of guilty and the accused does not waive or withdraw his right to appellate review under section 861 of this title (article 61). If any part of the findings or sentence is found to be unsupported in law or if reassessment of the sentence is appro-

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Excerpts from the MCM and UCMJ

elements are identical (for example, larceny as a lesser included offense of robbery);

(b) All of the elements of the lesser offense are included in the greater offense, but one or more elements is legally less serious (for example, housebreaking as a lesser included offense of burglary); or

(c) All of the elements of the lesser offense are included and necessary parts of the greater offense, but the mental element is legally less serious (for example, wrongful appropriation as a lesser included offense of larceny).

~~The notice requirement may also be met, depending on the allegations in the specification, even though an included offense requires proof of an element not required in the offense charged. For example, assault with a dangerous weapon may be included in a robbery.~~

Discussion

The words "or by fair implication" in paragraph 3b(1) and the last two sentences in paragraph 3b(1)(c) are inaccurate. *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). Amending paragraph 3 requires an Executive Order, hence the strikethrough font used above. In *Jones*, the Court examined Article 79 and clarified the legal test for lesser included offenses. 68 M.J. at 466. The Court held that the elements test is the proper method of determining lesser offenses and found that a lesser offense is "necessarily included" in the offense charged only if the elements of the lesser offense are a subset of the elements of the greater offense alleged. *Jones*, 68 M.J. at 470. Therefore, practitioners must consider lesser offenses on a case-by-case basis. *See also* Article 79 analysis in Appendix 23 of this Manual.

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(2) *Multiple lesser included offenses*. When the offense charged is a compound offense comprising two or more included offenses, an accused may be found guilty of any or all of the offenses included in the offense charged. For example, robbery includes both larceny and assault. Therefore, in a proper case, a court-martial may find an accused not guilty of robbery, but guilty of wrongful appropriation and assault.

(3) *Findings of guilty to a lesser included offense*. A court-martial may find an accused not guilty of the offense charged, but guilty of a lesser included offense by the process of exception and substitution. The court-martial may except (that is, delete) the words in the specification that pertain to the offense charged and, if necessary, substitute language appropriate to the lesser included offense. For example, the accused is charged with murder in violation of Article 118, but found guilty of voluntary manslaughter in violation of Article 119. Such a finding may be worded as follows:

Of the Specification: Guilty, except the word "murder," substituting therefor the words "willfully and unlawfully kill", of the excepted word, not guilty, of the substituted words, guilty.

Of the Charge: Not guilty, but guilty of a violation of Article 119.

If a court-martial finds an accused guilty of a lesser included offense, the finding as to the charge shall state a violation of the specific punitive article violated and not a violation of Article 79.

(4) *Specific lesser included offenses*. Specific lesser included offenses, if any, are listed for each offense discussed in this Part, but the lists are not all-inclusive.

Discussion

The lesser included offenses listed in Part IV of the Manual were established prior to *Jones* and must be analyzed on a case-by-case basis. *See United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010). Under *Jones*, some named lesser included offenses do not meet the elements test. 68 M.J. at 471-2. *See* discussion following paragraph 3b(1)(c) above. *See also* Article 79 analysis in Appendix 23 of this Manual.

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4. Article 80—Attempts

a. *Text of statute*.

(a) **An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.**

(b) **Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a court-martial may direct, unless otherwise specifically prescribed.**

(c) **Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.**

b. *Elements*.

(1) That the accused did a certain overt act;

(2) That the act was done with the specific intent to commit a certain offense under the code;

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(3) That the act amounted to more than mere preparation; and

(4) That the act apparently tended to effect the commission of the intended offense.

c. *Explanation*.

(1) *In general*. To constitute an attempt there must be a specific intent to commit the offense accompanied by an overt act which directly tends to accomplish the unlawful purpose.

(2) *More than preparation*. Preparation consists of devising or arranging the means or measures necessary for the commission of the offense. The overt act required goes beyond preparatory steps and is a direct movement toward the commission of the offense. For example, a purchase of matches with the intent to burn a haystack is not an attempt to commit arson, but it is an attempt to commit arson to applying a burning match to a haystack, even if no fire results. The overt act need not be the last act essential to the consummation of the offense. For example, an accused could commit an overt act, and then voluntarily decide not to go through with the intended offense. An attempt would nevertheless have been committed, for the combination of a specific intent to commit an offense, plus the commission of an overt act directly tending to accomplish it, constitutes the offense of attempt. Failure to complete the offense, whatever the cause, is not a defense.

(3) *Factual impossibility*. A person who purposely engages in conduct which would constitute the offense if the attendant circumstances were as that person believed them to be is guilty of an attempt. For example, if A, without justification or excuse and with intent to kill B, points a gun at B and pulls the trigger, A is guilty of attempt to murder, even though, unknown to A, the gun is defective and will not fire. Similarly, a person who reaches into the pocket of another with the intent to steal that person's billfold is guilty of an attempt to commit larceny, even though the pocket is empty.

(4) *Voluntary abandonment*. It is a defense to an attempt offense that the person voluntarily and completely abandoned the intended crime, solely because of the person's own sense that it was wrong, prior to the completion of the crime. The voluntary abandonment defense is not allowed if the abandonment results, in whole or in part, from other reasons, for example, the person feared detection or apprehension, decided to await a better opportunity for success, was unable to complete the crime, or encountered unanticipated difficulties or unexpected resistance. A person who is entitled to the defense of voluntary abandonment may nonetheless be guilty of a lesser included, completed offense. For example, a person who voluntarily abandoned an attempted armed robbery may nonetheless be guilty of assault with a dangerous weapon.

(5) *Solicitation*. Soliciting another to commit an offense does not constitute an attempt. *See* paragraph 6 for a discussion of Article 82, solicitation.

(6) *Attempts not under Article 80*. While most attempts should be charged under Article 80, the following attempts are specifically addressed by some other article, and should be charged accordingly:

(a) Article 85—desertion

(b) Article 94—mutiny or sedition.

(c) Article 100—subordinate compelling

(d) Article 104—aiding the enemy

(e) Article 106a—espionage

(f) Article 119a—attempting to kill an unborn child

(g) Article 128—assault

(7) *Regulations*. An attempt to commit conduct which would violate a lawful general order or regulation under Article 92 (*see* paragraph 16) should be charged under Article 80. It is not necessary in such cases to prove that the accused intended to violate the order or regulation, but it must be proved that the accused intended to commit the prohibited conduct.

d. *Lesser included offenses*. If the accused is charged with an attempt under Article 80, and the offense attempted has a lesser included offense, then the offense of attempting to commit the lesser included offense would ordinarily be a lesser included offense to the charge of attempt. For example, if an accused was charged with attempted larceny, the offense of attempted wrongful appropriation would be a lesser included offense, although it, like the attempted larceny, would be a violation of Article 80.

e. *Maximum punishment*. Any person subject to the code who is found guilty of an attempt under Article 80 to commit any offense punishable by the code shall be subject to the same maximum punishment authorized for the commission of the offense attempted, except that in no case shall the death pen-

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Excerpts from the MCM and UCMJ

alty be adjudged, nor shall any mandatory minimum punishment provisions apply; and in no case, other than attempted murder, shall confinement exceeding 20 years be adjudged.

f. *Sample specification*.

In that _____ (personal jurisdiction data) did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 ___ , attempt to (describe offense with sufficient detail to include expressly or by necessary implication every element).

5. Article 81—Conspiracy

a. *Text of statute*.

Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

b. *Elements*.

(1) That the accused entered into an agreement with one or more persons to commit an offense under the code; and

(2) That, while the agreement continued to exist, and while the accused remained a party to the agreement, the accused or at least one of the co-conspirators performed an overt act for the purpose of bringing about the object of the conspiracy.

c. *Explanation*.

(1) *Co-conspirators*. Two or more persons are required in order to have a conspiracy. Knowledge of the identity of co-conspirators and their particular connection with the criminal purpose need not be established. The accused must be subject to the code, but the other co-conspirators need not be. A person may be guilty of conspiracy although incapable of committing the intended offense. For example, a bedridden conspirator may knowingly furnish the car to be used in a robbery. The joining of another conspirator after the conspiracy has been established does not create a new conspiracy or affect the status of the other conspirators. However, the conspirator who joined an existing conspiracy can be convicted of this offense only if, at or after the time of joining the conspiracy, an overt act in furtherance of the object of the agreement is committed.

(2) *Agreement*. The agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy, and this may be shown by the conduct of the parties. The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play.

(3) *Object of the agreement*. The object of the agreement must, at least in part, involve the commission of one or more offenses under the code. An agreement to commit several offenses is ordinarily but a single conspiracy. Some offenses require two or more culpable actors acting in concert. There can be no conspiracy where the agreement exists only between the persons necessary to commit such an offense. Examples include dueling, bigamy, incest, adultery, and bribery.

(4) *Overt act*.

(a) The overt act must be independent of the agreement to commit the offense; must take place at the time of or after the agreement; must be done by one or more of the conspirators, but not necessarily the accused; and must be done to effectuate the object of the agreement.

(b) The overt act need not be in itself criminal, but it must be a manifestation that the agreement is being executed. Although committing the intended offense may constitute the overt act, it is not essential that the object offense be committed. Any overt act is enough, no matter how preliminary or preparatory in nature, as long as it is a manifestation that the agreement is being executed.

(c) An overt act by one conspirator becomes the act of all without any new agreement specifically directed to that act and each conspirator is equally guilty even though each does not participate in, or have knowledge of, all of the details of the execution of the conspiracy.

(5) *Liability for offenses*. Each conspirator is liable for all offenses committed pursuant to the conspiracy by any of the co-conspirators while the conspiracy continues and the person remains a party to it.

(6) *Withdrawal*. A party to the conspiracy who abandons or withdraws from the agreement to commit the offense before the commission of an overt act by any conspirator is not guilty of conspiracy. An effective withdrawal or abandonment must con-

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commissioned, or petty officer not in the execution of office

(c) Article 80—attempts

(2) *Disobeying a warrant, noncommissioned, or petty officer*.

(a) Article 92—failure to obey a lawful order

(b) Article 80—attempts

(3) *Treating with contempt or being disrespectful in language or deportment toward warrant, noncommissioned, or petty officer in the execution of office*.

(a) Article 117—using provoking or reproachful speech

(b) Article 80—attempts

e. *Maximum punishment*.

(1) *Striking or assaulting warrant officer*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(2) *Striking or assaulting superior noncommissioned or petty officer*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

(3) *Striking or assaulting other noncommissioned or petty officer*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(4) *Willfully disobeying the lawful order of a warrant officer*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(5) *Willfully disobeying the lawful order of a noncommissioned or petty officer*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(6) *Contempt or disrespect to warrant officer*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 9 months.

(7) *Contempt or disrespect to superior noncommissioned or petty officer*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(8) *Contempt or disrespect to other noncommissioned or petty officer*. Forfeiture of two-thirds pay per month for 3 months, and confinement for 3 months.

f. *Sample specifications*.

(1) *Striking or assaulting warrant, noncommissioned, or petty officer*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ , (strike) (assault) _____ , a _____ officer, then known to the said _____ to be a (superior) _____ officer who was then in the execution of his/her office, by _____ him/her (in) (on) (the _____) with (*a*) _____ (his/her) _____ .

(2) *Willful disobedience of warrant, noncommissioned, or petty officer*.

In that _____ (personal jurisdiction data), having received a lawful order from _____ , a _____ officer, then known by the said _____ to be a _____ officer, to _____ , an order which it was his/her duty to obey, did (at/on board—location), on or about _____ 20 __ , willfully disobey the same.

(3) *Contempt or disrespect toward warrant, noncommissioned, or petty officer*.

In that _____ (personal jurisdiction data) (at/on board—location), on or about _____ 20 __ , [did treat with contempt] [was disrespectful in (language) (deportment) toward] _____ , a _____ officer, then known by the said _____ to be a (superior) _____ officer, who was then in the execution of his/her office, by (saying to him/her, " _____ ," or words to that effect) (spitting at his/her feet) (_____)

16. Article 92—Failure to obey order or regulation

a. *Text of statute*.

Any person subject to this chapter who—

(1) **violates or fails to obey any lawful general order or regulation;**

(2) **having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or**

(3) **is derelict in the performance of his duties; shall be punished as a court-martial may direct.**

b. *Elements*.

(1) *Violation of or failure to obey a lawful general order or regulation*.

(a) That there was in effect a certain lawful general order or regulation;

(b) That the accused had a duty to obey it; and

(c) That the accused violated or failed to obey the order or regulation.

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Excerpts from the MCM and UCMJ

(2) *Failure to obey other lawful order*.

(a) That a member of the armed forces issued a certain lawful order;

(b) That the accused had knowledge of the order;

(c) That the accused had a duty to obey the order; and

(d) That the accused failed to obey the order.

(3) *Dereliction in the performance of duties*.

(a) That the accused had certain duties;

(b) That the accused knew or reasonably should have known of the duties; and

(c) That the accused was (willfully) (through neglect or culpable inefficiency) derelict in the performance of those duties.

c. *Explanation*.

(1) *Violation of or failure to obey a lawful general order or regulation*.

(a) *Authority to issue general orders and regulations*. General orders or regulations are those orders or regulations generally applicable to an armed force which are properly published by the President or the Secretary of Defense, of Homeland Security, or of a military department, and those orders or regulations generally applicable to the command of the officer issuing them throughout the command or a particular subdivision thereof which are issued by:

(i) an officer having general court-martial jurisdiction;

(ii) a general or flag officer in command; or

(iii) a commander superior to (i) or (ii).

(b) *Effect of change of command on validity of order*. A general order or regulation issued by a commander with authority under Article 92(1) retains its character as a general order or regulation when another officer takes command, until it expires by its own terms or is rescinded by separate action, even if it is issued by an officer who is a general or flag officer in command and command is assumed by another officer who is not a general or flag officer.

(c) *Lawfulness*. A general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it. *See* the discussion of lawfulness in paragraph 14c(2)(a).

(d) *Knowledge*. Knowledge of a general order or regulation need not be alleged or proved, as knowledge is not an element of this offense and a lack of knowledge does not constitute a defense.

(e) *Enforceability*. Not all provisions in general orders or regulations can be enforced under Article 92(1). Regulations which only supply general guidelines or advice for conducting military functions may not be enforceable under Article 92(1).

(2) *Violation of or failure to obey other lawful order*.

(a) *Scope*. Article 92(2) includes all other lawful orders which may be issued by a member of the armed forces, violations of which are not chargeable under Article 90, 91, or 92(1). It includes the violation of written regulations which are not general regulations. *See also* subparagraph (1)(e) above as applicable.

(b) *Knowledge*. In order to be guilty of this offense, a person must have had actual knowledge of the order or regulation. Knowledge of the order may be proved by circumstantial evidence.

(c) *Duty to obey order*.

(i) *From a superior*. A member of one armed force who is senior in rank to a member of another armed force is the superior of that member with authority to issue orders which that member has a duty to obey under the same circumstances as a commissioned officer of one armed force is the superior commissioned officer of a member of another armed force for the purposes of Articles 89 and 90. *See* paragraph 13c(1).

(ii) *From one not a superior*. Failure to obey the lawful order of one not a superior is an offense under Article 92(2), provided the accused had a duty to obey the order, such as one issued by a sentinel or a member of the armed forces police. *See* paragraph 15b(2) if the order was issued by a warrant, noncommissioned, or petty officer in the execution of office.

(3) *Dereliction in the performance of duties*.

(a) *Duty*. A duty may be imposed by treaty, statute, regulation, lawful order, standard operating procedure, or custom of the service.

(b) *Knowledge*. Actual knowledge of duties may be proved by circumstantial evidence. Actual knowledge need not be shown if the individual reasonably should have known of the duties. This may be demonstrated by regulations, training or operating

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manuals, customs of the service, academic literature or testimony, testimony of persons who have held similar or superior positions, or similar evidence.

(c) *Derelict*. A person is derelict in the performance of duties when that person willfully or negligently fails to perform that person's duties or when that person performs them in a culpably inefficient manner. "Willfully" means intentionally. It refers to the doing of an act knowingly and purposely, specifically intending the natural and probable consequences of the act. "Negligently" means an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care which a reasonably prudent person would have exercised under the same or similar circumstances. "Culpable inefficiency" is inefficiency for which there is no reasonable or just excuse.

(d) *Ineptitude*. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished. For example, a recruit who has tried earnestly during rifle training and throughout record firing is not derelict in the performance of duties if the recruit fails to qualify with the weapon.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*.

(1) *Violation of or failure to obey lawful general order or regulation*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Violation of or failure to obey other lawful order*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(3) *Dereliction in the performance of duties*.

(A) *Through neglect or culpable inefficiency*. Forfeiture of two-thirds pay per month for 3 months and confinement for 3 months.

(B) *Willful*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specifications*.

(1) *Violation or failure to obey lawful general order or regulation*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ , (violate) (fail to obey) a lawful general (order) (regulation), to wit: (paragraph _____ , (Army) (Air Force) Regulation _____ , dated _____ 20 __) (Article _____ , U.S. Navy Regulations, dated _____ 20 __) (General Order No. __ , U.S. Navy, dated _____ 20 __) (_____), by (wrongfully) _____ .

(2) *Violation or failure to obey other lawful written order*.

In that _____ (personal jurisdiction data), having knowledge of a lawful order issued by _____ , to wit: (paragraph _____ , (_____ the Combat Group Regulation No. _____) (USS _____ , Regulation _____), dated _____) (_____), an order which it was his/her duty to obey, did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ , fail to obey the same by (wrongfully) _____ .

(3) *Failure to obey other lawful order*.

In that _____ , (personal jurisdiction data) having knowledge of a lawful order issued by _____ (to submit to certain medical treatment) (to _____) (not to _____) (_____), an order which it was his/her duty to obey, did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ , fail to obey the same (by (wrongfully) _____ .)

(4) *Dereliction in the performance of duties*.

In that _____ , (personal jurisdiction data), who (knew) (should have known) of his/her duties (at/on board—location) (subject-matter jurisdiction data, if required), (on or about _____ 20 __) (from about _____ 20 __ to about _____ 20 __), was derelict in the performance of those duties in that he/she (negligently) (willfully) (by culpable inefficiency) failed _____ , as it was his/her duty to do.

17. Article 93—Cruelty and maltreatment

a. *Text of statute*.

Any person subject to this chapter who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct.

b. *Elements*.

(1) That a certain person was subject to the orders of the accused; and

(2) That the accused was cruel toward, or oppressed, or maltreated that person.

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Excerpts from the MCM and UCMJ

(1) *Releasing a prisoner without proper authority*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

(2) *Suffering a prisoner to escape through neglect*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(3) *Suffering a prisoner to escape through design*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specifications*.

(1) *Releasing a prisoner without proper authority*.

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __ , without proper authority, release _____ , a prisoner committed to his/her charge.

(2) *Suffering a prisoner to escape through neglect or design*.

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __ , through (neglect) (design), suffer _____ , a prisoner committed to his/her charge, to escape.

21. Article 97—Unlawful detention

a. *Text of statute*.

Any person subject to this chapter who, except as provided by law, apprehends, arrests, or confines any person shall be punished as a court-martial may direct.

b. *Elements*.

(1) That the accused apprehended, arrested, or confined a certain person; and

(2) That the accused unlawfully exercised the accused's authority to do so.

c. *Explanation*.

(1) *Scope*. This article prohibits improper acts by those empowered by the code to arrest, apprehend, or confine. *See* Articles 7 and 9; R.C.M. 302, 304, 305, and 1101, and paragraphs 2 and 5b, Part V. It does not apply to private acts of false imprisonment or unlawful restraint of another's freedom of movement by one not acting under such a delegation of authority under the code.

(2) *No force required*. The apprehension, arrest, or confinement must be against the will of the person restrained, but force is not required.

(3) *Defense*. A reasonable belief held by the person imposing restraint that it is lawful is a defense.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample specification*.

In that _____ (personal jurisdiction data), did, (at/on board—location), on or about _____ 20 __ , unlawfully (apprehend _____) (place _____ in arrest) (confine _____ in _____).

22. Article 98—Noncompliance with procedural rules

a. *Text of statute*.

Any person subject to this chapter who—

(1) **is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or**

(2) **Knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.**

b. *Elements*.

(1) *Unnecessary delay in disposing of case*.

(a) That the accused was charged with a certain duty in connection with the disposition of a case of a person accused of an offense under the code;

(b) That the accused knew that the accused was charged with this duty;

(c) That delay occurred in the disposition of the case;

(d) That the accused was responsible for the delay; and

(e) That, under the circumstances, the delay was unnecessary.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code*.

(a) That the accused failed to enforce or comply with a certain provision of the code regulating a proceeding before, during, or after a trial;

(b) That the accused had the duty of enforcing or complying with that provision of the code;

(c) That the accused knew that the accused was charged with this duty; and

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(d) That the accused's failure to enforce or comply with that provision was intentional.

c. *Explanation*.

(1) *Unnecessary delay in disposing of case*. The purpose of section (1) of Article 98 is to ensure expeditious disposition of cases of persons accused of offenses under the code. A person may be responsible for delay in the disposition of a case only when that person's duties require action with respect to the disposition of that case.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code*. Section (2) of Article 98 does not apply to errors made in good faith before, during, or after trial. It is designed to punish intentional failure to enforce or comply with the provisions of the code regulating the proceedings before, during, and after trial. Unlawful command influence under Article 37 may be prosecuted under this Article. *See also* Article 31 and R.C.M. 104.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*.

(1) *Unnecessary delay in disposing of case*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specifications*.

(1) *Unnecessary delay in disposing of case*.

In that _____ (personal jurisdiction data), being charged with the duty of ((investigating) (taking immediate steps to determine the proper disposition of) charges preferred against _____ , a person accused of an offense under the Uniform Code of Military Justice) (_____), was, (at/on board—location), on or about _____ 20 ___ , responsible for unnecessary delay in (investigating said charges) (determining the proper disposition of said charges (_____), in that he/she (did _____) (failed to _____) (_____).

(2) *Knowingly and intentionally failing to enforce or comply with provisions of the code*.

In that _____ (personal jurisdiction data), being charged with the duty of _____ , did, (at/on board—location), on or about _____ 20 ___ , knowingly and intentionally fail to (enforce) (comply with) Article _____ , Uniform Code of Military Justice, in that he/she _____ .

23. Article 99—Misbehavior before the enemy

a. *Text of statute*.

Any member of the armed forces who before or in the presence of the enemy—

(1) **runs away;**

(2) **shamefully abandons, surrenders, or delivers up any command, unit, place, or military property which it is his duty to defend;**

(3) **through disobedience, neglect, or intentional misconduct endangers the safety of any such command, unit, place, or military property;**

(4) **casts away his arms or ammunition;**

(5) **is guilty of cowardly conduct;**

(6) **quits his place of duty to plunder or pillage;**

(7) **causes false alarms in any command, unit, or place under control of the armed forces;**

(8) **willfully fails to do his utmost to encounter, engage, capture, or destroy any enemy troops, combatants, vessels, aircraft, or any other thing, which it is his duty so to encounter, engage, capture, or destroy; or**

(9) **does not afford all practicable relief and assistance to any troops, combatants, vessels, or aircraft of the armed forces belonging to the United States or their allies when engaged in battle; shall be punished by death or such other punishment as a court-martial may direct.**

b. *Elements*.

(1) *Running away*.

(a) That the accused was before or in the presence of the enemy;

(b) That the accused misbehaved by running away; and

(c) That the accused intended to avoid actual or impending combat with the enemy by running away.

(2) *Shamefully abandoning, surrendering, or delivering up command*.

(a) That the accused was charged by orders or circumstances with the duty to defend a certain command, unit, place, ship, or military property;

(b) That, without justification, the accused shamefully abandoned, surrendered, or delivered up

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PART IV
PUNITIVE ARTICLES

Sec. 2. Part IV of the Manual for Courts-Martial, United States, is amended as follows:

Paragraph 45, Article 120, Rape and sexual assault generally, subparagraph e is amended to read as follows:

e. *Maximum punishment*.

(1) *Rape*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

Paragraph 45b, Article 120b, Rape and sexual assault of a child, is amended by inserting the following new subparagraph e:

e. *Maximum punishment*.

(1) *Rape of a child*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *Sexual assault of a child*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Sexual abuse of a child*.

(a) *Cases involving sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(b) *Other cases*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years."

Paragraph 45c, Article 120c, Other sexual misconduct, is amended by inserting the following new subparagraph e:

e. *Maximum punishment*.

(1) *Indecent viewing*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

(2) *Indecent visual recording*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(3) *Broadcasting or distribution of an indecent visual recording*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(4) *Forcible pandering*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 12 years.

(5) *Indecent exposure*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

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In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 __ , cause bodily injury to the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(2) *Killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 __ , cause the death of the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(3) *Attempting to kill an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 __ , attempt to kill the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

(4) *Intentionally killing an unborn child.*

In that _____ (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____ 20 __ , intentionally kill the unborn child of , a pregnant woman, by engaging in the [(murder) (voluntary manslaughter) (involuntary manslaughter) (rape) (robbery) (maiming) (assault) of] [(burning) (setting afire) of (a dwelling inhabited by) (a structure or property known to (be occupied by) (belong to))] that woman.

45. Article 120—Rape and sexual assault generally

[Note: This statute applies to offenses committed on or after 28 June 2012. Previous versions of Article 120 are located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28.]

a. *Text of statute.*

(a) ***Rape*. Any person subject to this chapter who commits a sexual act upon another person by—**

(1) **using unlawful force against that other person;**

(2) **using force causing or likely to cause death or grievous bodily harm to any person;**

(3) **threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;**

(4) **first rendering that other person unconscious; or**

(5) **administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;**

is guilty of rape and shall be punished as a court-martial may direct.

(b) ***Sexual Assault*. Any person subject to this chapter who—**

(1) **commits a sexual act upon another person by—**

(A) **threatening or placing that other person in fear;**

(B) **causing bodily harm to that other person;**

(C) **making a fraudulent representation that the sexual act serves a professional purpose; or**

(D) **inducing a belief by any artifice, pretense, or concealment that the person is another person;**

(2) **commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or**

(3) **commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to—**

(A) **impairment by any drug, intoxicant,**

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Excerpts from the MCM and UCMJ

or other similar substance, and that condition is known or reasonably should be known by the person; or

(B) a mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person;

is guilty of sexual assault and shall be punished as a court-martial may direct.

(c) *Aggravated Sexual Contact*. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(d) *Abusive Sexual Contact*. Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (b) (sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(e) *Proof of Threat*. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

(f) *Defenses*. An accused may raise any applicable defenses available under this chapter or the Rules for Court-Martial. Marriage is not a defense for any conduct in issue in any prosecution under this section.

(g) *Definitions*. In this section:

(1) *Sexual act*. The term 'sexual act' means—

(A) contact between the penis and the vulva or anus or mouth, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or

(B) the penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) *Sexual contact*. The term 'sexual contact' means—

(A) touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

(B) any touching, or causing another person to touch, either directly or through the clothing, any body part of any person, if done with an intent to arouse or gratify the sexual desire of any person.

Touching may be accomplished by any part of the body.

(3) *Bodily harm*. The term 'bodily harm' means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact.

(4) *Grievous bodily harm*. The term 'grievous bodily harm' means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose.

(5) *Force*. The term 'force' means—

(A) the use of a weapon;

(B) the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

(C) inflicting physical harm sufficient to coerce or compel submission by the victim.

(6) *Unlawful Force*. The term 'unlawful force' means an act of force done without legal justification or excuse.

(7) *Threatening or placing that other person in fear*. The term 'threatening or placing that other person in fear' means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action.

(8) *Consent*.

(A) The term 'consent' means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating

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or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(B) **A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely to cause death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subparagraph (C) or (D) of subsection (b)(1).**

(C) **Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.**

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this version of Article 120. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

45a. Article 120a—Stalking

a. *Text of statute*.

(a) **Any person subject to this section:**

(1) **who wrongfully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family;**

(2) **who has knowledge, or should have knowledge, that the specific person will be placed in reasonable fear of death or bodily harm, including sexual assault, to himself or herself or a member of his or her immediate family; and**

(3) **whose acts induce reasonable fear in the specific person of death or bodily harm, including sexual assault, to himself or herself or to a member of his or her immediate family;**

is guilty of stalking and shall be punished as a court-martial may direct.

(b) **In this section:**

(1) **The term "course of conduct" means:**

(A) **a repeated maintenance of visual or physical proximity to a specific person; or**

(B) **a repeated conveyance of verbal threat, written threats, or threats implied by conduct, or a combination of such threats, directed at or towards a specific person.**

(2) **The term "repeated," with respect to conduct, means two or more occasions of such conduct.**

(3) **The term "immediate family," in the case of a specific person, means a spouse, parent, child, or sibling of the person, or any other family member, relative, or intimate partner of the person who regularly resides in the household of the person or who within the six months preceding the commencement of the course of conduct regularly resided in the household of the person.**

b. *Elements*.

(1) That the accused wrongfully engaged in a course of conduct directed at a specific person that would cause a reasonable person to fear death or bodily harm to himself or herself or a member of his or her immediate family;

(2) That the accused had knowledge, or should have had knowledge, that the specific person would be placed in reasonable fear of death or bodily harm to himself or herself or a member of his or her immediate family; and

(3) That the accused's acts induced reasonable fear in the specific person of death or bodily harm to himself or herself or to a member of his or her immediate family.

c. *Explanation*. See Paragraph 54c(1)(a) for an explanation of "bodily harm".

d. *Lesser included offenses*. Article 80 — attempts.

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 3 years.

f. *Sample Specification*.

In that _____ (personal jurisdiction data), who (knew)(should have known) that _____ would be placed in reasonable fear of (death)(bodily harm) to (himself) (herself) (_____ , a member of his or her immediate family) did (at/on board—location), (subject-matter jurisdiction data, if required), (on or about _____ 20 __)(from about _____ to about

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_____ 20 __), wrongfully engage in a course of conduct directed at _____ , to wit: _____ thereby inducing in _____ , a reasonable fear of (death)(bodily harm) to (himself)(herself) (_____ , a member of his or her immediate family).

45b. Article 120b—Rape and sexual assault of a child

[Note: This statute applies to offenses committed on or after 28 June 2012. Article 120b is a new statute designed to address only child sexual offenses. Previous versions of child sexual offenses are located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28.]

a. *Text of Statute*

(a) ***Rape of a Child*. Any person subject to this chapter who—**

(1) **commits a sexual act upon a child who has not attained the age of 12 years; or**

(2) **commits a sexual act upon a child who has attained the age of 12 years by—**

(A) **using force against any person;**

(B) **threatening or placing that child in fear;**

(C) **rendering that child unconscious; or**

(D) **administering to that child a drug, intoxicant, or other similar substance;**

is guilty of rape of a child and shall be punished as a court-martial may direct.

(b) ***Sexual Assault of a Child*. Any person subject to this chapter who commits a sexual act upon a child who has attained the age of 12 years is guilty of sexual assault of a child and shall be punished as a court-martial may direct.**

(c) ***Sexual Abuse of a Child*. Any person subject to this chapter who commits a lewd act upon a child is guilty of sexual abuse of a child and shall be punished as a court-martial may direct.**

(d) ***Age of Child*.**

(1) ***Under 12 years*. In a prosecution under this section, it need not be proven that the accused knew the age of the other person engaging in the sexual act or lewd act. It is not a defense that the accused reasonably believed that the child had attained the age of 12 years.**

(2) ***Under 16 years*. In a prosecution under this section, it need not be proven that the accused knew that the other person engaging in the sexual act or lewd act had not attained the age of 16 years, but it is a defense in a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), which the accused must prove by a preponderance of the evidence, that the accused reasonably believed that the child had attained the age of 16 years, if the child had in fact attained at least the age of 12 years.**

(e) ***Proof of Threat*. In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.**

(f) ***Marriage*. In a prosecution under subsection (b) (sexual assault of a child) or subsection (c) (sexual abuse of a child), it is a defense, which the accused must prove by a preponderance of the evidence, that the persons engaging in the sexual act or lewd act were at that time married to each other, except where the accused commits a sexual act upon the person when the accused knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring or when the other person is incapable of consenting to the sexual act due to impairment by any drug, intoxicant, or other similar substance, and that condition was known or reasonably should have been known by the accused.**

(g) ***Consent*. Lack of consent is not an element and need not be proven in any prosecution under this section. A child not legally married to the person committing the sexual act, lewd act, or use of force cannot consent to any sexual act, lewd act, or use of force.**

(h) ***Definitions*. In this section:**

(1) ***Sexual act and sexual contact*. The terms 'sexual act' and 'sexual contact' have the meanings given those terms in section 920(g) of this title (article 120(g)).**

(2) ***Force*. The term 'force' means—**

(A) **the use of a weapon;**

(B) **the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a child; or**

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(C) **inflicting physical harm.**

In the case of a parent-child or similar relationship, the use or abuse of parental or similar authority is sufficient to constitute the use of force.

(3) ***Threatening or placing that child in fear*. The term 'threatening or placing that child in fear' means a communication or action that is of sufficient consequence to cause the child to fear that non-compliance will result in the child or another person being subjected to the action contemplated by the communication or action.**

(4) ***Child*. The term 'child' means any person who has not attained the age of 16 years.**

(5) ***Lewd act*. The term 'lewd act' means—**

(A) **any sexual contact with a child;**

(B) **intentionally exposing one's genitalia, anus, buttocks, or female areola or nipple to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person;**

(C) **intentionally communicating indecent language to a child by any means, including via any communication technology, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or**

(D) **any indecent conduct, intentionally done with or in the presence of a child, including via any communication technology, that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.**

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this new statute, Article 120b. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

45c. Article 120c—Other sexual misconduct

[Note: This statute applies to offenses committed on or after 28 June 2012. Article 120c is a new statute designed to address miscellaneous sexual misconduct. Previous versions of these offenses are located as follows: for offenses committed on or before 30 September 2007, *see* Appendix 27; for offenses committed during the period 1 October 2007 through 27 June 2012, *see* Appendix 28.]

a. *Text of Statute*

(a) ***Indecent Viewing, Visual Recording, or Broadcasting*. Any person subject to this chapter who, without legal justification or lawful authorization—**

(1) **knowingly and wrongfully views the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy;**

(2) **knowingly photographs, videotapes, films, or records by any means the private area of another person, without that other person's consent and under circumstances in which that other person has a reasonable expectation of privacy; or**

(3) **knowingly broadcasts or distributes any such recording that the person knew or reasonably should have known was made under the circumstances proscribed in paragraphs (1) and (2); is guilty of an offense under this section and shall be punished as a court-martial may direct.**

(b) ***Forcible Pandering*. Any person subject to this chapter who compels another person to engage in an act of prostitution with any person is guilty of forcible pandering and shall be punished as a court-martial may direct.**

(c) ***Indecent Exposure*. Any person subject to this chapter who intentionally exposes, in an indecent manner, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall by punished as a court-martial may direct.**

(c) ***Definitions*. In this section:**

(1) ***Act of prostitution*. The term 'act of prostitution' means a sexual act or sexual contact (as defined in section 920(g) of this title (article 120(g))) on account of which anything of value is given to, or received by, any person.**

(2) ***Private area*. The term 'private area'**

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means the naked or underwear-clad genitalia, anus, buttocks, or female areola or nipple.

(3) ***Reasonable expectation of privacy*. The term 'under circumstances in which that other person has a reasonable expectation of privacy' means—**

(A) **circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the person was being captured; or**

(B) **circumstances in which a reasonable person would believe that a private area of the person would not be visible to the public.**

(4) ***Broadcast*. The term 'broadcast' means to electronically transmit a visual image with the intent that it be viewed by a person or persons.**

(5) ***Distribute*. The term 'distribute' means delivering to the actual or constructive possession of another, including transmission by electronic means.**

(6) ***Indecent manner*. The term 'indecent manner' means conduct that amounts to a form of immorality relating to sexual impurity which is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations.**

[Note: The subparagraphs that would normally address elements, explanation, lesser included offenses, maximum punishments, and sample specifications are generated under the President's authority to prescribe rules pursuant to Article 36. At the time of publishing this MCM, the President had not prescribed such rules for this new statute, Article 120c. Practitioners should refer to the appropriate statutory language and, to the extent practicable, use Appendix 28 as a guide.]

46. Article 121—Larceny and wrongful appropriation

a. *Text of statute*.

(a) **Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—**

(1) **with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or**

(2) **with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.**

(b) **Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.**

b. *Elements*.

(1) *Larceny*.

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent permanently to deprive or defraud another person of the use and benefit of the property or permanently to appropriate the property for the use of the accused or for any person other than the owner.

[Note: If the property is alleged to be military property, as defined in paragraph 46c(1)(h), add the following element]

(e) That the property was military property.

(2) *Wrongful appropriation*.

(a) That the accused wrongfully took, obtained, or withheld certain property from the possession of the owner or of any other person;

(b) That the property belonged to a certain person;

(c) That the property was of a certain value, or of some value; and

(d) That the taking, obtaining, or withholding by the accused was with the intent temporarily to deprive or defraud another person of the use and benefit of the property or temporarily to appropriate the property for the use of the accused or for any person other than the owner.

c. *Explanation*.

(1) *Larceny*.

(a) *In general*. A wrongful taking with intent

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APPENDIX 28
PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

The punitive articles contained in this appendix were replaced or superseded by Articles 120, 120b, and 120c, Uniform Code of Military Justice, as amended or established by the National Defense Authorization Act for Fiscal Year 2012. Article 120 was previously amended by the National Defense Authorization Act for Fiscal Year 2006. Each version of Article 120 is located in a different part of this Manual. For offenses committed prior to 1 October 2007, the relevant sexual offense provisions are contained in Appendix 27. For offenses committed during the period 1 October 2007 through 27 June 2012, the relevant sexual offense provisions are contained in this appendix and listed below. For offenses committed on or after 28 June 2012, the relevant sexual offense provisions are contained in Part IV of this Manual (Articles 120, 120b, and 120c).

45. Article 120—Rape, sexual assault, and other sexual misconduct

a. *Text of statute*.

(a) *Rape*. **Any person subject to this chapter who causes another person of any age to engage in a sexual act by—**

(1) **using force against that other person;**

(2) **causing grievous bodily harm to any person;**

(3) **threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping;**

(4) **rendering another person unconscious; or**

(5) **administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct; is guilty of rape and shall be punished as a court-martial may direct.**

(b) *Rape of a child*. **Any person subject to this chapter who—**

(1) **engages in a sexual act with a child who has not attained the age of 12 years; or**

(2) **engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years; is guilty of rape of a child and shall be punished as a court-martial may direct.**

(c) *Aggravated sexual assault*. **Any person subject to this chapter who—**

(1) **causes another person of any age to engage in a sexual act by—**

(A) **threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping); or**

(B) **causing bodily harm; or**

(2) **engages in a sexual act with another person of any age if that other person is substantially incapacitated or substantially incapable of—**

(A) **appraising the nature of the sexual act;**

(B) **declining participation in the sexual act; or**

(C) **communicating unwillingness to engage in the sexual act; is guilty of aggravated sexual assault and shall be punished as a court-martial may direct.**

(d) *Aggravated sexual assault of a child*. **Any person subject to this chapter who engages in a sexual act with a child who has attained the age of 12 years is guilty of aggravated sexual assault of a child and shall be punished as a court-martial may direct.**

(e) *Aggravated sexual contact*. **Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (a) (rape) had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.**

(f) *Aggravated sexual abuse of a child*. **Any person subject to this chapter who engages in a lewd act with a child is guilty of aggravated sexual abuse of a child and shall be punished as a court-martial may direct.**

(g) *Aggravated sexual contact with a child.* **Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (b) (rape of a child) had the sexual contact been a sexual act, is guilty of aggravated sexual contact with a child and shall be punished as a court-martial may direct.**

(h) *Abusive sexual contact.* **Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (c) (aggravated sexual assault) had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.**

(i) *Abusive sexual contact with a child.* **Any person subject to this chapter who engages in or causes sexual contact with or by another person, if to do so would violate subsection (d) (aggravated sexual assault of a child) had the sexual contact been a sexual act, is guilty of abusive sexual contact with a child and shall be punished as a court-martial may direct.**

(j) *Indecent liberty with a child.* **Any person subject to this chapter who engages in indecent liberty in the physical presence of a child—**

(1) **with the intent to arouse, appeal to, or gratify the sexual desire of any person; or**

(2) **with the intent to abuse, humiliate, or degrade any person; is guilty of indecent liberty with a child and shall be punished as a court-martial may direct.**

(k) *Indecent act.* **Any person subject to this chapter who engages in indecent conduct is guilty of an indecent act and shall be punished as a court-martial may direct.**

(l) *Forcible pandering.* **Any person subject to this chapter who compels another person to engage in an act of prostitution with another person to be directed to said person is guilty of forcible pandering and shall be punished as a court-martial may direct.**

(m) *Wrongful sexual contact.* **Any person subject to this chapter who, without legal justification or lawful authorization, engages in sexual contact with another person without that other person's permission is guilty of wrongful sexual contact and shall be punished as a court-martial may direct.**

(n) *Indecent exposure.* **Any person subject to this chapter who intentionally exposes, in an indecent manner, in any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor's family or household, the genitalia, anus, buttocks, or female areola or nipple is guilty of indecent exposure and shall be punished as a court-martial may direct.**

(o) *Age of child.*

(1) *Twelve years.* **In a prosecution under subsection (b) (rape of a child), subsection (g) (aggravated sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 12 years. It is not an affirmative defense that the accused reasonably believed that the child had attained the age of 12 years.**

(2) *Sixteen years.* **In a prosecution under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), or subsection (j) (indecent liberty with a child), it need not be proven that the accused knew that the other person engaging in the sexual act, contact, or liberty had not attained the age of 16 years. Unlike in paragraph (1), however, it is an affirmative defense that the accused reasonably believed that the child had attained the age of 16 years.**

(p) *Proof of threat.* **In a prosecution under this section, in proving that the accused made a threat, it need not be proven that the accused actually intended to carry out the threat.**

(q) *Marriage.*

(1) *In general.* **In a prosecution under paragraph (2) of subsection (c) (aggravated sexual assault), or under subsection (d) (aggravated sexual assault of a child), subsection (f) (aggravated sexual abuse of a child), subsection (i) (abusive sexual contact with a child), subsection (j) (indecent liberty with a child), subsection (m) (wrongful sexual contact), or subsection (n) (indecent exposure), it is an affirmative defense that the accused and the other person when they engaged in the sexual act, sexual contact, or sexual conduct were married to each other.**

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(2) *Definition.* **For purposes of this subsection, a marriage is a relationship, recognized by the laws of a competent State or foreign jurisdiction, between the accused and the other person as spouses. A marriage exists until it is dissolved in accordance with the laws of a competent State or foreign jurisdiction.**

(3) *Exception.* **Paragraph (1) shall not apply if the accused's intent at the time of the sexual conduct is to abuse, humiliate, or degrade any person.**

(r) *Consent and mistake of fact as to consent.* **Lack of permission is an element of the offense in subsection (m) (wrongful sexual contact). Consent and mistake of fact as to consent are not an issue, or an affirmative defense, in a prosecution under any other subsection, except they are an affirmative defense for the sexual conduct in issue in a prosecution under subsection (a) (rape), subsection (c) (aggravated sexual assault), subsection (e) (aggravated sexual contact), and subsection (h) (abusive sexual contact).**

(s) *Other affirmative defenses not precluded.* **The enumeration in this section of some affirmative defenses shall not be construed as excluding the existence of others.**

(t) *Definitions.* **In this section:**

(1) *Sexual act.* **The term "sexual act" means—**

(A) **contact between the penis and the vulva, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight; or**

(B) **the penetration, however slight, of the genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.**

(2) *Sexual contact.* **The term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of another person, or intentionally causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person or to arouse or gratify the sexual desire of any person.**

(3) *Grievous bodily harm.* **The term "grievous bodily harm" means serious bodily injury. It includes fractured or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose. It is the same level of injury as in section 928 (article 128) of this chapter, and a lesser degree of injury than in section 2246(4) of title 18.**

(4) *Dangerous weapon or object.* **The term "dangerous weapon or object" means—**

(A) **any firearm, loaded or not, and whether operable or not;**

(B) **any other weapon, device, instrument, material, or substance, whether animate or inanimate, that in the manner it is used, or is intended to be used, is known to be capable of producing death or grievous bodily harm; or**

(C) **any object fashioned or utilized in such a manner as to lead the victim under the circumstances to reasonably believe it to be capable of producing death or grievous bodily harm.**

(5) *Force.* **The term "force" means action to compel submission of another or to overcome or prevent another's resistance by—**

(A) **the use or display of a dangerous weapon or object;**

(B) **the suggestion of possession of a dangerous weapon or object that is used in a manner to cause another to believe it is a dangerous weapon or object; or**

(C) **physical violence, strength, power, or restraint applied to another person, sufficient that the other person could not avoid or escape the sexual conduct.**

(6) *Threatening or placing that other person in fear.* **The term "threatening or placing that other person in fear" under paragraph (3) of subsection (a) (rape), or under subsection (e) (aggravated sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another person being subjected to death, grievous bodily harm, or kidnapping.**

(7) *Threatening or placing that other person in fear.*

(A) *In general.* **The term "threatening or placing that other person in fear" under paragraph (1)(A) of subsection (c) (aggravated sexual**

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assault), or under subsection (h) (abusive sexual contact), means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the victim or another being subjected to a lesser degree of harm than death, grievous bodily harm, or kidnapping.

(B) *Inclusions.* **Such lesser degree of harm includes—**

(i) **physical injury to another person or to another person's property; or**

(ii) **a threat—**

(I) to accuse any person of a crime;

(II) to expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt, or ridicule; or

(III) through the use or abuse of military position, rank, or authority, to affect or threaten to affect, either positively or negatively, the military career of some person.

(8) *Bodily harm.* **The term "bodily harm" means any offensive touching of another, however slight.**

(9) *Child.* **The term "child" means any person who has not attained the age of 16 years.**

(10) *Lewd act.* **The term "lewd act" means—**

(A) **the intentional touching, not through the clothing, of the genitalia of another person, with an intent to abuse, humiliate, or degrade any person, or to arouse or gratify the sexual desire of any person; or**

(B) **intentionally causing another person to touch, not through the clothing, the genitalia of any person with an intent to abuse, humiliate or degrade any person, or to arouse or gratify the sexual desire of any person.**

(11) *Indecent liberty.* **The term "indecent liberty" means indecent conduct, but physical contact is not required. It includes one who with the requisite intent exposes one's genitalia, anus, buttocks, or female areola or nipple to a child. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child. If words designed to excite sexual desire are spoken to a child, or a child is exposed to or involved in sexual conduct, it is an indecent liberty; the child's consent is not relevant.**

(12) *Indecent conduct.* **The term "indecent conduct" means that form of immorality relating to sexual impurity that is grossly vulgar, obscene, and repugnant to common propriety, and tends to excite sexual desire or deprave morals with respect to sexual relations. Indecent conduct includes observing, or making a videotape, photograph, motion picture, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material, without another person's consent, and contrary to that other person's reasonable expectation of privacy, of—**

(A) **that other person's genitalia, anus, or buttocks, or (if that other person is female) that person's areola or nipple; or**

(B) **that other person while that other person is engaged in a sexual act, sodomy (under section 925 (article 125) of this chapter), or sexual contact.**

(13) *Act of prostitution.* **The term "act of prostitution" means a sexual act, sexual contact, or lewd act for the purpose of receiving money or other compensation.**

(14) *Consent.* **The term "consent" means words or overt acts indicating a freely given agreement to the sexual conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct at issue shall not constitute consent. A person cannot consent to sexual activity if—**

(A) **under 16 years of age; or**

(B) **substantially incapable of—**

(i) **appraising the nature of the sexual conduct at issue due to—**

(I) mental impairment or unconsciousness resulting from consumption of alcohol, drugs, a similar substance, or otherwise; or

(II) mental disease or defect that renders the person unable to understand the nature of the sexual conduct at issue;

(ii) **physically declining participation in the sexual conduct at issue; or**

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(iii) **physically communicating unwillingness to engage in the sexual conduct at issue.**

(15) *Mistake of fact as to consent*. **The term "mistake of fact as to consent" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person engaging in the sexual conduct consented. The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented. Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. Negligence is the absence of due care. Due care is what a reasonably careful person would do under the same or similar circumstances. The accused's state of intoxication, if any, at the time of the offense is not relevant to mistake of fact. A mistaken belief that the other person consented must be that which a reasonably careful, ordinary, prudent, sober adult would have had under the circumstances at the time of the offense.**

(16) *Affirmative defense*. **The term "affirmative defense" means any special defense that, although not denying that the accused committed the objective acts constituting the offense charged, denies, wholly, or partially, criminal responsibility for those acts. The accused has the burden of proving the affirmative defense by a preponderance of evidence. After the defense meets this burden, the prosecution shall have the burden of proving beyond a reasonable doubt that the affirmative defense did not exist.**

b. *Elements*.

(1) *Rape*.

(a) *Rape by using force*.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by using force against that other person.

(b) *Rape by causing grievous bodily harm*.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by causing grievous bodily harm to any person.

(c) *Rape by using threats or placing in fear*.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) *Rape by rendering another unconscious*.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by rendering that other person unconscious.

(e) *Rape by administration of drug, intoxicant, or other similar substance*.

(i) That the accused caused another person, who is of any age, to engage in a sexual act by administering to that other person a drug, intoxicant, or other similar substance;

(ii) That the accused administered the drug, intoxicant or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(iii) That, as a result, that other person's ability to appraise or control conduct was substantially impaired.

(2) *Rape of a child*.

(a) *Rape of a child who has not attained the age of 12 years*.

(i) That the accused engaged in a sexual act with a child; and

(ii) That at the time of the sexual act the child had not attained the age of twelve years.

(b) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force*.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by using force against that child.

(c) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm*.

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by causing grievous bodily harm to any person.

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(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by threatening or placing that child in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(e) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child unconscious.

(f) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance.*

(i) That the accused engaged in a sexual act with a child;

(ii) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii)(a) That the accused did so by administering to that child a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child; and

(c) That, as a result, that child's ability to appraise or control conduct was substantially impaired.

(3) *Aggravated sexual assault.*

(a) *Aggravated sexual assault by using threats or placing in fear.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).

(b) *Aggravated sexual assault by causing bodily harm.*

(i) That the accused caused another person, who is of any age, to engage in a sexual act; and

(ii) That the accused did so by causing bodily harm to another person.

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness.*

(i) That the accused engaged in a sexual act with another person, who is of any age; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual act;

(iv) That the other person was substantially incapable of declining participation in the sexual act; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual act.

(4) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years.*

(a) That the accused engaged in a sexual act with a child; and

(b) That at the time of the sexual act the child had attained the age of 12 years but had not attained the age of 16 years.

(5) *Aggravated sexual contact.*

(a) *Aggravated sexual contact by using force.*

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by using force against that other person.

(b) *Aggravated sexual contact by causing grievous bodily harm.*

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PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by causing grievous bodily harm to any person.

(c) *Aggravated sexual contact by using threats or placing in fear*.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(d) *Aggravated sexual contact by rendering another unconscious*.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by rendering that other person unconscious.

(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance*.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii)(a) That the accused did so by administering to that other person a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that other person; and

(c) That, as a result, that other person's ability to appraise or control conduct was substantially impaired.

(6) *Aggravated sexual abuse of a child*.

(a) That the accused engaged in a lewd act; and

(b) That the act was committed with a child who has not attained the age of 16 years.

(7) *Aggravated Sexual Contact with a Child*.

(a) *Aggravated sexual contact with a child who has not attained the age of 12 years*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had not attained the age of twelve years.

(b) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by using force against that child.

(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by causing grievous bodily harm to any person.

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

A28-7

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(iii) That the accused did so by threatening or placing that child or that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnapping.

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering another or that child unconscious*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii) That the accused did so by rendering that child or that other person unconscious.

(f) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years; and

(iii)(a) That the accused did so by administering to that child or that other person a drug, intoxicant, or other similar substance;

(b) That the accused administered the drug, intoxicant, or other similar substance by force or threat of force or without the knowledge or permission of that child or that other person; and

(c) That, as a result, that child's or that other person's ability to appraise or control conduct was substantially impaired.

(8) *Abusive sexual contact*.

(a) *Abusive sexual contact by using threats or placing in fear*.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by threatening or placing that other person in fear that any person would be subjected to bodily harm or other harm (other than by threatening or placing that other person in fear that any person would be subjected to death, grievous bodily harm, or kidnapping).

(b) *Abusive sexual contact by causing bodily harm*.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(ii) That the accused did so by causing bodily harm to another person.

(c) *Abusive sexual contact upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness*.

(i)(a) That the accused engaged in sexual contact with another person; or

(b) That the accused caused sexual contact with or by another person; and

(Note: add one of the following elements)

(ii) That the other person was substantially incapacitated;

(iii) That the other person was substantially incapable of appraising the nature of the sexual contact;

(iv) That the other person was substantially incapable of declining participation in the sexual contact; or

(v) That the other person was substantially incapable of communicating unwillingness to engage in the sexual contact.

(9) *Abusive sexual contact with a child*.

(i)(a) That the accused engaged in sexual contact with a child; or

(b) That the accused caused sexual contact with or by a child or by another person with a child; and

(ii) That at the time of the sexual contact the child had attained the age of 12 years but had not attained the age of 16 years.

(10) *Indecent liberty with a child*.

(a) That the accused committed a certain act or communication;

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(b) That the act or communication was indecent;

(c) That the accused committed the act or communication in the physical presence of a certain child;

(d) That the child was under 16 years of age; and

(e) That the accused committed the act or communication with the intent to:

(i) arouse, appeal to, or gratify the sexual desires of any person; or

(ii) abuse, humiliate, or degrade any person.

(11) *Indecent act*.

(a) That the accused engaged in certain conduct; and

(b) That the conduct was indecent conduct.

(12) *Forcible pandering*.

(a) That the accused compelled a certain person to engage in an act of prostitution; and

(b) That the accused directed another person to said person, who then engaged in an act of prostitution.

(13) *Wrongful sexual contact*.

(a) That the accused had sexual contact with another person;

(b) That the accused did so without that other person's permission; and

(c) That the accused had no legal justification or lawful authorization for that sexual contact.

(14) *Indecent exposure*.

(a) That the accused exposed his or her genitalia, anus, buttocks, or female areola or nipple;

(b) That the accused's exposure was in an indecent manner;

(c) That the exposure occurred in a place where the conduct involved could reasonably be expected to be viewed by people other than the accused's family or household; and

(d) That the exposure was intentional.

c. *Explanation*.

(1) *Definitions*. The terms are defined in Paragraph 45a.(t), supra.

(2) *Character of victim*. See Mil. R. Evid. 412 concerning rules of evidence relating to the character of the victim of an alleged sexual offense.

(3) *Indecent*. In conduct cases, "indecent" generally signifies that form of immorality relating to sexual impurity that is not only grossly vulgar, obscene, and repugnant to common propriety, but also tends to excite lust and deprave the morals with respect to sexual relations. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards.

d. *Lesser included offenses*. The following lesser included offenses are based on internal cross-references provided in the statutory text of Article 120. See subsection (e) for a further listing of possible lesser included offenses.

(1) *Rape*.

(a) Article 120—Aggravated sexual contact

(b) Article 134—Assault with intent to commit rape

(c) Article 128—Aggravated assault; Assault; Assault consummated by a battery

(d) Article 80—Attempts

(2) *Rape of a child*.

(a) Article 120—Aggravated sexual contact with a child; Indecent act

(b) Article 134—Assault with intent to commit rape

(c) Article 128—Aggravated assault; Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(d) Article 80—Attempts

(3) *Aggravated sexual assault*.

(a) Article 120—Abusive sexual contact

(b) Article 128—Aggravated assault; Assault; Assault consummated by a battery

(c) Article 80—Attempts

(4) *Aggravated sexual assault of a child*.

(a) Article 120—Abusive sexual contact with a child; Indecent act

(b) Article 128—Aggravated assault; Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(5) *Aggravated sexual contact*.

(a) Article 128—Aggravated assault; Assault; Assault consummated by a battery

(b) Article 80—Attempts

(6) *Aggravated sexual abuse of a child*.

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Excerpts from the MCM and UCMJ

(a) Article 120—Indecent act

(b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(7) *Aggravated sexual contact with a child*.

(a) Article 120—Indecent act

(b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(8) *Abusive sexual contact*.

(a) Article 128—Assault; Assault consummated by a battery

(b) Article 80—Attempts

(9) *Abusive sexual contact with a child*.

(a) Article 120—Indecent act

(b) Article 128—Assault; Assault consummated by a battery; Assault consummated by a battery upon a child under 16

(c) Article 80—Attempts

(10) *Indecent liberty with a child*.

(a) Article 120—Indecent act

(b) Article 80—Attempts

(11) *Indecent act*. Article 80—Attempts

(12) *Forcible pandering*. Article 80—Attempts

(13) *Wrongful sexual contact* Article 80—Attempts

(14) *Indecent exposure*. Article 80—Attempts

e. *Additional lesser included offenses*. Depending on the factual circumstances in each case, to include the type of act and level of force involved, the following offenses may be considered lesser included in addition to those offenses listed in subsection d. (See subsection (d) for a listing of the offenses that are specifically cross-referenced within the statutory text of Article 120.) The elements of the proposed lesser included offense should be compared with the elements of the greater offense to determine if the elements of the lesser offense are derivative of the greater offense and vice versa. See Appendix 23 for further explanation of lesser included offenses.

(1)(a) *Rape by using force*. Article 120—Indecent act; Wrongful sexual contact

(1)(b) *Rape by causing grievous bodily harm*. Article 120—Aggravated sexual assault by causing bodily harm; Abusive sexual contact by causing bodily harm; Indecent act; Wrongful sexual contact

(1)(c) *Rape by using threats or placing in fear*. Article 120—Aggravated sexual assault by using threats or placing in fear; Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(1)(d) *Rape by rendering another unconscious*. Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(1)(e) *Rape by administration of drug, intoxicant, or other similar substance*. Article 120—Aggravated sexual assault upon a person substantially incapacitated; Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(2)(a) - (f) *Rape of a child who has not attained 12 years; Rape of a child who has attained the age of 12 years but has not attained the age of 16 years*. Article 120—Aggravated sexual assault of a child; Aggravated sexual abuse of a child; Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact

(3) *Aggravated sexual assault*. Article 120—Wrongful sexual contact; Indecent act

(4) *Aggravated sexual assault of a child*. Article 120—Aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact

(5)(a) *Aggravated sexual contact by force*. Article 120—Indecent act; Wrongful sexual contact

(5)(b) *Aggravated sexual contact by causing grievous bodily harm*. Article 120—Abusive sexual contact by causing bodily harm; Indecent act; Wrongful sexual contact

(5)(c) *Aggravated sexual contact by using threats or placing in fear*. Article 120—Abusive sexual contact by using threats or placing in fear; Indecent act; Wrongful sexual contact

(5)(d) *Aggravated sexual contact by rendering another unconscious*. Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

(5)(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance*. Article 120—Abusive sexual contact upon a person substantially incapacitated; Indecent act; Wrongful sexual contact

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

(6) *Aggravated sexual abuse of a child*. Article 120—Aggravated sexual contact with a child; Aggravated sexual abuse of a child; Indecent liberty with a child; Wrongful sexual contact

(7) *Aggravated sexual contact with a child*. Article 120—Abusive sexual contact with a child; Indecent liberty with a child; Wrongful sexual contact

(8) *Abusive sexual contact*. Article 120—Wrongful sexual contact; Indecent act

(9) *Abusive sexual contact with a child*. Article 120—Indecent liberty with a child; Wrongful sexual contact

(10) *Indecent liberty with a child*. Article 120—Wrongful sexual contact

f. *Maximum punishment*.

(1) *Rape and rape of a child*. Death or such other punishment as a court martial may direct.

(2) *Aggravated sexual assault*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 30 years.

(3) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years, aggravated sexual abuse of a child, aggravated sexual contact, and aggravated sexual contact with a child*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(4) *Abusive sexual contact with a child and indecent liberty with a child*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 15 years.

(5) *Abusive sexual contact*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

(6) *Indecent act or forcible pandering*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

(7) *Wrongful sexual contact or indecent exposure*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 1 year.

g. *Sample specifications*.

(1) *Rape*.

(a) *Rape by using force*.

(i) *Rape by use or display of dangerous weapon or object*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by (using a dangerous weapon or object, to wit: _____ against (him)(her)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)).

(ii) *Rape by suggestion of possession of dangerous weapon or object*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 ___, cause _____to engage in a sexual act, to wit: _____, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him) (her) to believe it was a dangerous weapon or object.

(iii) *Rape by using physical violence, strength, power, or restraint to any person*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by using (physical violence) (strength) (power) (restraint applied to _____), sufficient that (he) (she) could not avoid or escape the sexual conduct.

(b) *Rape by causing grievous bodily harm*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by causing grievous bodily harm upon (him)(her)(_____), to wit: a (broken leg)(deep cut)(fractured skull)(_____).

(c) *Rape by using threats or placing in fear*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by [threatening] [placing (him)(her) in fear] that (he)(she) (_____) will be subjected to (death)(grievous bodily harm) (kidnapping) by _____.

(d) *Rape by rendering another unconscious*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by rendering (him)(her) unconscious.

(e) *Rape by administration of drug, intoxicant, or other similar substance*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-

A28-11

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by administering to (him)(her) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her) knowledge or permission), and thereby substantially impaired (his)(her) ability to [(appraise) (control)][(his) (her)] conduct.

(2) *Rape of a child*.

(a) *Rape of a child who has not attained the age of 12 years*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____ with _____, a child who had not attained the age of 12 years.

(b) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using force*.

(i) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by (using a dangerous weapon or object, to wit: _____against (him)(her)) (displaying a dangerous weapon or object, to wit: _____to (him)(her)).

(ii) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her) to believe it was a dangerous weapon or object.

(iii) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by using (physical violence) (strength) (power) (restraint applied to _____) sufficient that (he)(she) could not avoid or escape the sexual conduct.

(c) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by causing grievous bodily harm upon (him)(her)(_____), to wit: a (broken leg)(deep cut)(fractured skull)(_____).

(d) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by [threatening] [placing (him)(her) in fear] that (he)(she) (_____) would be subjected to (death)(grievous bodily harm) (kidnapping) by _____.

(e) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child unconscious*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by rendering (him)(her) unconscious.

(f) *Rape of a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____,with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, by administering to (him)(her) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her) knowledge or permission), and

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

thereby substantially impaired (his)(her) ability to [(appraise)(control)][(his)(her)] conduct.

(3) *Aggravated sexual assault*.

(a) *Aggravated sexual assault by using threats or placing in fear*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, cause _____ to engage in a sexual act, to wit: _____, by [threatening] [placing(him)(her) in fear of] [(physical injury to _____) (injury to _____'s property)(accusation of crime)(exposition of secret)(abuse of military position)(_____)].

(b) *Aggravated sexual assault by causing bodily harm*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, cause _____to engage in a sexual act, to wit: _____, by causing bodily harm upon (him)(her)(_____), to wit: _____.

(c) *Aggravated sexual assault upon a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or communicating unwillingness*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____ with _____, who was (substantially incapacitated) [substantially incapable of (appraising the nature of the sexual act)(declining participation in the sexual act) (communicating unwillingness to engage in the sexual act)].

(4) *Aggravated sexual assault of a child who has attained the age of 12 years but has not attained the age of 16 years*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a sexual act, to wit: _____ with _____, who had attained the age of 12 years, but had not attained the age of 16 years.

(5) *Aggravated sexual contact*.

(a) *Aggravated sexual contact by using force*.

(i) *Aggravated sexual contact by use or display of dangerous weapon or object*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____) (cause _____to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by (using a dangerous weapon or object, to wit: _____ against (him)(her)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)).

(ii) *Aggravated sexual contact by suggestion of possession of dangerous weapon or object*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her)(_____) to believe it was a dangerous weapon or object.

(iii) *Aggravated sexual contact by using physical violence, strength, power, or restraint to any person*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by using (physical violence) (strength) (power) (restraint applied to _____), sufficient that (he)(she)(_____) could not avoid or escape the sexual conduct.

(b) *Aggravated sexual contact by causing grievous bodily harm*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____)(cause _____to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by causing grievous bodily harm upon (him)(her)(_____), to wit: a (broken leg)(deep cut)(fractured skull)(_____).

(c) *Aggravated sexual contact by using threats or placing in fear*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by [(threatening (him)(her)(_____)] [(placing(him)(her) (_____) in fear] that (he)(she)(

A28-13

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

_____) will be subjected to (death)(grievous bodily harm)(kidnapping) by _____.

(d) *Aggravated sexual contact by rendering another unconscious*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____)(cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by rendering (him)(her)(_____) unconscious.

(e) *Aggravated sexual contact by administration of drug, intoxicant, or other similar substance*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by administering to (him)(her)(_____) a drug, intoxicant, or other similar substance, (by force) (by threat of force) (without (his)(her)(_____) knowledge or permission), and thereby substantially impaired (his)(her)(_____) ability to [(appraise) (control)] [(his) (her)] conduct.

(6) *Aggravated sexual abuse of a child*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in a lewd act, to wit: _____ with _____, a child who had not attained the age of 16 years.

(7) *Aggravated sexual contact with a child*.

(a) *Aggravated sexual contact with a child who has not attained the —age of 12 years*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had not attained the age of 12 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had not attained the age of 12 years) (cause sexual contact with or by _____, a child who had not attained the age of 12 years, to wit: _____)].

(b) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using force*.

(i) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by use or display of dangerous weapon or object*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by (using a dangerous weapon or object, to wit: _____ against (him)(her)(_____)) (displaying a dangerous weapon or object, to wit: _____ to (him)(her)(_____)).

(ii) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by suggestion of possession of dangerous weapon or object*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by the suggestion of possession of a dangerous weapon or an object that was used in a manner to cause (him)(her)(_____) to believe it was a dangerous weapon or object.

(iii) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using physical violence, strength, power, or restraint to any person*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had not

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED DURING THE PERIOD 1 OCTOBER 2007 THROUGH 27 JUNE 2012

attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by using (physical violence) (strength) (power) (restraint applied to _____) sufficient that (he)(she)(_____) could not avoid or escape the sexual conduct.

(c) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by causing grievous bodily harm*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by causing grievous bodily harm upon (him)(her)(_____), to wit: a (broken leg)(deep cut)(fractured skull)(_____).

(d) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by using threats or placing in fear*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____20 _____, [(engage in sexual contact, to wit: _____with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by [threatening] [placing (him)(her)(_____) in fear] that (he)(she)(_____) will be subjected to (death) (grievous bodily harm)(kidnapping) by _____.

(e) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by rendering that child or another unconscious*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years, but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years, but had not attained the age of 16 years, to wit: _____)] by rendering (him)(her)(_____) unconscious.

(f) *Aggravated sexual contact with a child who has attained the age of 12 years but has not attained the age of 16 years by administration of drug, intoxicant, or other similar substance*. In that _____(personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years but had not attained the age of 16 years)(cause _____to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: _____)] by administering to (him)(her)(_____) a drug, intoxicant, or other similar substance (by force) (by threat of force) (without (his)(her)(_____) knowledge or permission), and thereby substantially impaired (his)(her)(_____) ability to [(appraise) (control)][(his) (her)] conduct.

(8) *Abusive sexual contact*.

(a) *Abusive sexual contact by using threats or placing in fear*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] by [(threatening) (placing (him)(her)(_____) in fear of)] [(physical injury to _____)(injury to _____'s property)(accusation of crime)(exposition of secret)(abuse of military position)(_____)].

(b) *Abusive sexual contact by causing bodily harm*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____with _____) (cause _____to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by

_____, to wit: _____)] by causing bodily harm upon (him)(her)(_____), to wit: (_____).

(c) *Abusive sexual contact by engaging in a sexual act with a person substantially incapacitated or substantially incapable of appraising the act, declining participation, or substantially incapable of communicating unwillingness*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____) (cause _____ to engage in sexual contact, to wit: _____, with _____) (cause sexual contact with or by _____, to wit: _____)] while (he)(she)(_____) was [substantially incapacitated] [substantially incapable of (appraising the nature of the sexual contact) (declining participation in the sexual contact) (communicating unwillingness to engage in the sexual contact)].

(9) *Abusive sexual contact with a child*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____, [(engage in sexual contact, to wit: _____ with _____, a child who had attained the age of 12 years but had not attained the age of 16 years)(cause _____ to engage in sexual contact, to wit: _____, with _____, a child who had attained the age of 12 years but had not attained the age of 16 years) (cause sexual contact with or by _____, a child who had attained the age of 12 years but had not attained the age of 16 years, to wit: _____)].

(10) *Indecent liberties with a child*. In that _____ (personal jurisdiction data), did, (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____,(take indecent liberties) (engage in indecent conduct) in the physical presence of _____, a (female) (male) under 16 years of age, by (communicating the words: to wit: _____) (exposing one's private parts, to wit: _____) (_____), with the intent to [(arouse) (appeal to) (gratify) the (sexual desire) of the _____(or _____)] [(abuse)(humiliate)(degrade) _____].

(11) *Indecent act*. In that _____ (personal jurisdiction data), did (at/on board-location) (subject-matter jurisdiction data, if required), on or about _____ 20 _____,wrongfully commit indecent conduct, to wit _____.

(12) *Forcible pandering*. In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, compel _____ to engage in [(a sexual act)(sexual contact) (lewd act), to wit: _____] for the purpose of receiving money or other compensation with _____ (a) person(s) to be directed to (him)(her) by the said _____.

(13) *Wrongful sexual contact*. In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, engage in sexual contact with _____, to wit: _____, and such sexual contact was without legal justification or lawful authorization and without the permission of _____.

(14) *Indecent exposure*. In that _____ (personal jurisdiction data), did (at/on board-location), (subject-matter jurisdiction data, if required), on or about _____ 20 _____, intentionally (expose in an indecent manner (his) (her) (_____) (_____) while (at the barracks window) (in a public place) (_____)."

Appendix 23 Analysis Follows:

[Note: The analysis below was removed from Appendix 23 and pertains to the 2007 Amendment of Article 120. The analysis was inserted into this appendix to accompany the version of Article 120 applicable to offenses committed during the period 1 October 2007 through 27 June 2012. For offenses committed prior to 1 October 2007, analysis related to Article 120 and other punitive articles applicable to sexual offenses is contained in Appendix 27. For offenses committed on or after 28 June 2012, analysis related to Article 120, 120b, and 120c is contained in Appendix 23.]

45. Article 120—Rape, sexual assault, and other sexual misconduct

2007 Amendment: Changes to this paragraph are contained in Div. A. Title V. Subtitle E, Section 552(a)(1) of the National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, 119 Stat. 3257 (6 January 2006), which supersedes the previous paragraph 45, Rape and Carnal Knowledge, in its entirety and replaces paragraph 45 with Rape, sexual assault and other sexual misconduct. In accordance with Section 552(c) of that Act, the amendment to

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

the Article applies only with respect to offenses committed on or after 1 October 2007.

Nothing in these amendments invalidates any nonjudicial punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to 1 October 2007. Any such nonjudical punishment proceeding, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

This new Article 120 consolidates several sexual misconduct offenses and is generally based on the Sexual Abuse Act of 1986, 18 U.S.C. Sections 2241-2245. The following is a list of offenses that have been replaced by this new paragraph 45:

(1) Paragraph 63, 134 Assault - Indecent, has been replaced in its entirety by three new offenses under paragraph 45. *See* subsections (e) Aggravated Sexual Contact, (h) Abusive Sexual Contact, and (m) Wrongful Sexual Contact.

(2) Paragraph 87, 134 Indecent Acts or Liberties with a Child, has been replaced in its entirety by three new offenses under paragraph 45. *See* subsections (g) Aggravated Sexual Contact with a Child, (i) Abusive Sexual Contact with a Child, and (j) Indecent Liberty with a Child.

(3) Paragraph 88, Article 134 Indecent Exposure, has been replaced in its entirety by a new offense under paragraph 45. *See* subsection (n) Indecent Exposure.

(4) Paragraph 90, Article 134 Indecent Acts with Another, has been replaced in its entirety by a new offense under paragraph 45. *See* subsection (k) Indecent Act.

(5) Paragraph 97, Article 134 Pandering and Prostitution, has been amended. The act of compelling another person to engage in an act of prostitution with another person will no longer be an offense under paragraph 97 and has been replaced by a new offense under paragraph 45. *See* subsection (l), Forcible Pandering.

c. *Explanation*. Subparagraph (3), definition of "indecent," is taken from paragraphs 89.c and 90.c of the Manual (2005 ed.) and is intended to consolidate the definitions of "indecent," as used in the former offenses under Article 134 of "Indecent acts or liberties with a child," "Indecent exposure," and "Indecent acts with another," formerly at paragraphs 87, 88, and 90 of the 2005 Manual, and "Indecent language," at paragraph 89. The application of this single definition of "indecent" to the offenses of "Indecent liberty with a child," "Indecent act," and "Indecent exposure" under Article 120 is consistent with the construction given to the former Article 134 offenses in the 2005 Manual that were consolidated into Article 120. *See e.g. United States v. Negron*, 60 M.J. 136 (C.A.A.F. 2004).

d. *Additional Lesser Included Offenses*. The test to determine whether an offense is factually the same as another offense, and therefore lesser-included to that offense, is the "elements" test. *United States v. Foster*, 40 M.J. 140, 142 (C.M.A. 1994). Under this test, the court considers "whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. 299 at 304 (1932). Rather than adopting a literal application of the elements test, the Court stated that resolution of lesser-included claims "can only be resolved by lining up elements realistically and determining whether each element of the supposed 'lesser' offense is rationally derivative of one or more elements of the other offense - and vice versa." *Foster*, 40 M.J. at 146. Whether an offense is a lesser-included offense is a matter of law that the Court will consider de novo. *United States v. Palagar*, 56 M.J. 294, 296 (C.A.A.F. 2002).

e. *Maximum punishment*. *See 1995 Amendment* regarding maximum punishment of death.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

APPENDIX 27
PUNITIVE ARTICLES APPLICABLE TO SEXUAL OFFENSES COMMITTED PRIOR TO 1 OCTOBER 2007

The punitive articles contained in this appendix were replaced or superseded by changes to Article 120, Uniform Code of Military Justice, contained in the National Defense Authorization Act for Fiscal Year 2006. Article 120 was amended again by the National Defense Authorization Act for Fiscal Year 2012. Each version of Article 120 is located in a different part of this Manual. For offenses committed prior to 1 October 2007, the relevant sexual offense provisions and analysis are contained in this appendix and listed below. For offenses committed during the period 1 October 2007 through 27 June 2012, the relevant sexual offense provisions and analysis are contained in Appendix 28. For offenses committed on or after 28 June 2012, the relevant sexual offense provisions are contained in Part IV of this Manual (Articles 120, 120b, and 120c).

45. Article 120—Rape and carnal knowledge

a. *Text*.

(a) Any person subject to this chapter who commits an act of sexual intercourse by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

(b) Any person subject to this chapter who, under circumstances not amounting to rape, commits an act of sexual intercourse with a person—

(1) who is not his or her spouse; and

(2) who has not attained the age of sixteen years, is guilty of carnal knowledge and shall be punished as a court-martial may direct.

(c) Penetration, however slight, is sufficient to complete either of these offenses.

(d)(1) In a prosecution under subsection (b), it is an affirmative defense that—

(A) the person with whom the accused committed the act of sexual intercourse had at the time of the alleged offense attained the age of twelve years; and

(B) the accused reasonably believed that the person had at the time of the alleged offense attained the age of 16 years.

(2) The accused has the burden of proving a defense under subparagraph (d)(1) by a preponderance of the evidence.

b. *Elements*.

(1) *Rape*.

(a) That the accused committed an act of sexual intercourse; and

(b) That the act of sexual intercourse was done by force and without consent.

(2) *Carnal knowledge*.

(a) That the accused committed an act of sexual intercourse with a certain person;

(b) That the person was not the accused's spouse; and

(c)(1) That at the time of the sexual intercourse the person was under the age of 12; or

(2) That at the time of the sexual intercourse the person had attained the age of 12 but was under the age of 16.

c. *Explanation*.

(1) *Rape*.

(a) *Nature of offense*. Rape is sexual intercourse by a person, executed by force and without consent of the victim. It may be committed on a victim of any age. Any penetration, however slight, is sufficient to complete the offense.

(b) *Force and lack of consent*. Force and lack of consent are necessary to the offense. Thus, if the victim consents to the act, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a victim in possession of his or her mental faculties fails to make lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that the victim did consent. Consent, however, may not be inferred if resistance would have been futile, where resistance is overcome by threats of death or great bodily harm, or where the victim is unable to resist because of the lack of mental or physical faculties. In such a case there is no consent and the force involved in penetration will suffice. All the surrounding circumstances are to be considered in determining whether a victim gave consent, or whether he or she failed or ceased to resist only because of a reasonable fear of death or grievous bodily harm. If there is actual

consent, although obtained by fraud, the act is not rape, but if to the accused's knowledge the victim is of unsound mind or unconscious to an extent rendering him or her incapable of giving consent, the act is rape. Likewise, the acquiescence of a child of such tender years that he or she is incapable of understanding the nature of the act is not consent.

(c) *Character of victim*. *See* Mil. R. Evid. 412 concerning rules of evidence relating to an alleged rape victim's character.

(2) *Carnal knowledge*. "Carnal knowledge" is sexual intercourse under circumstances not amounting to rape, with a person who is not the accused's spouse and who has not attained the age of 16 years. Any penetration, however slight, is sufficient to complete the offense. It is a defense, however, which the accused must prove by a preponderance of the evidence, that at the time of the act of sexual intercourse, the person with whom the accused committed the act of sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this same person was at least 16 years of age.

d. *Lesser included offenses*.

(1) *Rape*.

(a) Article 128—assault; assault consummated by a battery

(b) Article 134—assault with intent to commit rape

(c) Article 134—indecent assault

(d) Article 80—attempts

(e) Article 120(b)—carnal knowledge

(2) *Carnal knowledge*.

(a) Article 134—indecent acts or liberties with a person under 16

(b) Article 80—attempts

e. *Maximum punishment*.

(1) *Rape*. Death or such other punishment as a court-martial may direct.

(2) *Carnal knowledge with a child who, at the time of the offense, has attained the age of 12 years*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *Carnal knowledge with a child under the age of 12 years at the time of the offense*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

f. *Sample specifications*.

(1) *Rape*. In that (personal jurisdiction data), did, (at/on board — location) (subject - matter jurisdiction data, if required), on or about _____, rape, _____ (a person under the age of 12) (a person who had attained the age of 12 but was under the age of 16).

(2) *Carnal knowledge*. In that (personal jurisdiction data), did, (at/on board — location) (subject - matter jurisdiction data, if required), on or about _____, commit the offense of carnal knowledge with _____, (a person under the age of 12) (a person who attained the age of 12 but was under the age of 16).

63. Article 134—(Assault—indecent)

a. *Text*. *See* paragraph 60.

b. *Elements*.

(1) That the accused assaulted a certain person not the spouse of the accused in a certain manner;

(2) That the acts were done with the intent to gratify the lust or sexual desires of the accused; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation*. See paragraph 54c for a discussion of assault. Specific intent is an element of this offense. For a definition of 'indecent', *see* paragraph 90*c*.

d. *Lesser included offenses*.

(1) Article 128—assault consummated by a battery; assault

(2) Article 134—indecent acts

(3) Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification*. In that (personal jurisdiction data), did (at/on board—location), (subject-matter jurisdiction data, if required), on or about _____, commit an indecent assault upon a person not his/her wife/husband by _____, with intent to gratify his/her (lust) (sexual desires).

87. Article 134—(Indecent acts or liberties with a child)

a. *Text*. *See* paragraph 60.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

b. *Elements*.

(1) *Physical contact*.

(a) That the accused committed a certain act upon or with the body of a certain person;

(b) That the person was under 16 years of age and not the spouse of the accused;

(c) That the act of the accused was indecent;

(d) That the accused committed the act with intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(e) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) *No physical contact*.

(a) That the accused committed a certain act;

(b) That the act amounted to the taking of indecent liberties with a certain person;

(c) That the accused committed the act in the presence of this person;

(d) That this person was under 16 years of age and not the spouse of the accused;

(e) That the accused committed the act with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of the accused, the victim, or both; and

(f) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation*.

(1) *Consent*. Lack of consent by the child to the act or conduct is not essential to this offense; consent is not a defense.

(2) *Indecent liberties*. When a person is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but physical contact is not required. Thus, one who with the requisite intent exposes one's private parts to a child under 16 years of age may be found guilty of this offense. An indecent liberty may consist of communication of indecent language as long as the communication is made in the physical presence of the child.

(3) *Indecent*. *See* paragraph 89c and 90c.

d. *Lesser included offense*.

(1) Article 134—indecent acts with another

(2) Article 128—assault; assault consummated by a battery

(3) Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 7 years.

f. *Sample specification*. In that (personal jurisdiction data), did, (at/on board — location) (subject - matter jurisdiction data, if required), on or about _____, (take (indecent) liberties with) (commit an indecent act (upon) (with) the body of) _____, a (female) (male) under 16 years of age, not the (wife) (husband) of the said _____, by (fondling (her) (him) and placing his/her hands upon (her) (his) leg and private parts) ( ), with intent to (arouse) (appeal to) (gratify) the (lust) (passion) (sexual desires) of the said ( ).

88. Article 134—(Indecent exposure)

a. *Text*. *See* paragraph 60.

b. *Elements*.

(1) That the accused exposed a certain part of the accused's body to public view in an indecent manner;

(2) That the exposure was willful and wrongful; and

(3) That, under the circumstances, the accused's conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation*. "Willful" means an intentional exposure to public view. Negligent indecent exposure is not punishable as a violation of the code. See paragraph 90c concerning "indecent."

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Bad - conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification*. In that (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, while (at a barracks window) ( ) willfully and wrongfully expose in an indecent manner to public view his or her _____.

90. Article 134—(Indecent acts with another)

a. *Text*. *See* paragraph 60.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

b. *Elements*.

(1) That the accused committed a certain wrongful act with a certain person;

(2) That the act was indecent; and

(3) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation*. "Indecent" signifies that form of immorality relating to sexual impurity which is not only grossly vulgar, obscene, and repugnant to common propriety, but tends to excite lust and deprave the morals with respect to sexual relations.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification*. In that (personal jurisdiction data), did (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____, wrongfully commit an indecent act with by _____.

Appendix 23 Analysis Follows:

[Note: The analysis below was removed from Appendix 23 and pertains to Article 120 and other punitive articles applicable to sexual offenses as they existed prior to the 2007 Amendment. The analysis was inserted into this appendix to accompany the version of Article 120, and other punitive sexual offense articles, applicable to offenses committed before 1 October 2007. For offenses committed during the period 1 October 2007 through 27 June 20 12, analysis related to Article 120 is contained in Appendix 27. For offenses committed on or after 28 June 2012, analysis related to Article 120, 120b, and 120c is contained in Appendix 23.]

45. Article 120—Rape and carnal knowledge

b. *Elements*. *2004 Amendment:* Paragraph 45(b)(2) was amended to add two distinct elements of age based upon the 1994 amendment to paragraph 45(e). See also concurrent change to R.C.M. 307(c)(3) and accompanying analysis.

c. *Explanation*. This paragraph is based on paragraph 199 of MCM, 1969 (Rev.). The third paragraph of paragraph 199(a) was deleted as unnecessary. The third paragraph of paragraph 199(b) was deleted based on the preemption doctrine. *See United States v. Wright*, 5 M.J. 106 (C.M.A. 1978); *United States v. Norris*, 2 U.S.C.M.A. 236, 8 C.M.R. 36 (1953). *Cf. Williams v. United States*, 327 U.S. 711 (1946) (scope of preemption doctrine). The Military Rules of Evidence deleted the requirement for corroboration of the victim's testimony in rape and similar cases under former paragraph 153 *a* of MCM, 1969. *See* Analysis, Mil. R. Evid. 412.

d. *Lesser included offenses*. Carnal knowledge was deleted as a lesser included offense of rape in view of the separate elements in each offense. Both should be separately pleaded in a proper case. *See generally United States v. Smith*, 7 M.J. 842 (A.C.M.R. 1979).

1993 Amendment. The amendment to para 45*d*(1) represents an administrative change to conform the Manual with case authority. Carnal knowledge is a lesser included offense of rape where the pleading alleges that the victim has not attained the age of 16 years. *See United States v. Baker*, 28 M.J. 900 (A.C.M.R. 1989); *United States v. Stratton*, 12 M.J. 998 (A.F.C.M.R. 1982), *pet. denied*, 15 M.J. 107 (C.M.A. 1983); *United States v. Smith*, 7 M.J. 842 (A.C.M.R. 1979).

e. *Maximum punishment*.

1994 Amendment. Subparagraph *e* was amended by creating two distinct categories of carnal knowledge for sentencing purposes -- one involving children who had attained the age of 12 years at the time of the offense, now designated as subparagraph e(2), and the other for those who were younger than 12 years. The latter is now designated as subparagraph e(3). The punishment for the older children was increased from 15 to 20 years confinement. The maximum confinement for carnal knowledge of a child under 12 years was increased to life. The purpose for these changes is to bring the punishments more in line with those for sodomy of a child under paragraph 51e of this part and with the Sexual Abuse Act of 1986, 18 U.S.C. §§ 2241–2245. The alignment of the maximum punishments for carnal knowledge with those of sodomy is aimed at paralleling the concept of gender–neutrality incorporated into the Sexual Abuse Act.

1995 Amendment. The offense of rape was made gender neutral and the spousal exception was removed under Article 120(a). National Defense Au-

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

thorization Act for Fiscal Year 1993, Pub. L. No. 102–484, 106 Stat. 2315, 2506 (1992).

Rape may "be punished by death" only if constitutionally permissible. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that the death penalty is "grossly disproportionate and excessive punishment for the rape of an adult woman," and is "therefore forbidden by the Eighth Amendment as cruel and unusual punishment." *Id*. at 592 (plurality opinion). *Coker*, however, leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult. *See Coker*, 433 U.S. at 595. *See Leatherwood v. State*, 548 So.2d 389 (Miss. 1989) (death sentence for rape of minor by an adult is not cruel and unusual punishment prohibited by the Eighth Amendment). *But see Buford v. State*, 403 So.2d 943 (Fla. 1981) (sentence of death is grossly disproportionate for sexual assault of a minor by an adult and consequently is forbidden by Eighth Amendment as cruel and unusual punishment).

1998 Amendment: In enacting section 1113 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 462 (1996), Congress amended Article 120, UCMJ, to make the offense gender neutral and create a mistake of fact as to age defense to a prosecution for carnal knowledge. The accused must prove by a preponderance of the evidence that the person with whom he or she had sexual intercourse was at least 12 years of age, and that the accused reasonably believed that this person was at least 16 years of age.

f. *Sample Specification*. *2004 Amendment:* Paragraph 45(f)(2) was amended to aid practitioners in charging the two distinct categories of carnal knowledge created in 1994. For the same reason paragraph 45(f)(1) was amended to allow for contingencies of proof because carnal knowledge is a lesser-included offense of rape if properly pleaded. *See also* concurrent change to R.C.M.307(c)(3) and accompanying analysis.

63. Article 134—(Assault—indecent)

c. *Explanation*. This paragraph is based on paragraph 213*f*(2) of MCM, 1969 (Rev.). *See United States v. Caillouette*, 12 U.S.C.M.A. 149, 30 C.M.R. 149 (1961) regarding specific intent. *See also United States v. Headspeth*, 2 U.S.C.M.A. 635, 10 C.M.R. 133 (1953).

Gender-neutral language has been used in this paragraph, as well as throughout this Manual. This will eliminate any question about the intended scope of certain offenses, such as indecent assault such as may have been raised by the use of the masculine pronoun in MCM, 1969 (Rev.). It is, however, consistent with the construction given to the former Manual. *See, e.g., United States v. Respess*, 7 M.J. 566 (A.C.M.R. 1979). *See generally* 1 U.S.C. § 1 ("unless the context indicates otherwise … words importing the masculine gender include the feminine as well ….").

d. *Lesser included offenses*. *See United States v. Thacker*, 16 U.S.C.M.A. 408, 37 C.M.R. 28 (1966); *United States v. Jackson*, 31 C.M.R. 738 (A.F.B.R. 1962).

2007 Amendment: This paragraph has been replaced in its entirety by paragraph 45. *See* Article 120 (e) Aggravated Sexual Contact, (h) Abusive Sexual Contact, and (m) Wrongful Sexual Contact.

87. Article 134—(Indecent acts or liberties with a child)

c. *Explanation*. This paragraph is based on paragraph 213*f*(3) of MCM, 1969 (Rev.). *See also United States v. Knowles*, 15 U.S.C.M.A. 404, 35 C.M.R. 376 (1965); *United States v. Brown*, 3 U.S.C.M.A. 454, 13 C.M.R. 454, 13 C.M.R. 10 (1953); *United States v. Riffe*, 25 C.M.R. 650 (A.B.R. 1957), *pet. denied*, 9 U.S.C.M.A. 813, 25 C.M.R. 486 (1958). "Lewd" and "lascivious" were deleted because they are synonymous with indecent. *See id*. *See also* paragraph 90c.

2007 Amendment. This paragraph has been replaced in its entirety by paragraph 45. *See* Article 120 (g) Aggravated Sexual Contact with a Child, (i) Abusive Sexual Contact with a Child, and (j) Indecent Liberty with Child.

88. Article 134—(Indecent exposure)

c. *Explanation*. This paragraph and is based on *United States v. Manos*, 8 U.S.C.M.A. 734, 25 C.M.R. 238 (1958). *See also United States v. Caune*, 22 U.S.C.M.A. 200, 46 C.M.R. 200 (1973); *United States v. Conrad*, 15 U.S.C.M.A. 439, 35 C.M.R. 411 (1965).

e. *Maximum punishment*. The maximum punishment has been increased to include a bad-conduct dis-

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charge. Indecent exposure in some circumstances (e.g., in front of children, but without the intent to incite lust or gratify sexual desires necessary for indecent acts or liberties) is sufficiently serious to authorize a punitive discharge.

2007 Amendment: This paragraph has been replaced in its entirety by paragraph 45. *See* Article 120(n) Indecent Exposure.

90. Article 134—(Indecent acts with another)

c. *Explanation*. This and is based on *United States v. Holland*, 12 U.S.C.M.A. 444, 31 C.M.R. 30 (1961); *United States v. Gaskin*, 12 U.S.C.M.A. 419, 31 C.M.R. 5 (1962); *United States v. Sanchez*, 11 U.S.C.M.A. 216, 29 C.M.R. 32 (1960); *United States v. Johnson*, 4 M.J. 770 (A.C.M.R. 1978). "Lewd" and "lascivious" have been deleted as they are synonymous with "indecent." *See id*.

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Excerpts from the MCM and UCMJ

(1) That the accused inflicted a certain injury upon a certain person;

(2) That this injury seriously disfigured the person's body, destroyed or disabled an organ or member, or seriously diminished the person's physical vigor by the injury to an organ or member; and

(3) That the accused inflicted this injury with an intent to cause some injury to a person.

c. *Explanation*.

(1) *Nature of offense*. It is maiming to put out a person's eye, to cut off a hand, foot, or finger, or to knock out a tooth, as these injuries destroy or disable those members or organs. It is also maiming to injure an internal organ so as to seriously diminish the physical vigor of a person. Likewise, it is maiming to cut off an ear or to scar a face with acid, as these injuries seriously disfigure a person. A disfigurement need not mutilate any entire member to come within the article, or be of any particular type, but must be such as to impair perceptibly and materially the victim's comeliness. The disfigurement, diminishment of vigor, or destruction or disablement of any member or organ must be a serious injury of a substantially permanent nature. However, the offense is complete if such an injury is inflicted even though there is a possibility that the victim may eventually recover the use of the member or organ, or that the disfigurement may be cured by surgery.

(2) *Means of inflicting injury*. To prove the offense it is not necessary to prove the specific means by which the injury was inflicted. However, such evidence may be considered on the question of intent.

(3) *Intent*. Maiming requires a specific intent to injure generally but not a specific intent to maim. Thus, one commits the offense who intends only a slight injury, if in fact there is infliction of an injury of the type specified in this article. Infliction of the type of injuries specified in this article upon the person of another may support an inference of the intent to injure, disfigure, or disable.

(4) *Defenses*. If the injury is done under circumstances which would justify or excuse homicide, the offense of maiming is not committed. *See* R.C.M. 916.

d. *Lesser included offenses*.

(1) Article 128—assault; assault consummated by a battery

(2) Article 128—assault with a dangerous weapon

(3) Article 128—assault intentionally inflicting grievous bodily harm

(4) Article 80—attempts

e. *Maximum punishment*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

f. *Sample specification*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required) on or about _____ 20 __ , maim _____ by (crushing his/her foot with a sledge hammer) (_____).

51. Article 125—Sodomy

a. *Text of statute*.

(a) **Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.**

(b) **Any person found guilty of sodomy shall by punished as a court-martial may direct.**

b. *Elements*.

(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal.

[Note: Add any of the following as applicable]

(2) That the act was done with a child under the age of 12.

(3) That the act was done with a child who had attained the age of 12 but was under the age of 16.

(4) That the act was done by force and without the consent of the other person.

c. *Explanation*. It is unnatural carnal copulation for a person to take into that person's mouth or anus the sexual organ of another person or of an animal; or to place that person's sexual organ in the mouth or anus of another person or of an animal; or to have carnal copulation in any opening of the body, except the sexual parts, with another person; or to have carnal copulation with an animal.

d. *Lesser included offenses*.

(1) *With a child under the age of 16*.

(a) Article 125—forcible sodomy (and offenses included therein; *see* subparagraph (2) below)

(b) Article 80—attempts

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(2) *Forcible sodomy*.

(a) Article 125—sodomy (and offenses included therein; *see* subparagraph (3) below)

(b) Article 134—assault with intent to commit sodomy

(c) Article 80—attempts.

(3) *Sodomy*. Article 80—attempts

[Note: Consider lesser included offenses under Art. 120, depending on the factual circumstances in each case.]

e. *Maximum punishment*.

(1) *By force and without consent*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(2) *With a child who, at the time of the offense, has attained the age of 12 but is under the age of 16 years*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years.

(3) *With a child under the age of 12 years at the time of the offense*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for life without eligibility for parole.

(4) *Other cases*. Dishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.

f. *Sample specification*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ , commit sodomy with _____ , (a child under the age of 12) (a child who had attained the age of 12 but was under the age of 16) (by force and without the consent of the said _____).

52. Article 126—Arson

a. *Text of statute*.

(a) **Any person subject to this chapter who willfully and maliciously burns or sets on fire an inhabited dwelling, or any other structure, movable or immovable, wherein to the knowledge of the offender there is at the time a human being, is guilty of aggravated arson and shall be punished as a court-martial may direct.**

(b) **Any person subject to this chapter who willfully and maliciously burns or sets fire to the property of another, except as provided in subsection (a), is guilty of simple arson and shall be punished as a court-martial may direct.**

b. *Elements*.

(1) *Aggravated arson*.

(a) *Inhabited dwelling*.

(i) That the accused burned or set on fire an inhabited dwelling;

(ii) That this dwelling belonged to a certain person and was of a certain value; and

(iii) That the act was willful and malicious.

(b) *Structure*.

(i) That the accused burned or set on fire a certain structure;

(ii) That the act was willful and malicious;

(iii) That there was a human being in the structure at the time;

(iv) That the accused knew that there was a human being in the structure at the time; and

(v) That this structure belonged to a certain person and was of a certain value.

(2) *Simple arson*.

(a) That the accused burned or set fire to certain property of another;

(b) That the property was of a certain value; and

(c) That the act was willful and malicious.

c. *Explanation*.

(1) *In general*. In aggravated arson, danger to human life is the essential element; in simple arson, it is injury to the property of another. In either case, it is immaterial that no one is, in fact, injured. It must be shown that the accused set the fire willfully and maliciously, that is, not merely by negligence or accident.

(2) *Aggravated arson*.

(a) *Inhabited dwelling*. An inhabited dwelling includes the outbuildings that form part of the cluster of buildings used as a residence. A shop or store is not an inhabited dwelling unless occupied as such, nor is a house that has never been occupied or which has been temporarily abandoned. A person may be guilty of aggravated arson of the person's dwelling, whether as owner or tenant.

(b) *Structure*. Aggravated arson may also be committed by burning or setting on fire any other structure, movable or immovable, such as a theater, church, boat, trailer, tent, auditorium, or any other sort of shelter or edifice, whether public or private, when the offender knows that there is a human being inside at the time. It may be that the offender

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someone other than the driver or a passenger in the driver's vehicle. It also covers accidents caused by the accused, even if the accused's vehicle does not contact other people, vehicles, or property.

(2) *Knowledge*. Actual knowledge that an accident has occurred is an essential element of this offense. Actual knowledge may be proved by circumstantial evidence.

(3) *Passenger*. A passenger other than a senior passenger may also be liable under this paragraph. *See* paragraph 1 of this Part.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Bad-conduct discharge, forfeiture of all pay and allowances, and confinement for 6 months.

f. *Sample specification*.

In that _____ (personal jurisdiction data), (the driver of) (*a passenger in) (the senior officer/noncommissioned officer in) (_____ in) a vehicle at the time of an accident in which said vehicle was involved, and having knowledge of said accident, did, at _____ (subject-matter jurisdiction data, if required), on or about _____ 20 __ (wrongfully leave) (*by _____ , assist the driver of the said vehicle in wrongfully leaving) (wrongfully order, cause, or permit the driver to leave) the scene of the accident without (providing assistance to _____ , who had been struck (and injured) by the said vehicle) (making his/her (the driver's) identity known).

[*Note: This language should be used when the accused was a passenger and is charged as a principal. *See* paragraph 1 of this part.]

83. Article 134—(Fraternization)

a. *Text of statute*. *See* paragraph 60.

b. *Elements*.

(1) That the accused was a commissioned or warrant officer;

(2) That the accused fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

(3) That the accused then knew the person(s) to be (an) enlisted member(s);

(4) That such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

(5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

c. *Explanation*.

(1) *In general*. The gist of this offense is a violation of the custom of the armed forces against fraternization. Not all contact or association between officers and enlisted persons is an offense. Whether the contact or association in question is an offense depends on the surrounding circumstances. Factors to be considered include whether the conduct has compromised the chain of command, resulted in the appearance of partiality, or otherwise undermined good order, discipline, authority, or morale. The acts and circumstances must be such as to lead a reasonable person experienced in the problems of military leadership to conclude that the good order and discipline of the armed forces has been prejudiced by their tendency to compromise the respect of enlisted persons for the professionalism, integrity, and obligations of an officer.

(2) *Regulations*. Regulations, directives, and orders may also govern conduct between officer and enlisted personnel on both a service-wide and a local basis. Relationships between enlisted persons of different ranks, or between officers of different ranks may be similarly covered. Violations of such regulations, directives, or orders may be punishable under Article 92. *See* paragraph 16.

d. *Lesser included offense*. Article 80—attempts

e. *Maximum punishment*. Dismissal, forfeiture of all pay and allowances, and confinement for 2 years.

f. *Sample specification*.

In that _____ (personal jurisdiction data), did, (at/on board—location) (subject-matter jurisdiction data, if required), on or about _____ 20 __ , knowingly fraternize with _____ , an enlisted person, on terms of military equality, to wit: _____ , in violation of the custom of (the Naval Service of the United States) (the United States Army) (the United States Air Force) (the United States Coast Guard) that officers shall not fraternize with enlisted persons on terms of military equality.

84. Article 134—(Gambling with subordinate)

a. *Text of statute*. *See* paragraph 60.

b. *Elements*.

(1) That the accused gambled with a certain servicemember;

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Rule 104. Unlawful command influence

(a) *General prohibitions*.

(1) *Convening authorities and commanders*. No convening authority or commander may censure, reprimand, or admonish a court-martial or other military tribunal or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court-martial or tribunal, or with respect to any other exercise of the functions of the court-martial or tribunal or such persons in the conduct of the proceedings.

(2) *All persons subject to the code*. 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.

(3) *Exceptions*.

(A) *Instructions*. Subsections (a)(1) and (2) of the rule do not prohibit general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing personnel of a command in the substantive and procedural aspects of courts-martial.

(B) *Court-martial statements*. Subsections (a)(1) and (2) of this rule do not prohibit statements and instructions given in open session by the military judge or counsel.

(C) *Professional supervision*. Subsections (a)(1) and (2) of this rule do not prohibit action by the Judge Advocate General concerned under R.C.M. 109.

(D) *Offense*. Subsection (a)(1) and (2) of this rule do not prohibit appropriate action against a person for an offense committed while detailed as a military judge, counsel, or member of a court-martial, or while serving as individual counsel.

(b) *Prohibitions concerning evaluations*.

(1) *Evaluation of member or defense counsel*. In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces should be retained on active duty, no person subject to the code may:

(A) Consider or evaluate the performance of duty of any such person as a member of a court-martial; or

(B) Give a less favorable rating or evaluation of any defense counsel because of the zeal with which such counsel represented any accused.

(2) *Evaluation of military judge*.

(A) *General courts-martial*. Unless the general court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge detailed to a general court-martial, which relates to the performance of duty as a military judge.

(B) *Special courts-martial*. The convening authority may not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a special court-martial which relates to the performance of duty as a military judge. When the military judge is normally rated or the military judge's report is reviewed by the convening authority, the manner in which such military judge will be rated or evaluated upon the performance of duty as a military judge may be as prescribed in regulations of the Secretary concerned which shall ensure the absence of any command influence in the rating or evaluation of the military judge's judicial performance.

Discussion

See paragraph 22 of Part IV concerning prosecuting violations of Article 37 under Article 98.

Rule 105. Direct communications: convening authorities and staff judge advocates; among staff judge advocates

(a) *Convening authorities and staff judge advocates*. Convening authorities shall at all times communicate directly with their staff judge advocates in matters relating to the administration of military justice.

(b) *Among staff judge advocates and with the Judge Advocate General*. The staff judge advocate of any command is entitled to communicate directly with

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(B) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B);

(C) In the case of a private dwelling which is military property or under military control, or non-military property in a foreign country

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry;

(D) In the case of a private dwelling not included in subsection (e)(2)(C) of this rule,

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority. A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in this subsection ((e)(2)) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

Discussion

For example, if law enforcement officials enter a private dwelling pursuant to a valid search warrant or search authorization, they may apprehend persons therein if grounds for an apprehension exist. This subsection is not intended to be an independent grant of authority to execute civilian arrest or search warrants. The authority must derive from an appropriate Federal or state procedure. *See e.g.* Fed. R. Crim. P. 41 and 28 C.F.R. 60.1.

Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

Discussion

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.

The Military Rules of Evidence should be consulted when conducting interrogations (*see* Mil. R. Evid. 301-306), searches (*see* Mil. R. Evid. 311-317), and eyewitness identifications (*see* Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, *see* Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. *See also* R.C.M. 702 (depositions).

A person who is an accuser (*see* Article 1(9)) is disqualified from convening a general or special court-martial in that case. R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that preferral is warranted.

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint*. Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) *Conditions on liberty*. Conditions on liberty are imposed by orders directing a person to do or

refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) *Restriction in lieu of arrest*. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) *Arrest*. Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) *Confinement*. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. *See* R.C.M. 305.

Discussion

Conditions on liberty include orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must not hinder pretrial preparation, however. Thus, when such conditions are imposed, they must by sufficiently flexible to permit pretrial preparation.

Restriction in lieu of arrest is a less severe restraint on liberty than is arrest. Arrest includes suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction in lieu of arrest. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest.

Breach of arrest or restriction in lieu of arrest or violation of conditions on liberty are offenses under the code. *See* paragraphs 16, 19, and 102, Part IV. When such an offense occurs, it may warrant appropriate action such as nonjudicial punishment or court-martial. *See* R.C.M. 306. In addition, such a breach or violation may provide a basis for the imposition of a more severe form of restraint.

R.C.M. 707(a) requires that the accused be brought to trial within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4).

(b) *Who may order pretrial restraint*.

(1) *Of civilians and officers*. Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

Discussion

Civilians may be restrained under these rules only when they are subject to trial by court-martial. *See* R.C.M. 202.

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(2) *Of enlisted persons*. Any commissioned officer may order pretrial restraint of any enlisted person.

(3) *Delegation of authority*. The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) *Authority to withhold*. A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) *When a person may be restrained*. No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

Discussion

The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of R.C.M. 305(h)(2)(B) should be considered. The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

Restraint is not required in every case. The absence of pretrial restraint does not affect the jurisdiction of a court-martial. However, *see* R.C.M. 202(c) concerning attachment of jurisdiction. *See* R.C.M. 305 concerning the standards and procedures governing pretrial confinement.

(d) *Procedures for ordering pretrial restraint*. Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the re-

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straint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the code. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) *Notice of basis for restraint*. When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

Discussion

See R.C.M. 305(e) concerning additional information which must be given to a person who is confined. If the person ordering the restrain is not the commander of the person restrained, that officer should be notified.

(f) *Punishment prohibited*. Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

Discussion

Offenses under the code by a person under restraint may be disposed of in the same manner as any other offenses.

(g) *Release*. Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

Discussion

Pretrial restraint may be imposed (or reimposed) if charges are to be reinstated or a rehearing or "other" trial is to be ordered.

(h) *Administrative restraint*. Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

Discussion

See also R.C.M. 306.

Rule 305. Pretrial confinement

(a) *In general*. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Discussion

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States. Article 12. However, if members of the armed forces of the United States are separated from prisoners of the other categories mentioned, they may be confined in the same confinement facilities.

(b) *Who may be confined*. Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

Discussion

See R.C.M. 201 and 202 and the discussions therein concerning persons who are subject to trial by courts-martial.

(c) *Who may order confinement*. *See* R.C.M. 304(b).

Discussion

"No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the committing officer furnishes a statement, signed by him, of the offense charged against the prisoner." Article 11(a).

(d) *When a person may be confined*. No person may be ordered into pretrial confinement except for prob-

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able cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person confined committed it; and

(3) Confinement is required by the circumstances.

Discussion

The person who directs confinement should consider the matters discussed under subsection (h)(2)(B) of this rule before ordering confinement. However, the person who initially orders confinement is not required to make a detailed analysis of the necessity for confinement. It is often not possible to review a person's background and character or even the details of an offense before physically detaining the person. For example, until additional information can be secured, it may be necessary to confine a person apprehended in the course of a violent crime.

"[W]hen charged only with an offense normally tried by summary court-martial, [an accused] shall not ordinarily be paced in confinement." Article 10.

Confinement should be distinguished from custody. Custody is restraint which is imposed by apprehension and which may be, but is not necessarily, physical. Custody may be imposed by anyone authorized to apprehend (*see* R.C.M. 302(b)), and may continue until a proper authority under R.C.M. 304(B) is notified and takes action. Thus, a person who has been apprehended could be physically restrained, but this would not be pretrial confinement in the sense of this rule until a person authorized to do so under R.C.M. 304(b) directed confinement.

(e) *Advice to the accused upon confinement*. Each person confined shall be promptly informed of:

(1) The nature of the offenses for which held;

(2) The right to remain silent and that any statement made by the person may be used against the person;

(3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and

(4) The procedures by which pretrial confinement will be reviewed.

(f) *Military counsel*. If requested by the prisoner and such request is made known to military authorities, military counsel shall be provided to the prisoner before the initial review under subsection (i) of this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner's own selection.

(g) *Who may direct release from confinement*. Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) and/or (j) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For purposes of this subsection, "any commander" includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) *Notification and action by commander*.

(1) *Report*. Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the prisoner should be notified. In unusual cases any commander to whose authority the prisoner is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with subsection (h)(2) of this rule.

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(2) *Action by commander*.

(A) *Decision*. Not later than 72 hours after the commander's ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander's unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander's compliance with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsections R.C.M. 305(d), R.C.M.

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305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

(B) *Requirements for confinement*. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

(i) An offense triable by a court-martial has been committed;

(ii) The prisoner committed it; and

(iii) Confinement is necessary because it is foreseeable that:

(a) The prisoner will not appear at trial, pretrial hearing, or investigation, or

(b) The prisoner will engage in serious criminal misconduct; and

(iv) Less severe forms of restraint are inadequate.

Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

Discussion

A person should not be confined as a mere matter of convenience or expedience.

Some of the factors which should be considered under this subsection are:

(1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;

(2) The weight of the evidence against the accused;

(3) The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;

(4) The accused's character and mental condition;

(5) The accused's service record, including any record of previous misconduct;

(6) The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and

(7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

Although the Military Rules of Evidence are not applicable, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner's personnel records, police records, and may consider the recommendations of others.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the prisoner could be safely returned to the prisoner's unit, at liberty or under restriction, arrest, or conditions on liberty. *See* R.C.M. 304.

(C) *72-hour memorandum*. If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement*.

(1) *48-hour probable cause determination*. Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) *7-day review of pretrial confinement*. Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review*.

(i) *Matters considered*. The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

(ii) *Rules of evidence*. Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) *Standard of proof*. The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(B) *Extension of time limit*. The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer*. Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(D) *Memorandum*. The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement*. The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the prisoner based upon any significant information not previously considered.

(j) *Review by military judge*. Once the charges for which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release*. The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) *Credit*. The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of this rule.

(k) *Remedy*. The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7). For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

(l) *Confinement after release*. No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release,

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion

See R.C.M. 304(b) concerning who may order confinement.

(m) *Exceptions*.

(1) *Operational necessity*. The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea*. Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion

Under this subsection the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The prisoner's commander still must determine whether confinement will continue under subsection (h)(2)(B) of this rule. The suspension of subsection (h)(2)(A) of this rule removes the 72-hour requirement since in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under subsection (2) since the commander of a vessel is always available.)

Rule 306. Initial disposition

(a) *Who may dispose of offenses*. Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

Discussion

Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. *See* R.C.M. 401(c); 601(f). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604.

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

(b) *Policy*. Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

Discussion

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

(A) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;

(B) when applicable, the views of the victim as to disposition;

(C) existence of jurisdiction over the accused and the offense;

(D) availability and admissibility of evidence;

(E) the willingness of the victim or others to testify;

(F) cooperation of the accused in the apprehension or conviction of others;

(G) possible improper motives or biases of the person(s) making the allegation(s);

(H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;

(I) appropriateness of the authorized punishment to the particular accused or offense;

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(J) the character and military service of the accused; and
(K) other likely issues.

(c) *How offenses may be disposed of*. Within the limits of the commander's authority, a commander may take the actions set forth in this subsection to initially dispose of a charge or suspected offense.

Discussion

Prompt disposition of charges is essential. *See* R.C.M. 707 (speedy trial requirements).

Before determining an appropriate disposition, a commander should ensure that a preliminary inquiry under R.C.M. 303 has been conducted. If charges have not already been preferred, the commander may, if appropriate, prefer them and dispose of them under this rule. *But see* R.C.M. 601 (c) regarding disqualification of an accuser.

If charges have been preferred, the commander should ensure that the accused has been notified in accordance with R.C.M. 308, and that charges are in proper form. *See* R.C.M. 307. Each commander who forwards or disposes of charges may make minor changes therein. *See* R.C.M. 603(a) and (b). If major changes are necessary, the affected charge should be preferred anew. *See* R.C.M. 603(d).

When charges are brought against two or more accused with a view to a joint or common trial, *see* R.C.M. 307(c)(5); 601(e)(3). If it appears that the accused may lack mental capacity to stand trial or may not have been mentally responsible at the times of the offenses, *see* R.C.M. 706; 909; 916(k).

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(1) *No action*. A commander may decide to take no action on an offense. If charges have been preferred, they may be dismissed.

Discussion

A decision to take no action or dismissal of charges at this stage does not bar later disposition of the offenses under subsection (c)(2) through (5) of this rule.

See R.C.M. 401(a) concerning who may dismiss charges, and R.C.M. 401(c)(1) concerning dismissal of charges.

When a decision is made to take no action, the accused should be informed.

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(2) *Administrative action*. A commander may take or initiate administrative action, in addition to or instead of other action taken under this rule, subject to regulations of the Secretary concerned. Administrative actions include corrective measures such as counseling, admonition, reprimand, exhortation, disapproval, criticism, censure, reproach, rebuke, extra military instruction, or the administrative withholding of privileges, or any combination of the above.

Discussion

Other administrative measures, which are subject to regulations of the Secretary concerned, include matters related to efficiency reports, academic reports, and other ratings; rehabilitation and reassignment; career field reclassification; administrative reduction for inefficiency; bar to reenlistment; personnel reliability program reclassification; security classification changes; pecuniary liability for negligence or misconduct; and administrative separation.

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(3) *Nonjudicial punishment*. A commander may consider the matter pursuant to Article 15, nonjudicial punishment. *See* Part V.

(4) *Disposition of charges*. Charges may be disposed of in accordance with R.C.M. 401.

Discussion

If charges have not been preferred, they may be preferred. *See* R.C.M. 307 concerning preferral of charges. However, *see* R.C.M. 601(c) concerning disqualification of an accuser.

Charges may be disposed of by dismissing them, forwarding them to another commander for disposition, or referring them to a summary, special, or general court-martial. Before charges may be referred to a general court-martial, compliance with R.C.M. 405 and 406 is necessary. Therefore, if appropriate, an investigation under R.C.M. 405 may be directed. Additional guidance on these matters is found in R.C.M. 401-407.

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(5) *Forwarding for disposition*. A commander may forward a matter concerning an offense, or charges, to a superior or subordinate authority for disposition.

Discussion

The immediate commander may lack authority to take action which that commander believes is an appropriate disposition. In such cases, the matter should be forwarded to a superior officer with a recommendation as to disposition. *See also* R.C.M. 401(c)(2) concerning forwarding charges. If allegations are forwarded to a higher authority for disposition, because of lack of authority or otherwise, the disposition decision becomes a matter within the discretion of the higher authority.

A matter may be forwarded for other reasons, such as for investigation of allegations and preferral of charges, if warranted (*see* R.C.M. 303, 307), or so that a subordinate can dispose of the matter.

(d) *National security matters*. If a commander not authorized to convene general courts-martial finds

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that an offense warrants trial by court-martial, but believes that trial would be detrimental to the prosecution of a war or harmful to national security, the matter shall be forwarded to the general court-martial convening authority for action under R.C.M. 407(b).

Rule 307. Preferral of charges

(a) *Who may prefer charges*. Any person subject to the code may prefer charges.

Discussion

No person may be ordered to prefer charges to which that person is unable to make truthfully the required oath. *See* Article 30(a) and subsection (b) of this rule. A person who has been the accuser or nominal accuser (*see* Article 1(9)) may not also serve as the convening authority of a general or special court-martial to which the charges are later referred. *See* Articles 22(b) and 23(b); R.C.M. 601; however, *see* R.C.M. 1302(b) (summary court-martial convening authority is not disqualified by being the accuser). A person authorized to dispose of offenses (*see* R.C.M. 306(a); 401–404 and 407) should not be ordered to prefer charges when this would disqualify that person from exercising that person's authority or would improperly restrict that person's discretion to act on the case. *See* R.C.M. 104 and 504(c).

Charges may be preferred against a person subject to trial by court-martial at any time but should be preferred without unnecessary delay. *See* the statute of limitations prescribed by Article 43. Preferral of charges should not be unnecessarily delayed. When a good reason exists—as when a person is permitted to continue a course of conduct so that a ringleader or other conspirators may also be discovered or when a suspected counterfeiter goes uncharged until guilty knowledge becomes apparent—a reasonable delay is permissible. However, *see* R.C.M. 707 concerning speedy trial requirements.

(b) *How charges are preferred; oath*. A person who prefers charges must:

(1) Sign the charges and specifications under oath before a commissioned officer of the armed forces authorized to administer oaths; and

(2) State that the signer has personal knowledge of or has investigated the matters set forth in the charges and specifications and that they are true in fact to the best of that person's knowledge and belief.

Discussion

See Article 136 for authority to administer oaths. The following form may be used to administer the oath:

"You (swear) (affirm) that you are a person subject to the Uniform Code of Military Justice, that you have personal knowledge of or have investigated the matters set forth in the foregoing charge(s) and specification(s), and that the same are true in fact to the best of your knowledge and belief. (So help you God.)"

The accuser's belief may be based upon reports of others in whole or in part.

(c) *How to allege offenses*.

(1) *In general*. The format of charge and specification is used to allege violations of the code.

Discussion

See Appendix 4 for a sample of a Charge Sheet (DD Form 458).

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(2) *Charge*. A charge states the article of the code, law of war, or local penal law of an occupied territory which the accused is alleged to have violated.

Discussion

The particular subdivision of an article of the code (for example, Article 118(1)) should not be included in the charge. When there are numerous infractions of the same article, there will be only one charge, but several specifications thereunder. There may also be several charges, but each must allege a violation of a different article of the code. For violations of the law of war, *see* (D) below.

(A) *Numbering charges*. If there is only one charge, it is not numbered. When there is more than one charge, each charge is numbered by a Roman numeral.

(B) *Additional charges*. Charges preferred after others have been preferred are labeled "additional charges" and are also numbered with Roman numerals, beginning with "I" if there is more than one additional charge. These ordinarily relate to offenses not known at the time or committed after the original charges were preferred. Additional charges do not require a separate trial if incorporated in the trial of the original charges before arraignment. *See* R.C.M. 601(e)(2).

(C) *Preemption*. An offense specifically defined by Articles 81 through 132 may not be alleged as a violation of Article 134. *See* paragraph 60c(5)(a) of Part IV. *But see* subsection (d) of this rule.

(D) *Charges under the law of war*. In the case of a person subject to trial by general court-martial for violations of the law of war (*see* Article 18), the charge should be: "Violation of the Law of War"; or "Violation of _____, _____" referring to the local penal law of the occupied territory. *See* R.C.M. 201(f)(1)(B). *But see* subsection (d) of this rule. Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.

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(3) *Specification*. A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged

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offense expressly or by necessary implication. Except for aggravating factors under R.C.M 1003(d) and R.C.M. 1004, facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.

Discussion

[Note: Although the elements of an offense may possibly be implied, practitioners should expressly allege every element of the charged offense. *See United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011); *United States v. Ballan*, 71 M.J. 28 (C.A.A.F. 2012). To state an offense under Article 134, practitioners should expressly allege at least one of the three terminal elements, i.e., that the alleged conduct was: prejudicial to good order and discipline; service discrediting; or a crime or offense not capital. *See Fosler*, 70 M.J. at 226. An accused must be given notice as to which clause or clauses he must defend against, and including the word and figures "Article 134" in a charge does not by itself allege the terminal element expressly or by necessary implication. *Fosler*, 70 M.J. at 229. *See also* discussion following paragraph 60c(6)(a) in Part IV of this Manual and the related analysis in Appendix 23.]

[Note: In *United States v. Jones*, the Court of Appeals for the Armed Forces examined Article 79 and clarified the legal test for lesser included offenses. 68 M.J. at 466. A lesser offense is "necessarily included" in the offense charged only if the elements of the lesser offense are a subset of the elements of the greater offense alleged. *Jones*, 68 M.J. at 470. *See* discussion following paragraph 3b(1)(c) in Part IV of this Manual and the related analysis in Appendix 23.]

How to draft specifications.

(A) *Sample specifications*. Before drafting a specification, the drafter should read the pertinent provisions of Part IV, where the elements of proof of various offenses and forms for specifications appear.

[Note: Be advised that the sample specifications in this Manual have not been amended to comport with *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) and *United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). Practitioners should read the notes above and draft specifications in conformity with the cases cited therein.]

(B) *Numbering specifications*. If there is only one specification under a charge it is not numbered. When there is more than one specification under any charge, the specifications are numbered in Arabic numerals. The term "additional" is not used in connection with the specifications under an additional charge.

(C) *Name and description of the accused*.

(i) *Name*. The specification should state the accused's full name: first name, middle name or initial, last name. If the accused is known by more than one name, the name acknowledged by the accused should be used. If there is no such acknowledgment, the name believed to be the true name should be listed first, followed by all known aliases. For example: Seaman John P. Smith, U.S. Navy, alias Lt. Robert R. Brown, U.S. Navy.

(ii) *Military association*. The specification should state the accused's rank or grade. If the rank or grade of the accused has changed since the date of an alleged offense, and the change is pertinent to the offense charged, the accused should be identified by the present rank or grade followed by rank or grade on the date of the alleged offense. For example: In that Seaman _____, then Seaman Apprentice _____, etc.

(iii) *Social security number or service number*. The social security number or service number of an accused should not be stated in the specification.

(iv) *Basis of personal jurisdiction*.

(a) *Military members on active duty*. Ordinarily, no allegation of the accused's armed force or unit or organization is necessary for military members on active duty.

(b) *Persons subject to the code under Article 2(a), subsections (3) through (12), or subject to trial by court-martial under Articles 3 or 4*. The specification should describe the accused's armed force, unit or organization, position, or status which will indicate the basis of jurisdiction. For example: John Jones, (a person employed by and serving with the U.S. Army in the field in time of war) (a person convicted of having obtained a fraudulent discharge), etc.

(D) *Date and time of offense*

(i) *In general*. The date of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand what particular act or omission to defend against.

(ii) *Use of "on or about."* In alleging the date of the offense it is proper to allege it as "on or about" a specified day.

(iii) *Hour*. The exact hour of the offense is ordinarily not alleged except in certain absence offenses. When the exact time is alleged, the 24-hour clock should be used. The use of "at or about" is proper.

(iv) *Extended periods*. When the acts specified extend(s) over a considerable period of time it is proper to allege it (or them) as having occurred, for example, "from about 15 June 1983 to about 4 November 1983," or "did on divers occasions between 15 June 1983 and 4 November 1983."

(E) *Place of offense*. The place of the commission of the offense charged should be stated in the specification with sufficient precision to identify the offense and enable the accused to understand the particular act or omission to defend against. In alleging the place of the offense, it is proper to allege it as "at or near" a certain place if the exact place is uncertain.

(F) *Subject-matter jurisdiction allegations*. Pleading the accused's rank or grade along with the proper elements of the offense normally will be sufficient to establish subject-matter jurisdiction.

(G) *Description of offense*.

[Note: To state an offense under Article 134, practitioners should expressly allege the terminal element, i.e., that the alleged conduct was: prejudicial to good order and discipline; service discrediting; or a crime or offense not capital. *See United States v. Fosler*, 70 M.J. 225 (C.A.A.F. 2011). *See also* note at the beginning of this Discussion.]

(i) *Elements*. The elements of the offense must be expressly alleged. *See* note at the beginning of this Discussion. If a specific intent, knowledge, or state of mind is an element of the offense, it must be alleged.

(ii) *Words indicating criminality*. If the alleged act is not itself an offense but is made an offense either by applicable statute (including Articles 133 and 134), or regulation or custom

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Excerpts from the MCM and UCMJ

having the effect of law, then words indicating criminality such as "wrongfully," "unlawfully," or "without authority" (depending upon the nature of the offense) should be used to describe the accused's acts.

(iii) *Specificity*. The specification should be sufficiently specific to inform the accused of the conduct charged, to enable the accused to prepare a defense, and to protect the accused against double jeopardy. Only those facts that make the accused's conduct criminal ordinarily should be alleged. Specific evidence supporting the allegations ordinarily should not be included in the specifications.

(iv) *Duplicitousness*. One specification should not allege more than one offense, either conjunctively (the accused "lost and destroyed") or alternatively (the accused "lost or destroyed"). However, if two acts or a series of acts constitute one offense, they may be alleged conjunctively. *See* R.C.M. 906(b)(5).

(H) *Other considerations in drafting specifications*.

(i) *Principals*. All principals are charged as if each was the perpetrator. *See* paragraph 1 of Part IV for a discussion of principals.

(ii) *Victim*. In the case of an offense against the person or property of a person, the first name, middle initial and last name of such person should be alleged, if known. If the name of the victim is unknown, a general physical description may be used. If this cannot be done, the victim may be described as "a person whose name is unknown." Military rank or grade should be alleged, and must be alleged if an element of the offense, as in an allegation of disobedience of the command of a superior officer. If the person has no military position, it may otherwise be necessary to allege the status as in an allegation of using provoking words toward a person subject to the code. *See* paragraph 42 of Part IV.

(iii) *Property*. In describing property generic terms should be used, such as "a watch" or "a knife," and descriptive details such as make, model, color, and serial number should ordinarily be omitted. In some instances, however, details may be essential to the offense, so they must be alleged. For example: the length of a knife blade may be important when alleging a violation of general regulation prohibiting carrying a knife with a blade that exceeds a certain length.

(iv) *Value*. When the value of property or other amount determines the maximum punishment which may be adjudged for an offense, the value or amount should be alleged, for in such a case increased punishments that are contingent upon value may not be adjudged unless there is an allegation, as well as proof, of a value which will support the punishment. If several articles of different kinds are the subject of the offense, the value of each article should be stated followed by a statement of the aggregate value. Exact value should be stated, if known. For ease of proof an allegation may be "of a value not less than _____." If only an approximate value is known, it may be alleged as "of a value of about _____." If the value of an item is unknown but obviously minimal, the term "of some value" may be used. These principles apply to allegations of amounts.

(v) *Documents*. When documents other than regulations or orders must be alleged (for example, bad checks in violation of Article 123a), the document may be set forth verbatim (including photocopies and similar reproductions) or may be described, in which case the description must be sufficient to inform the accused of the offense charged.

(vi) *Orders*.

(a) *General orders*. A specification alleging a violation of a general order or regulation (Article 92(1)) must clearly identify the specific order or regulation allegedly violated. The general order or regulation should be cited by its identifying title or number, section or paragraph, and date. It is not necessary to recite the text of the general order or regulation verbatim.

(b) *Other orders*. If the order allegedly violated is an "other lawful order" (Article 92(2)), it should be set forth verbatim or described in the specification. When the order is oral, *see* (vii) below.

(c) *Negating exceptions*. If the order contains exceptions, it is not necessary that the specification contain a specific allegation negating the exceptions. However, words of criminality may be required if the alleged act is not necessarily criminal. *See* subsection (G)(ii) of this discussion.

(vii) *Oral statements*. When alleging oral statements the phrase "or words to that effect" should be added.

(viii) *Joint offense*. In the case of a joint offense each accused may be charged separately as if each accused acted alone or all may be charged together in a single specification. For example:

(a) If Doe and Roe are joint perpetrators of an offense and it is intended to charge and try both at the same trial, they should be charged in a single specification as follows:

"In that Doe and Roe, acting jointly and pursuant to a common intent, did. . . ."

(b) If it is intended that Roe will be tried alone or that Roe will be tried with Doe at a common trial, Roe may be charged in the same manner as if Roe alone had committed the offense. However, to show in the specification that Doe was a joint actor with Roe, even though Doe is not to be tried with Roe, Roe may be charged as follows:

"In that Roe did, in conjunction with Doe, ..."

(ix) *Matters in aggravation*. Matters in aggravation that do not increase the maximum authorized punishment ordinarily should not be alleged in the specification. Prior convictions need not be alleged in the specification to permit increased punishment. Aggravating factors in capital cases should not be alleged in the specification. Notice of such factors is normally provided in accordance with R.C.M. 1004(b)(1).

(x) *Abbreviations*. Commonly used and understood abbreviations may be used, particularly abbreviations for ranks, grades, units and organizations, components, and geographic or political entities, such as the names of states or countries.

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(4) *Multiple offenses*. Charges and specifications alleging all known offenses by an accused may be preferred at the same time. Each specification shall state only one offense. What is substantially one transaction should not be made the basis for an unreasonable multiplication of charges against one person.

Discussion

[Note: Practitioners are advised that the use of the phrase "multiplicity in sentencing" has been deemed confusing. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). Unreasonable multipli-

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cation of charges should not be confused with multiplicity. *See* R.C.M. 1003(c)(1)(C).]

See R.C.M. 906(b)(12) and 1003(c)(1)(C). For example, a person should not be charged with both failure to report for a routine scheduled duty, such as reveille, and with absence without leave if the failure to report occurred during the period for which the accused is charged with absence without leave. There are times, however, when sufficient doubt as to the facts or the law exists to warrant making one transaction the basis for charging two or more offenses. In no case should both an offense and a lesser included offense thereof be separately charged.

See also R.C.M. 601(e)(2) concerning referral of several offenses.

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(5) *Multiple offenders*. A specification may name more than one person as an accused if each person so named is believed by the accuser to be a principal in the offense which is the subject of the specification.

Discussion

See also R.C.M. 601(e)(3) concerning joinder of accused.

A joint offense is one committed by two or more persons acting together with a common intent. Principals may be charged jointly with the commission of the same offense, but an accessory after the fact cannot be charged jointly with the principal whom the accused is alleged to have received, comforted, or assisted. Offenders are properly joined only if there is a common unlawful design or purpose; the mere fact that several persons happen to have committed the same kinds of offenses at the time, although material as tending to show concert of purpose, does not necessarily establish this. The fact that several persons happen to have absented themselves without leave at about the same time will not, in the absence of evidence indicating a joint design, purpose, or plan justify joining them in one specification, for they may merely have been availing themselves of the same opportunity. In joint offenses the participants may be separately or jointly charged. However, if the participants are members of different armed forces, they must be charged separately because their trials must be separately reviewed. The preparation of joint charges is discussed in subsection (c)(3) Discussion (H) (viii)*(a)* of this rule. The advantage of a joint charge is that all accused will be tried at one trial, thereby saving time, labor, and expense. This must be weighed against the possible unfairness to the accused which may result if their defenses are inconsistent or antagonistic. An accused cannot be called as a witness except upon that accused's own request. If the testimony of an accomplice is necessary, the accomplice should not be tried jointly with those against whom the accomplice is expected to testify. *See also* Mil. R. Evid. 306.

See R.C.M. 603 concerning amending specifications.

See R.C.M. 906(b)(5) and (6) concerning motions to amend specifications and bills of particulars.

(d) *Harmless error in citation*. Error in or omission of the designation of the article of the code or other statute, law of war, or regulation violated shall not be ground for dismissal of a charge or reversal of a conviction if the error or omission did not prejudicially mislead the accused.

Rule 308. Notification to accused of charges

(a) *Immediate commander*. The immediate commander of the accused shall cause the accused to be informed of the charges preferred against the accused, and the name of the person who preferred the charges and of any person who ordered the charges to be preferred, if known, as soon as practicable.

Discussion

When notice is given, a certificate to that effect on the Charge Sheet should be completed. *See* Appendix 4.

(b) *Commanders at higher echelons*. When the accused has not been informed of the charges, commanders at higher echelons to whom the preferred charges are forwarded shall cause the accused to be informed of the matters required under subsection (a) of this rule as soon as practicable.

(c) *Remedy*. The sole remedy for violation of this rule is a continuance or recess of sufficient length to permit the accused to adequately prepare a defense, and no relief shall be granted upon a failure to comply with this rule unless the accused demonstrates that the accused has been hindered in the preparation of a defense.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

the hour and date of receipt to be entered on the charge sheet.

Discussion

See Article 24 and R.C.M. 1302(a) concerning who may exercise summary court-martial jurisdiction.

The entry indicating receipt is important because it stops the running of the statute of limitations. *See* Article 43; R.C.M. 907(b)(2)(B). Charges may be preferred and forwarded to an officer exercising summary court-martial jurisdiction over the command to stop the running of the statute of limitations even though the accused is absent without authority.

(b) *Disposition*. When in receipt of charges a commander exercising summary court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the effect of dismissing charges, and options for further action.

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(2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate. When appropriate, charges may be forwarded to a subordinate even if the subordinate previously considered them.

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(3) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

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(4) Subject to R.C.M. 601(d), refer charges to a summary court-martial for trial; or

Discussion

See R.C.M. 1302(c) concerning referral of charges to a summary court-martial.

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(5) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Discussion

An investigation should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If an investigation of the subject matter already has been conducted, *see* R.C.M. 405(b).

Rule 404. Action by commander exercising special court-martial jurisdiction

When in receipt of charges, a commander exercising special court-martial jurisdiction may:

(a) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges, the effect of dismissing charges, and options for further action.

(b) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

Discussion

See R.C.M. 401(c)(2)(B) concerning forwarding charges to a subordinate. When appropriate, charges may be forwarded to a subordinate even if that subordinate previously considered them.

(c) Forward any charges to a superior commander for disposition;

Discussion

See R.C.M. 401(c)(2)(A) for guidance concerning forwarding charges to a superior.

(d) Subject to R.C.M. 601(d), refer charges to a summary court-martial or to a special court-martial for trial; or

Discussion

See Article 23 and R.C.M. 504(b)(2) concerning who may convene special courts-martial.

See R.C.M. 601 concerning referral of charges to a special court-martial. *See* R.C.M. 1302(c) concerning referral of charges to a summary court-martial.

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(e) Unless otherwise prescribed by the Secretary concerned, direct a pretrial investigation under R.C.M. 405, and, if appropriate, forward the report of investigation with the charges to a superior commander for disposition.

Discussion

An investigation should be directed when it appears that the charges are of such a serious nature that trial by general court-martial may be warranted. *See* R.C.M. 405. If an investigation of the subject matter already has been conducted, *see* R.C.M. 405(b).

Rule 405. Pretrial investigation

(a) *In general*. Except as provided in subsection (k) of this rule, no charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made in substantial compliance with this rule. Failure to comply with this rule shall have no effect if the charges are not referred to a general court-martial.

Discussion

The primary purpose of the investigation required by Article 32 and this rule is to inquire into the truth of the matters set forth in the charges, the form of the charges, and to secure information on which to determine what disposition should be made of the case. The investigation also serves as a means of discovery. The function of the investigation is to ascertain and impartially weigh all available facts in arriving at conclusions and recommendations, not to perfect a case against the accused. The investigation should be limited to the issues raised by the charges and necessary to proper disposition of the case. The investigation is not limited to examination of the witnesses and evidence mentioned in the accompanying allied papers. *See* subsection (e) of this rule. Recommendations of the investigating officer are advisory.

If at any time after an investigation under this rule the charges are changed to allege a more serious or essentially different offense, further investigation should be directed with respect to the new or different matters alleged.

Failure to comply substantially with the requirements of Article 32, which failure prejudices the accused, may result in delay in disposition of the case or disapproval of the proceedings. *See* R.C.M. 905(b)(1) and 906(b)(3) concerning motions for appropriate relief relating to the pretrial investigation.

The accused may waive the pretrial investigation. *See* subsection (k) of this rule. In such case, no investigation need be held. The commander authorized to direct the investigation may direct that it be conducted notwithstanding the waiver.

(b) *Earlier investigation*. If an investigation of the subject matter of an offense has been conducted before the accused is charged with an offense, and the accused was present at the investigation and afforded the rights to counsel, cross-examination, and presentation of evidence required by this rule, no further investigation is required unless demanded by the accused to recall witnesses for further cross-examination and to offer new evidence.

Discussion

An earlier investigation includes courts of inquiry and similar investigations which meet the requirements of this subsection.

(c) *Who may direct investigation*. Unless prohibited by regulations of the Secretary concerned, an investigation may be directed under this rule by any court-martial convening authority. That authority may also give procedural instructions not inconsistent with these rules.

(d) *Personnel*.

(1) *Investigating officer*. The commander directing an investigation under this rule shall detail a commissioned officer not the accuser, as investigating officer, who shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

Discussion

The investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training. The investigating officer may seek legal advice concerning the investigating officer's responsibilities from an impartial source, but may not obtain such advice from counsel for any party.

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(2) *Defense counsel*.

(A) *Detailed counsel*. Except as provided in subsection (d)(2)(B) of this rule, military counsel certified in accordance with Article 27(b) shall be detailed to represent the accused.

(B) *Individual military counsel*. The accused may request to be represented by individual military counsel. Such requests shall be acted on in accordance with R.C.M. 506(b). When the accused is represented by individual military counsel, counsel detailed to represent the accused shall ordinarily be excused, unless the authority who detailed the defense counsel, as a matter of discretion, approves a request by the accused for retention of detailed

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counsel. The investigating officer shall forward any request by the accused for individual military counsel to the commander who directed the investigation. That commander shall follow the procedures in R.C.M. 506(b).

(C) *Civilian counsel*. The accused may be represented by civilian counsel at no expense to the United States. Upon request, the accused is entitled to a reasonable time to obtain civilian counsel and to have such counsel present for the investigation. However, the investigation shall not be unduly delayed for this purpose. Representation by civilian counsel shall not limit the rights to military counsel under subsections (d)(2)(A) and (B) of this rule.

Discussion

See R.C.M. 502(d)(6) concerning the duties of defense counsel.

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(3) *Others*. The commander who directed the investigation may also, as a matter of discretion, detail or request an appropriate authority to detail:

(A) Counsel to represent the United States;

(B) A reporter; and

(C) An interpreter.

(e) *Scope of investigation*. The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation as to the disposition of the charges. If evidence adduced during the investigation indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of such offense and make a recommendation as to its disposition, without the accused first having been charged with the offense. The accused's rights under subsection (f) are the same with regard to investigation of both charged and uncharged offenses.

Discussion

The investigation may properly include such inquiry into issues raised directly by the charges as is necessary to make an appropriate recommendation. For example, inquiry into the legality of a search or the admissibility of a confession may be appropriate. However, the investigating officer is not required to rule on the admissibility of evidence and need not consider such matters except as the investigating officer deems necessary to an informed recommendation. When the investigating officer is aware that evidence may not be admissible, this should be noted in the report. *See also* subsection (i) of this rule.

In investigating uncharged misconduct identified during the pretrial investigation, the investigating officer will inform the accused of the general nature of each uncharged offense investigated, and otherwise afford the accused the same opportunity for representation, cross examination, and presentation afforded during the investigation of any charge offense.

(f) *Rights of the accused*. At any pretrial investigation under this rule the accused shall have the right to:

(1) Be informed of the charges under investigation;

(2) Be informed of the identity of the accuser;

(3) Except in circumstances described in R.C.M. 804(c)(2), be present throughout the taking of evidence;

(4) Be represented by counsel;

(5) Be informed of the witnesses and other evidence then known to the investigating officer;

(6) Be informed of the purpose of the investigation;

(7) Be informed of the right against self-incrimination under Article 31;

(8) Cross-examine witnesses who are produced under subsection (g) of this rule;

(9) Have witnesses produced as provided for in subsection (g) of this rule;

(10) Have evidence, including documents or physical evidence, within the control of military authorities produced as provided under subsection (g) of this rule;

(11) Present anything in defense, extenuation, or mitigation for consideration by the investigating officer; and

(12) Make a statement in any form.

(g) *Production of witnesses and evidence; alternatives*.

(1) *In general*.

(A) *Witnesses*. Except as provided in subsection (g)(4)(A) of this rule, any witness whose testimony would be relevant to the investigation and not cumulative, shall be produced if reasonably available. This includes witnesses requested by the accused, if the request is timely. A witness is "reasonably available" when the witness is located within 100 miles of the situs of the investigation and the significance of the testimony and personal appearance of the witness outweighs the difficulty, expense, delay, and effect on military operations of

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obtaining the witness' appearance. A witness who is unavailable under Mil. R. Evid. 804(a)(1)-(6), is not "reasonably available."

Discussion

A witness located beyond the 100-mile limit is not *per se* unavailable. To determine if a witness beyond 100 miles is reasonably available, the significance of the witness' live testimony must be balanced against the relative difficulty and expense of obtaining the witness' presence at the hearing.

(B) *Evidence*. Subject to Mil. R. Evid., Section V, evidence, including documents or physical evidence, which is under the control of the Government and which is relevant to the investigation and not cumulative, shall be produced if reasonably available. Such evidence includes evidence requested by the accused, if the request is timely. As soon as practicable after receipt of a request by the accused for information which may be protected under Mil. R. Evid. 505 or 506, the investigating officer shall notify the person who is authorized to issue a protective order under subsection (g)(6) of this rule, and the convening authority, if different. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay, and effect on military operations of obtaining the evidence.

Discussion

In preparing for the investigation, the investigating officer should consider what evidence will be necessary to prepare a thorough and impartial investigation. The investigating officer should consider, as to potential witnesses, whether their personal appearance will be necessary. Generally, personal appearance is preferred, but the investigating officer should consider whether, in light of the probable importance of a witness' testimony, an alternative to testimony under subsection (g)(4)(A) of this rule would be sufficient.

After making a preliminary determination of what witnesses will be produced and other evidence considered, the investigating officer should notify the defense and inquire whether it requests the production of other witnesses or evidence. In addition to witnesses for the defense, the defense may request production of witnesses whose testimony would favor the prosecution.

Once it is determined what witnesses the investigating officer intends to call it must be determined whether each witness is reasonably available. That determination is a balancing test. The more important the testimony of the witness, the greater the difficulty, expense, delay, or effect on military operations must be to permit nonproduction. For example, the temporary absence of a witness on leave for 10 days would normally justify using an alternative to that witness' personal appearance if the sole reason for the witness' testimony was to impeach the credibility of another witness by reputation evidence, or to establish a mitigating character trait of the accused. On the other hand, if the same witness was the only eyewitness to the offense, personal appearance would be required if the defense requested it and the witness is otherwise reasonably available. The time and place of the investigation may be changed if reasonably necessary to permit the appearance of a witness. Similar considerations apply to the production of evidence.

If the production of witnesses or evidence would entail substantial costs or delay, the investigating officer should inform the commander who directed the investigation.

The provision in (B), requiring the investigating officer to notify the appropriate authorities of requests by the accused for information privileged under Mil. R. Evid. 505 or 506, is for the purpose of placing the appropriate authority on notice that an order, as authorized under subparagraph(g)(6), may be required to protect whatever information the government may decide to release to the accused.

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(2) *Determination of reasonable availability*.

(A) *Military witnesses*. The investigating officer shall make an initial determination whether a military witness is reasonably available. If the investigating officer decides that the witness is not reasonably available, the investigating officer shall inform the parties. Otherwise, the immediate commander of the witness shall be requested to make the witness available. A determination by the immediate commander that the witness is not reasonably available is not subject to appeal by the accused but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the immediate commander of the requested witness and with others. If the immediate commander determined that the witness is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(B) *Civilian witnesses*. The investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.

Discussion

The investigating officer should initially determine whether a civilian witness is reasonably available without regard to whether the witness is willing to appear. If the investigating officer determines that a civilian witness is apparently reasonably available, the witness should be invited to attend and when appropriate, informed that necessary expenses will be paid.

If the witness refuses to testify, the witness is not reasonably available because civilian witnesses may not be compelled to attend a pretrial investigation. Under subsection (g)(3) of this rule, civilian witnesses may be paid for travel and associated

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expenses to testify at a pretrial investigation. Except for use in support of the deposition of a witness under Article 49, UCMJ, and ordered pursuant to R.C.M. 702(b), the investigating officer and any government representative to an Article 32, UCMJ, proceeding does not possess authority to issue a subpoena to compel against his or her will a civilian witness to appear and provide testimony or documents.

(C) *Evidence*. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide the evidence. A determination by the custodian that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under R.C.M. 906(b)(3).

Discussion

The investigating officer may discuss factors affecting reasonable availability with the custodian and with others. If the custodian determines that the evidence is not reasonably available, the reasons for that determination should be provided to the investigating officer.

(D) *Action when witness or evidence is not reasonably available*. If the defense objects to a determination that a witness or evidence is not reasonably available, the investigating officer shall include a statement of the reasons for the determination in the report of investigation.

(3) *Witness expenses*. Transportation expenses and a per diem allowance may be paid to civilians requested to testify in connection with an investigation under this rule according to regulations prescribed by the Secretary of a Department.

Discussion

See Department of Defense Joint Travel Regulations, Vol 2, paragraphs C3054, C6000.

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(4) *Alternatives to testimony*.

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the witness:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is as claimed;

(iii) Prior testimony under oath;

(iv) Depositions;

(v) Stipulations of fact or expected testimony;

(vi) Unsworn statements; and

(vii) Offers of proof of expected testimony of that witness.

(B) The investigating officer may consider, over objection of the defense, when the witness is not reasonably available:

(i) Sworn statements;

(ii) Statements under oath taken by telephone, radio, or similar means providing each party the opportunity to question the witness under circumstances by which the investigating officer may reasonably conclude that the witness' identity is a claimed;

(iii) Prior testimony under oath; and

(iv) Deposition of that witness; and

(v) In time of war, unsworn statements.

(5) *Alternatives to evidence*.

(A) Unless the defense objects, an investigating officer may consider, regardless of the availability of the evidence:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence;

(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described;

(iv) A stipulation of fact, document's contents, or expected testimony;

(v) An unsworn statement describing the evidence; or

(vi) An offer of proof concerning pertinent characteristics of the evidence.

(B) The investigating officer may consider, over objection of the defense, when the evidence is not reasonably available:

(i) Testimony describing the evidence;

(ii) An authenticated copy, photograph, or reproduction of similar accuracy of the evidence; or

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(iii) An alternative to testimony, when permitted under subsection (g)(4)(B) of this rule, in which the evidence is described.

(6) *Protective order for release of privileged information*. If, prior to referral, the Government agrees to disclose to the accused information to which the protections afforded by Mil. R. Evid. 505 or 506 may apply, the convening authority, or other person designated by regulation of the Secretary of the service concerned, may enter an appropriate protective order, in writing, to guard against the compromise of information disclosed to the accused. The terms of any such protective order may include prohibiting the disclosure of the information except as authorized by the authority issuing the protective order, as well as those terms specified by Mil. R. Evid. 505(g)(1)(B) through (F) or 506(g)(2) through (5).

(h) *Procedure*.

(1) *Presentation of evidence*.

(A) *Testimony*. All testimony shall be taken under oath, except that the accused may make an unsworn statement. The defense shall be given wide latitude in cross-examining witnesses.

Discussion

The following oath may be given to witnesses:
"Do you (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

The investigating officer is required to include in the report of the investigation a summary of the substance of all testimony. *See* subsection (j)(2)(B) of this rule. After the hearing, the investigating officer should, whenever possible, reduce the substance of the testimony of each witness to writing.

If the accused testifies, the investigating officer may invite but not require the accused to swear to the truth of a summary of that testimony. If substantially verbatim notes of a testimony or recordings of testimony were taken during the investigation, they should be preserved until the end of trial.

If it appears that material witnesses for either side will not be available at the time anticipated for trial, the investigating officer should notify the commander who directed the investigation so that depositions may be taken if necessary.

If during the investigation any witness subject to the code is suspected of an offense under the code, the investigating officer should comply with the warning requirements of Mil. R. Evid. 305(c), (d), and, if necessary, (e).

(B) *Other evidence*. The investigating officer shall inform the parties what other evidence will be considered. The parties shall be permitted to examine all other evidence considered by the investigating officer.

(C) *Defense evidence*. The defense shall have full opportunity to present any matters in defense, extenuation, or mitigation.

(2) *Objections*. Any objection alleging failure to comply with this rule, except subsection (j), shall be made to the investigating officer promptly upon discovery of the alleged error. The investigating officer shall not be required to rule on any objection. An objection shall be noted in the report of investigation if a party so requests. The investigating officer may require a party to file any objection in writing.

Discussion

See also subsection (k) of this rule.

Although the investigating officer is not required to rule on objections, the investigating officer may take corrective action in response to an objection as to matters relating to the conduct of the proceedings when the investigating officer believes such action is appropriate.

If an objection raises a substantial question about a matter within the authority of the commander who directed the investigation (for example, whether the investigating officer was properly appointed) the investigating officer should promptly inform the commander who directed the investigation.

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(3) *Access by spectators*. Access by spectators to all or part of the proceedings may be restricted or foreclosed in the discretion of the commander who directed the investigation or the investigating officer. Article 32 investigations are public hearings and should remain open to the public whenever possible. When an overriding interest exists that outweighs the value of an open investigation, the hearing may be closed to spectators. Any closure must be narrowly tailored to achieve the overriding interest that justified the closure. Commanders or investigating officers must conclude that no lesser methods short of closing the Article 32 investigation can be used to protect the overriding interest in the case. Commanders or investigating officers must conduct a case-by-case, witness-by-witness, circumstance-by-circumstance analysis of whether closure is necessary. If a commander or investigating officer believes closing the Article 32 investigation is necessary, the commander or investigating officer must make specific findings of fact in writing that support the closure. The written findings of fact must be included in the Article 32 investigating offi-

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cer's report. Examples of overriding interests may include: preventing psychological harm or trauma to a child witness or an alleged victim of a sexual crime, protecting the safety of a witness or alleged victim, protecting classified material, and receiving evidence where a witness is incapable of testifying in an open setting.

(4) *Presence of accused*. The further progress of the taking of evidence shall not be prevented and the accused shall be considered to have waived the right to be present, whenever the accused:

(A) After being notified of the time and place of the proceeding is voluntarily absent (whether or not informed by the investigating officer of the obligation to be present); or

(B) After being warned by the investigating officer that disruptive conduct will cause removal from the proceeding, persists in conduct which is such as to justify exclusion from the proceeding.

(i) *Military Rules of Evidence*. The Military Rules of Evidence—other than Mil. R. Evid. 301, 302, 303, 305, 412 and Section V—shall not apply in pretrial investigations under this rule.

Discussion

The investigating officer should exercise reasonable control over the scope of the inquiry. *See* subsection (e) of this rule. An investigating officer may consider any evidence, even if that evidence would not be admissible at trial. However, *see* subsection (g)(4) of this rule as to limitations on the ways in which testimony may be presented.

Certain rules relating to the form of testimony which may be considered by the investigating officer appear in subsection (g) of this rule.

(j) *Report of investigation*.

(1) *In general*. The investigating officer shall make a timely written report of the investigation to the commander who directed the investigation.

Discussion

If practicable, the charges and the report of investigation should be forwarded to the general court-martial convening authority within 8 days after an accused is ordered into arrest or confinement. Article 33.

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(2) *Contents*. The report of investigation shall include:

(A) A statement of names and organizations or addresses of defense counsel and whether defense counsel was present throughout the taking of evidence, or if not present the reason why;

(B) The substance of the testimony taken on both sides, including any stipulated testimony;

(C) Any other statements, documents, or matters considered by the investigating officer, or recitals of the substance or nature of such evidence;

(D) A statement of any reasonable grounds for belief that the accused was not mentally responsible for the offense or was not competent to participate in the defense during the investigation;

Discussion

See R.C.M. 909 (mental capacity); 916(k) (mental responsibility).

(E) A statement whether the essential witnesses will be available at the time anticipated for trial and the reasons why any essential witness may not then be available;

(F) An explanation of any delays in the investigation;

(G) The investigating officer's conclusion whether the charges and specifications are in proper form;

(H) The investigating officer's conclusion whether reasonable grounds exist to believe that the accused committed the offenses alleged; and

(I) The recommendations of the investigating officer, including disposition.

Discussion

For example, the investigating officer may recommend that the charges and specifications be amended or that additional charges be preferred. *See* R.C.M. 306 and 401 concerning other possible dispositions.

See Appendix 5 for a sample of the Investigating Officer's Report (DD Form 457).

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(3) *Distribution of the report*. The investigating officer shall cause the report to be delivered to the commander who directed the investigation. That commander shall promptly cause a copy of the report to be delivered to each accused.

(4) *Objections*. Any objection to the report shall be made to the commander who directed the investigation within 5 days of its receipt by the accused. This subsection does not prohibit a convening au-

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thority from referring the charges or taking other action within the 5-day period.

(k) *Waiver*. The accused may waive an investigation under this rule. In addition, failure to make a timely objection under this rule, including an objection to the report, shall constitute waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

Discussion

See also R.C.M. 905(b)(1); 906(b)(3).

If the report fails to include reference to objections which were made under subsection (h)(2) of this rule, failure to object to the report will constitute waiver of such objections in the absence of good cause for relief from the waiver.

The commander who receives an objection may direct that the investigation be reopened or take other action, as appropriate.

Even if the accused made a timely objection to failure to produce a witness, a defense request for a deposition may be necessary to preserve the issue for later review.

Rule 406. Pretrial advice

(a) *In general*. Before any charge may be referred for trial by a general court-martial, it shall be referred to the staff judge advocate of the convening authority for consideration and advice.

Discussion

A pretrial advice need not be prepared in cases referred to special or summary courts-martial. A convening authority may, however, seek the advice of a lawyer before referring charges to such a court-martial. When charges have been withdrawn from a general court-martial (*see* R.C.M. 604) or when a mistrial has been declared in a general court-martial (*see* R.C.M. 915), supplementary advice is necessary before the charges may be referred to another general court-martial.

The staff judge advocate may make changes in the charges and specifications in accordance with R.C.M. 603.

(b) *Contents*. The advice of the staff judge advocate shall include a written and signed statement which sets forth that person's:

(1) Conclusion with respect to whether each specification alleges an offense under the code;

(2) Conclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report);

(3) Conclusion with respect to whether a court-martial would have jurisdiction over the accused and the offense; and

(4) Recommendation of the action to be taken by the convening authority.

Discussion

The staff judge advocate is personally responsible for the pretrial advice and must make an independent and informed appraisal of the charges and evidence in order to render the advice. Another person may prepare the advice, but the staff judge advocate is, unless disqualified, responsible for it and must sign it personally. Grounds for disqualification in a case include previous action in that case as investigating officer, military judge, trial counsel, defense counsel, or member.

The advice need not set forth the underlying analysis or rationale for its conclusions. Ordinarily, the charge sheet, forwarding letter, endorsements, and report of investigation are forwarded with the pretrial advice. In addition, the pretrial advice should include when appropriate: a brief summary of the evidence; discussion of significant aggravating, extenuating, or mitigating factors; any recommendations for disposition of the case by commanders or others who have forwarded the charges; and the recommendation of the Article 32 investigating officer. However, there is no legal requirement to include such information, and failure to do so is not error.

Whatever matters are included in the advice, whether or not they are required, should be accurate. Information which is incorrect or so incomplete as to be misleading may result in a determination that the advice is defective, necessitating appropriate relief. *See* R.C.M. 905(b)(1); 906(b)(3).

The standard of proof to be applied in R.C.M. 406(b)(2) is probable cause. *See* R.C.M. 601(d)(1). Defects in the pretrial advice are not jurisdictional and are raised by pretrial motion. *See* R.C.M.905(b)(1) and its Discussion.

(c) *Distribution*. A copy of the advice of the staff judge advocate shall be provided to the defense if charges are referred to trial by general court-martial.

Rule 407. Action by commander exercising general court-martial jurisdiction

(a) *Disposition*. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

(1) Dismiss any charges;

Discussion

See R.C.M. 401(c)(1) concerning dismissal of charges and the effect of dismissing charges.

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(2) Forward charges (or, after dismissing charges,

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CHAPTER V. COURT-MARTIAL COMPOSITION AND PERSONNEL; CONVENING COURTS-MARTIAL

Rule 501. Composition and personnel of courts-martial

(a) *Composition of courts-martial*.

(1) *General courts-martial*.

(A) Except in capital cases, general courts-martial shall consist of a military judge and not less than five members, or of the military judge alone if requested and approved under R.C.M. 903.

(B) In all capital cases, general courts-martial shall consist of a military judge and no fewer than 12 members, unless 12 members are not reasonably available because of physical conditions or military exigencies. If 12 members are not reasonably available, the convening authority shall detail the next lesser number of reasonably available members under 12, but in no event fewer than five. In such a case, the convening authority shall state in the convening order the reasons why 12 members are not reasonably available.

(2) *Special courts-martial*. Special courts-martial shall consist of:

(A) Not less than three members;

(B) A military judge and not less than three members; or

(C) A military judge alone if a military judge is detailed and if requested and approved under R.C.M. 903.

Discussion

See R.C.M. 1301(a) concerning composition of summary courts-martial.

(b) *Counsel in general and special courts-martial*. Military trial and defense counsel shall be detailed to general and special courts-martial. Assistant trial and associate or assistant defense counsel may be detailed.

(c) *Other personnel*. Other personnel, such as reporters, interpreters, bailiffs, clerks, escorts, and orderlies, may be detailed or employed as appropriate but need not be detailed by the convening authority personally.

Discussion

The convening authority may direct that a reporter not be used in special courts-martial. Regulations of the Secretary concerned may also require or restrict the use of reporters in special courts-martial.

Rule 502. Qualifications and duties of personnel of courts-martial

(a) *Members*.

(1) *Qualifications*. The members detailed to a court-martial shall be those persons who in the opinion of the convening authority are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament. Each member shall be on active duty with the armed forces and shall be:

(A) A commissioned officer;

(B) A warrant officer, except when the accused is a commissioned officer; or

(C) An enlisted person if the accused is an enlisted person and has made a timely request under R.C.M. 503(a)(2).

Discussion

Retired members of any Regular component and members of Reserve components of the armed forces are eligible to serve as members if they are on active duty.

Members of the National Oceanic and Atmospheric Administration and of the Public Health Service are eligible to serve as members when assigned to and serving with an armed force. The Public Health Service includes both commissioned and warrant officers. The National Oceanic and Atmospheric Administration includes only commissioned officers.

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(2) *Duties*. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote with other members in deliberating upon and deciding all matters submitted to them, except as otherwise specifically provided in these rules. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except the president of a special

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court-martial without a military judge may use such materials in open session.

Discussion

Members should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality. Except as provided in these rules, members should not discuss any part of a case with anyone until the matter is submitted to them for determination. Members should not on their own visit or conduct a view of the scene of the crime and should not investigate or gather evidence of the offense. Members should not form an opinion on any matter in connection with a case until that matter has been submitted to them for determination.

(b) *President*.

(1) *Qualifications*. The president of a court-martial shall be the detailed member senior in rank then serving.

(2) *Duties*. The president shall have the same duties as the other members and shall also:

(A) Preside over closed sessions of the members of the court-martial during their deliberations;

(B) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and

(C) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge except as otherwise expressly provided.

(c) *Qualifications of military judge*. A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member. In addition, the military judge of a general court-martial shall be designated for such duties by the Judge Advocate General or the Judge Advocate General's designee, certified to be qualified for duty as a military judge of a general court-martial, and assigned and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The Secretary concerned may prescribe additional qualifications for military judges in special courts-martial. As used in this subsection "military judge" does not include the president of a special court-martial without a military judge.

Discussion

See R.C.M. 801 for description of some of the general duties of the military judge.

Military judges assigned as general court-martial judges may perform duties in addition to the primary duty of judge of a general court-martial only when such duties are assigned or approved by the Judge Advocate General, or a designee, of the service of which the military judge is a member. Similar restrictions on other duties which a military judge in special courts-martial may perform may be prescribed in regulations of the Secretary concerned.

(d) *Counsel*.

(1) *Certified counsel required*. Only persons certified under Article 27(b) as competent to perform duties as counsel in courts-martial by the Judge Advocate General of the armed force of which the counsel is a member may be detailed as defense counsel or associate defense counsel in general or special courts-martial or as trial counsel in general courts-martial.

Discussion

To be certified by the Judge Advocate General concerned under Article 27(b), a person must be a member of the bar of a Federal court or the highest court of a State. The Judge Advocate General concerned may establish additional requirements for certification.

When the accused has individual military or civilian defense counsel, the detailed counsel is "associate counsel" unless excused from the case. *See* R.C.M. 506(b)(3).

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(2) *Other military counsel*. Any commissioned officer may be detailed as trial counsel in special courts-martial, or as assistant trial counsel or assistant defense counsel in general or special courts-martial. The Secretary concerned may establish additional qualifications for such counsel.

(3) *Qualifications of individual military and civilian defense counsel*. Individual military or civilian defense counsel who represents an accused in a court-martial shall be:

(A) A member of the bar of a Federal court or of the bar of the highest court of a State; or

(B) If not a member of such a bar, a lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training and familiarity

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with the general principles of criminal law which apply in a court-martial.

Discussion

In making such a determination—particularly in the case of civilian defense counsel who are members only of a foreign bar—the military judge also should inquire into:

(i) the availability of the counsel at times at which sessions of the court-martial have been scheduled;

(ii) whether the accused wants the counsel to appear with military defense counsel;

(iii) the familiarity of the counsel with spoken English;

(iv) practical alternatives for discipline of the counsel in the event of misconduct;

(v) whether foreign witnesses are expected to testify with whom the counsel may more readily communicate than might military counsel; and

(vi) whether ethnic or other similarity between the accused and the counsel may facilitate communication and confidence between the accused and civilian defense counsel.

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(4) *Disqualifications*. No person shall act as trial counsel or assistant trial counsel or, except when expressly requested by the accused, as defense counsel or associate or assistant defense counsel in any case in which that person is or has been:

(A) The accuser;

(B) An investigating officer;

(C) A military judge; or

(D) A member.

No person who has acted as counsel for a party may serve as counsel for an opposing party in the same case.

Discussion

In the absence of evidence to the contrary, it is presumed that a person who, between referral and trial of a case, has been detailed as counsel for any party to the court-martial to which the case has been referred, has acted in that capacity.

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(5) *Duties of trial and assistant trial counsel*. The trial counsel shall prosecute cases on behalf of the United States and shall cause the record of trial of such cases to be prepared. Under the supervision of trial counsel an assistant trial counsel may perform any act or duty which trial counsel may perform under law, regulation, or custom of the service.

Discussion

(A) *General duties before trial*. Immediately upon receipt of referred charges, trial counsel should cause a copy of the charges to be served upon accused. *See* R.C.M. 602.

Trial counsel should: examine the charge sheet and allied papers for completeness and correctness; correct (and initial) minor errors or obvious mistakes in the charges but may not without authority make any substantial changes (*see* R.C.M. 603); and assure that the information about the accused on the charge sheet and any evidence of previous convictions are accurate.

(B) *Relationship with convening authority*. Trial counsel should: report to the convening authority any substantial irregularity in the convening orders, charges, or allied papers; report an actual or anticipated reduction of the number of members below quorum to the convening authority; bring to the attention of the convening authority any case in which trial counsel finds trial inadvisable for lack of evidence or other reasons.

(C) *Relations with the accused and defense counsel*. Trial counsel must communicate with a represented accused only through the accused's defense counsel. However, *see* R.C.M. 602. Trial counsel may not attempt to induce an accused to plead guilty or surrender other important rights.

(D) *Preparation for trial*. Trial counsel should: ensure that a suitable room, a reporter (if authorized), and necessary equipment and supplies are provided for the court-martial; obtain copies of the charges and specifications and convening orders for each member and all personnel of the court-martial; give timely notice to the members, other parties, other personnel of the court-martial, and witnesses for the prosecution and (if known) defense of the date, time, place, and uniform of the meetings of the court-martial; ensure that any person having custody of the accused is also informed; comply with applicable discovery rules (*see* R.C.M. 701); prepare to make a prompt, full, and orderly presentation of the evidence at trial; consider the elements of proof of each offense charged, the burden of proof of guilt and the burdens of proof on motions which may be anticipated, and the Military Rules of Evidence; secure for use at trial such legal texts as may be available and necessary to sustain the prosecution's contentions; arrange for the presence of witnesses and evidence in accordance with R.C.M. 703; prepare to make an opening statement of the prosecution's case (*see* R.C.M. 913); prepare to conduct the examination and cross-examination of witnesses; and prepare to make final argument on the findings and, if necessary, on sentencing (*see* R.C.M. 919; 1001(g)).

(E) *Trial*. Trial counsel should bring to the attention of the military judge any substantial irregularity in the proceedings. Trial counsel should not allude to or disclose to the members any evidence not yet admitted or reasonably expected to be admitted in evidence or intimate, transmit, or purport to transmit to the military judge or members the views of the convening authority or others as to the guilt or innocence of the accused, an appropriate sentence, or any other matter within the discretion of the court-martial.

(F) *Post-trial duties*. Trial counsel must promptly provide written notice of the findings and sentence adjudged to the convening authority or a designee, the accused's immediate commander, and (if applicable) the officer in charge of the confinement facility (*see* R.C.M. 1101(a)), and supervise the preparation, authentication, and distribution of copies of the record as required by these rules and regulations of the Secretary concerned (*see* R.C.M. 1103; 1104).

(G) *Assistant trial counsel*. An assistant trial counsel may act in that capacity only under the supervision of the detailed trial

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counsel. Responsibility for trial of a case may not devolve to an assistant not qualified to serve as trial counsel. Unless the contrary appears, all acts of an assistant trial counsel are presumed to have been done by the direction of the trial counsel. An assistant trial counsel may not act in the absence of trial counsel at trial in a general court-martial unless the assistant has the qualifications required of a trial counsel. *See* R.C.M. 805(c).

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(6) *Duties of defense and associate or assistant defense counsel*. Defense counsel shall represent the accused in matters under the code and these rules arising from the offenses of which the accused is then suspected or charged. Under the supervision of the defense counsel an associate or assistant defense counsel may perform any act or duty which a defense counsel may perform under law, regulation, or custom of the service.

Discussion

(A) *Initial advice by military defense counsel*. Defense counsel should promptly explain to the accused the general duties of the defense counsel and inform the accused of the rights to request individual military counsel of the accused's own selection, and of the effect of such a request, and to retain civilian counsel. If the accused wants to request individual military counsel, the defense counsel should immediately inform the convening authority through trial counsel and, if the request is approved, serve as associate counsel if the accused requests and the convening authority permits. Unless the accused directs otherwise, military counsel will begin preparation of the defense immediately after being detailed without waiting for approval of a request for individual military counsel or retention of civilian counsel. *See R.C.M. 506*.

(B) *General duties of defense counsel*. Defense counsel must: guard the interests of the accused zealously within the bounds of the law without regard to personal opinion as to the guilt of the accused; disclose to the accused any interest defense counsel may have in connection with the case, any disqualification, and any other matter which might influence the accused in the selection of counsel; represent the accused with undivided fidelity and may not disclose the accused's secrets or confidences except as the accused may authorize (*see also* Mil. R. Evid. 502). A defense counsel designated to represent two or more co-accused in a joint or common trial or in allied cases must be particularly alert to conflicting interests of those accused. Defense counsel should bring such matters to the attention of the military judge so that the accused's understanding and choice may be made a matter of record. *See* R.C.M. 901(d)(4)(D).

Defense counsel must explain to the accused: the elections available as to composition of the court-martial and assist the accused to make any request necessary to effect the election (*see* R.C.M. 903); the right to plead guilty or not guilty and the meaning and effect of a plea of guilty; the rights to introduce evidence, to testify or remain silent, and to assert any available defense; and the rights to present evidence during sentencing and the rights of the accused to testify under oath, make an unsworn statement, and have counsel make a statement on behalf of the accused. These explanations must be made regardless of the intentions of the accused as to testifying and pleading.

Defense counsel should try to obtain complete knowledge of the facts of the case before advising the accused, and should give the accused a candid opinion of the merits of the case.

(C) *Preparation for trial*. Defense counsel may have the assistance of trial counsel in obtaining the presence of witnesses and evidence for the defense. *See* R.C.M. 703.

Defense counsel should consider the elements of proof of the offenses alleged and the pertinent rules of evidence to ensure that evidence that the defense plans to introduce is admissible and to be prepared to object to inadmissible evidence offered by the prosecution.

Defense counsel should: prepare to make an opening statement of the defense case (*see* R.C.M. 913(b)); and prepare to examine and cross-examine witnesses, and to make final argument on the findings and, if necessary, on sentencing (*see* R.C.M. 919; 1001(g)).

(D) *Trial*. Defense counsel should represent and protect the interests of the accused at trial.

When a trial proceeds in the absence of the accused, defense counsel must continue to represent the accused.

(E) *Post-trial duties*.

(i) *Deferment of confinement*. If the accused is sentenced to confinement, the defense counsel must explain to the accused the right to request the convening authority to defer service of the sentence to confinement and assist the accused in making such a request if the accused chooses to make one. *See* R.C.M. 1101(c).

(ii) *Examination of the record; appellate brief*. The defense counsel should in any case examine the record for accuracy and note any errors in it. This notice may be forwarded for attachment to the record. *See* R.C.M. 1103(b)(3)(C). *See* also R.C.M. 1103(i)(1)(B).

(iii) *Submission of matters*. If the accused is convicted, the defense counsel may submit to the convening authority matters for the latter's consideration in deciding whether to approve the sentence or to disapprove any findings. *See* R.C.M. 1105. Defense counsel should discuss with the accused the right to submit matters to the convening authority and the powers of the convening authority in taking action on the case. Defense counsel may also submit a brief of any matters counsel believes should be considered on further review.

(iv) *Appellate rights*. Defense counsel must explain to the accused the rights to appellate review that apply in the case, and advise the accused concerning the exercise of those rights. If the case is subject to review by the Court of Criminal Appeals, defense counsel should explain the powers of that court and advise the accused of the right to be represented by counsel before it. *See* R.C.M. 1202 and 1203. Defense counsel should also explain the possibility of further review by the Court of Appeals for the Armed Forces and the Supreme Court. *See* R.C.M. 1204 and 1205. If the case may be examined in the office of the Judge Advocate General under Article 69(a), defense counsel should explain the nature of such review to the accused. *See* R.C.M. 1201(b)(1). Defense counsel must explain the consequences of waiver of appellate review, when applicable, and, if the accused elects to waive appellate review, defense counsel will assist in preparing the waiver. *See* R.C.M. 1110. If the accused waives appellate review, or if it is not available, defense counsel should explain that the case will be reviewed by a judge advocate

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and should submit any appropriate matters for consideration by the judge advocate. *See* R.C.M. 1112. The accused should be advised of the right to apply to the Judge Advocate General for relief under Article 69(b) when such review is available. *See* R.C.M. 1201(b)(3).

(v) *Examination of post-trial recommendation*. When the post-trial recommendation is served on defense counsel, defense counsel should examine it and reply promptly in writing, noting any errors or omissions. Failure to note defects in the recommendation waives them. *See* R.C.M. 1106(f).

(F) *Associate or assistant defense counsel*. Associate or assistant counsel may act in that capacity only under the supervision and by the general direction of the defense counsel. A detailed defense counsel becomes associate defense counsel when the accused has individual military or civilian counsel and detailed counsel is not excused. Although associate counsel acts under the general supervision of the defense counsel, associate defense counsel may act without such supervision when circumstances require. *See*, for example, R.C.M. 805(c). An assistant defense counsel may do this only if such counsel has the qualifications to act as defense counsel. Responsibility for trial of a case may not devolve upon an assistant who is not qualified to serve as defense counsel. An assistant defense counsel may not act in the absence of the defense counsel at trial unless the assistant has the qualifications required of a defense counsel. *See also* R.C.M. 805. Unless the contrary appears, all acts of an assistant or associate defense counsel are presumed to have been done under the supervision of the defense counsel.

(e) *Interpreters, reporters, escorts, bailiffs, clerks, and guards*.

(1) *Qualifications*. The qualifications of interpreters and reporters may be prescribed by the Secretary concerned. Any person who is not disqualified under subsection (e)(2) of this rule may serve as escort, bailiff, clerk, or orderly, subject to removal by the military judge.

(2) *Disqualifications*. In addition to any disqualifications which may be prescribed by the Secretary concerned, no person shall act as interpreter, reporter, escort, bailiff, clerk, or orderly in any case in which that person is or has been in the same case:

(A) The accuser;

(B) A witness;

(C) An investigating officer;

(D) Counsel for any party; or

(E) A member of the court-martial or of any earlier court-martial of which the trial is a rehearing or new or other trial.

(3) *Duties*. In addition to such other duties as the Secretary concerned may prescribe, the following persons may perform the following duties.

(A) *Interpreters*. Interpreters shall interpret for the court-martial or for an accused who does not speak or understand English.

Discussion

The accused also may retain an unofficial interpreter without expense to the United States.

(B) *Reporters*. Reporters shall record the proceedings and testimony and shall transcribe them so as to comply with the requirements for the record of trial as prescribed in these rules.

(C) *Others*. Other personnel detailed for the assistance of the court-martial shall have such duties as may be imposed by the military judge.

(4) *Payment of reporters, interpreters*. The Secretary concerned may prescribe regulations for the payment of allowances, expenses, per diem, and compensation of reporters and interpreters.

Discussion

See R.C.M. 807 regarding oaths for reporters, interpreters, and escorts.

(f) *Action upon discovery of disqualification or lack of qualifications*. Any person who discovers that a person detailed to a court-martial is disqualified or lacks the qualifications specified by this rule shall cause a report of the matter to be made before the court-martial is first in session to the convening authority or, if discovered later, to the military judge.

Rule 503. Detailing members, military judge, and counsel

(a) *Members*.

(1) *In general*. The convening authority shall detail qualified persons as members for courts-martial.

Discussion

The following persons are subject to challenge under R.C.M. 912(f) and should not be detailed as members: any person who is, in the same case, an accuser, witness, investigating officer, or counsel for any party; any person who, in the case of a new trial, other trial, or rehearing, was a member of any court-martial which previously heard the case; any person who is junior to the accused, unless this is unavoidable; an enlisted member from the same unit as the accused; or any person who is in arrest or confinement.

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(2) *Enlisted members*. An enlisted accused may,

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before assembly, request orally on the record or in writing that enlisted persons serve as members of the general or special court-martial to which that accused's case has been or will be referred. If such a request is made, an enlisted accused may not be tried by a court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total number of members unless eligible enlisted members cannot be obtained because of physical conditions or military exigencies. If the appropriate number of enlisted members cannot be obtained, the court-martial may be assembled, and the trial may proceed without them, but the convening authority shall make a detailed written explanation why enlisted members could not be obtained which must be appended to the record of trial.

Discussion

When such a request is made, the convening authority should:

(1) Detail an appropriate number of enlisted members to the court-martial and, if appropriate, relieve an appropriate number of commissioned or warrant officers previously detailed;

(2) Withdraw the charges from the court-martial to which they were originally referred and refer them to a court-martial which includes the proper proportion of enlisted members; or

(3) Advise the court-martial before which the charges are then pending to proceed in the absence of enlisted members if eligible enlisted members cannot be detailed because of physical conditions or military exigencies.

See also R.C.M. 1103(b)(2)(D)(iii).

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(3) *Members from another command or armed force*. A convening authority may detail as members of general and special courts-martial persons under that convening authority's command or made available by their commander, even if those persons are members of an armed force different from that of the convening authority or accused.

Discussion

Concurrence of the proper commander may be oral and need not be shown by the record of trial.

Members should ordinarily be of the same armed force as the accused. When a court-martial composed of members of different armed forces is selected, at least a majority of the members should be of the same armed force as the accused unless exigent circumstances make it impractical to do so without manifest injury to the service.

(b) *Military judge*.

(1) *By whom detailed*. The military judge shall be detailed, in accordance with regulations of the Secretary concerned, by a person assigned as a military judge and directly responsible to the Judge Advocate General or the Judge Advocate General's designee. The authority to detail military judges may be delegated to persons assigned as military judges. If authority to detail military judges has been delegated to a military judge, that military judge may detail himself or herself as military judge for a court-martial.

(2) *Record of detail*. The order detailing a military judge shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the military judge was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Military judge from a different armed force*. A military judge from one armed force may be detailed to a court-martial convened in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the military judge is a member. The Judge Advocate General may delegate authority to make military judges available for this purpose.

(c) *Counsel*.

(1) *By whom detailed*. Trial and defense counsel, assistant trial and defense counsel, and associate defense counsel shall be detailed in accordance with regulations of the Secretary concerned. If authority to detail counsel has been delegated to a person, that person may detail himself or herself as counsel for a court-martial.

(2) *Record of detail*. The order detailing a counsel shall be reduced to writing and included in the record of trial or announced orally on the record at the court-martial. The writing or announcement shall indicate by whom the counsel was detailed. The Secretary concerned may require that the order be reduced to writing.

(3) *Counsel from a different armed force*. A person from one armed force may be detailed to serve as counsel in a court-martial in a different armed force, a combatant command or joint command when permitted by the Judge Advocate General of the armed force of which the counsel is a member.

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The Judge Advocate General may delegate authority to make persons available for this purpose.

Rule 504. Convening courts-martial

(a) *In general*. A court-martial is created by a convening order of the convening authority.

(b) *Who may convene courts-martial*.

(1) *General courts-martial*. Unless otherwise limited by superior competent authority, general courts-martial may be convened by persons occupying positions designated in Article 22(a) and by any commander designated by the Secretary concerned or empowered by the President.

Discussion

The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. The rule by which command devolves are found in regulations of the Secretary concerned.

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(2) *Special courts-martial*. Unless otherwise limited by superior competent authority, special courts-martial may be convened by persons occupying positions designated in Article 23(a) and by commanders designated by the Secretary concerned.

Discussion

See the discussion of subsection (b)(1) of this rule. Persons authorized to convene general courts-martial may also convene special courts-martial.

(A) *Definition*. For purposes of Articles 23 and 24, a command or unit is "separate or detached" when isolated or removed from the immediate disciplinary control of a superior in such manner as to make its commander the person held by superior commanders primarily responsible for discipline. "Separate or detached" is used in a disciplinary sense and not necessarily in a tactical or physical sense. A subordinate joint command or joint task force is ordinarily considered to be "separate or detached."

Discussion

The power of a commander of a separate or detached unit to convene courts-martial, like that of any other commander, may be limited by superior competent authority.

(B) *Determination*. If a commander is in doubt whether the command is separate or detached, the matter shall be determined:

(i) In the Army or the Air Force, by the officer exercising general court-martial jurisdiction over the command; or

(ii) In the Naval Service or Coast Guard, by the flag or general officer in command or the senior officer present who designated the detachment; or

(iii) In a combatant command or joint command, by the officer exercising general court-martial jurisdiction over the command.

(3) *Summary courts-martial*. *See* R.C.M. 1302(a).

Discussion

See the discussion under subsection (b)(1) of this rule.

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(4) *Delegation prohibited*. The power to convene courts-martial may not be delegated.

(c) *Disqualification*.

(1) *Accuser*. An accuser may not convene a general or special court-martial for the trial of the person accused.

Discussion

See also Article 1(9); 307(a); 601(c). However, *see* R.C.M. 1302(b) (accuser may convene a summary court-martial).

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(2) *Other*. A convening authority junior in rank to an accuser may not convene a general or special court-martial for the trial of the accused unless that convening authority is superior in command to the accuser. A convening authority junior in command to an accuser may not convene a general or special court-martial for the trial of the accused.

(3) *Action when disqualified*. When a commander who would otherwise convene a general or special court-martial is disqualified in a case, the charges shall be forwarded to a superior competent authority for disposition. That authority may personally dispose of the charges or forward the charges to another convening authority who is superior in rank to the accuser, or, if in the same chain of command, who is superior in command to the accuser.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

CHAPTER VI. REFERRAL, SERVICE, AMENDMENT, AND WITHDRAWAL OF CHARGES

Rule 601. Referral

(a) *In general*. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

Discussion

Referral of charges requires three elements: a convening authority who is authorized to convene the court-martial and is not disqualified (*see* R.C.M. 601(b) and (c)); preferred charges which have been received by the convening authority for disposition (*see* R.C.M. 307 as to preferral of charges and Chapter IV as to disposition); and a court-martial convened by that convening authority or a predecessor (*see* R.C.M. 504).

If trial would be warranted but would be detrimental to the prosecution of a war or inimical to national security, *see* R.C.M. 401(d) and 407(b).

(b) *Who may refer*. Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor, unless the power to do so has been withheld by superior competent authority.

Discussion

See R.C.M. 306(a), 403, 404, 407, and 504.

The convening authority may be of any command, including a command different from that of the accused, but as a practical matter the accused must be subject to the orders of the convening authority or otherwise under the convening authority's control to assure the appearance of the accused at trial. The convening authority's power over the accused may be based upon agreements between the commanders concerned.

(c) *Disqualification*. An accuser may not refer charges to a general or special court-martial.

Discussion

Convening authorities are not disqualified from referring charges by prior participation in the same case except when they have acted as accuser. For a definition of "accuser," *see* Article 1(9). A convening authority who is disqualified may forward the charges and allied papers for disposition by competent authority superior in rank or command. *See* R.C.M. 401(c) concerning actions which the superior may take.

See R.C.M. 1302 for rules relating to convening summary courts-martial.

(d) *When charges may be referred*.

(1) *Basis for referral*. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (d)(2) of this rule. The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

Discussion

For a discussion of selection among alternative dispositions, *see* R.C.M. 306. The convening authority is not obliged to refer all charges which the evidence might support. The convening authority should consider the options and considerations under R.C.M. 306 in exercising the discretion to refer.

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(2) *General courts-martial*. The convening authority may not refer a specification under a charge to a general court-martial unless—

(A) There has been substantial compliance with the pretrial investigation requirements of R.C.M. 405; and

(B) The convening authority has received the advice of the staff judge advocate required under R.C.M. 406. These requirements may be waived by the accused.

Discussion

See R.C.M. 201(f)(2)(C) concerning limitations on referral of capital offenses to special courts-martial. *See* R.C.M. 103(3) for the definition of a capital offense.

See R.C.M. 1301(c) concerning limitations on the referral of certain cases to summary courts-martial.

(e) *How charges shall be referred*.

(1) *Order, instructions*. Referral shall be by the personal order of the convening authority. The con-

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vening authority may include proper instructions in the order.

Discussion

Referral is ordinarily evidenced by an indorsement on the charge sheet. Although the indorsement should be completed on all copies of the charge sheet, only the original must be signed. The signature may be that of a person acting by the order or direction of the convening authority. In such a case the signature element must reflect the signer's authority.

If, for any reason, charges are referred to a court-martial different from that to which they were originally referred, the new referral is ordinarily made by a new indorsement attached to the original charge sheet. The previous indorsement should be lined out and initialed by the person signing the new referral. The original indorsement should not be obliterated. *See also* R.C.M. 604.

If the only officer present in a command refers the charges to a summary court-martial and serves as the summary court-martial under R.C.M. 1302, the indorsement should be completed with the additional comments, "only officer present in the command."

The convening authority may instruct that the charges against the accused be tried with certain other charges against the accused. *See* subsection (2) below.

The convening authority may instruct that charges against one accused be referred for joint or common trial with another accused. *See* subsection (3) below.

The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided that the convening authority has otherwise complied with the applicable notice requirements. If the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

The convening authority should acknowledge by an instruction that a bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged when the prerequisites under Article 19 will not be met. *See* R.C.M. 201(f)(2)(B)(ii). For example, this instruction may be given when a court reporter is not detailed.

Any special instructions must be stated in the referral indorsement.

When the charges have been referred to a court-martial, the indorsed charge sheet and allied papers should be promptly transmitted to the trial counsel.

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(2) *Joinder of offenses*. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements concerning the additional charges have been complied with. After arraignment of the accused upon charges, no additional charges may be referred to the same trial without consent of the accused.

Discussion

Ordinarily all known charges should be referred to a single court-martial.

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(3) *Joinder of accused*. Allegations against two or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such accused may be charged in one or more specifications together or separately, and every accused need not be charged in each specification. Related allegations against two or more accused which may be proved by substantially the same evidence may be referred to a common trial.

Discussion

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. *See* R.C.M. 307(c)(5) Discussion. Convening authorities should consider that joint and common trials may be complicated by procedural and evidentiary rules.

(f) *Superior convening authorities*. Except as otherwise provided in these rules, a superior competent authority may cause charges, whether or not referred, to be transmitted to the authority for further consideration, including, if appropriate, referral.

Rule 602. Service of charges

The trial counsel detailed to the court-martial to which charges have been referred for trial shall cause to be served upon each accused a copy of the charge sheet. In time of peace, no person may, over objection, be brought to trial—including an Article 39(a) session—before a general court-martial within a period of five days after service of charges, or before a special court-martial within a period of three days after service of charges. In computing these periods, the date of service of charges and the

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CHAPTER VII. PRETRIAL MATTERS

Rule 701. Discovery

(a) *Disclosure by the trial counsel*. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the trial counsel shall provide the following information or matters to the defense—

(1) *Papers accompanying charges; convening orders; statements*. As soon as practicable after service of charges under R.C.M. 602, the trial counsel shall provide the defense with copies of, or, if extraordinary circumstances make it impracticable to provide copies, permit the defense to inspect:

(A) Any paper which accompanied the charges when they were referred to the court-martial, including papers sent with charges upon a rehearing or new trial;

(B) The convening order and any amending orders; and

(C) Any sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel.

(2) *Documents, tangible objects, reports*. After service of charges, upon request of the defense, the Government shall permit the defense to inspect:

(A) Any books, papers, documents, photographs, tangible objects, buildings, or places, or copies of portions thereof, which are within the possession, custody, or control of military authorities, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial, or were obtained from or belong to the accused; and

(B) Any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of military authorities, the existence of which is known or by the exercise of due diligence may become known to the trial counsel, and which are material to the preparation of the defense or are intended for use by the trial counsel as evidence in the prosecution case-in-chief at trial.

Discussion

For specific rules concerning certain mental examinations of the accused or third party patients, *see* R.C.M. 701(f), R.C.M. 706, Mil. R. Evid. 302 and Mil. R. Evid. 513.

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(3) *Witnesses*. Before the beginning of trial on the merits the trial counsel shall notify the defense of the names and addresses of the witnesses the trial counsel intends to call:

(A) In the prosecution case-in-chief; and

(B) To rebut a defense of alibi, innocent ingestion, or lack of mental responsibility, when trial counsel has received timely notice under subsection (b)(1) or (2) of this rule.

Discussion

Such notice should be in writing except when impracticable.

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(4) *Prior convictions of accused offered on the merits*. Before arraignment the trial counsel shall notify the defense of any records of prior civilian or court-martial convictions of the accused of which the trial counsel is aware and which the trial counsel may offer on the merits for any purpose, including impeachment, and shall permit the defense to inspect such records when they are in the trial counsel's possession.

(5) *Information to be offered at sentencing*. Upon request of the defense the trial counsel shall:

(A) Permit the defense to inspect such written material as will be presented by the prosecution at the presentencing proceedings; and

(B) Notify the defense of the names and addresses of the witnesses the trial counsel intends to call at the presentencing proceedings under R.C.M. 1001(b).

(6) *Evidence favorable to the defense*. The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence known to the trial counsel which reasonably tends to:

(A) Negate the guilt of the accused of an offense charged;

(B) Reduce the degree of guilt of the accused of an offense charged; or

(C) Reduce the punishment.

Discussion

In addition to the matters required to be disclosed under subsection (a) of this rule, the Government is required to notify the defense of or provide to the defense certain information under other rules. Mil. R. Evid. 506 covers the disclosure of unclassified

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information which is under the control of the Government. Mil. R. Evid. 505 covers disclosure of classified information.

Other R.C.M. and Mil. R. Evid. concern disclosure of other specific matters. *See* R.C.M. 308 (identification of accuser), 405 (report of Article 32 investigation), 706(c)(3)(B) (mental examination of accused), 914 (production of certain statements), and 1004(b)(1) (aggravating circumstances in capital cases); Mil. R. Evid. 301(c)(2) (notice of immunity or leniency to witnesses), 302 (mental examination of accused), 304(d)(1) (statements by accused), 311(d)(1) (evidence seized from accused), 321(c)(1) (evidence based on lineups), 507 (identity of informants), 612 (memoranda used to refresh recollection), and 613(a) (prior inconsistent statements).

Requirements for notice of intent to use certain evidence are found in: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 301(c)(2) (immunized witnesses), 304(d)(2) (notice of intent to use undisclosed confessions), 304(f) (testimony of accused for limited purpose on confession), 311(d)(2)(B) (notice of intent to use undisclosed evidence seized), 311(f) (testimony of accused for limited purpose on seizures), 321(c)(2)(B) (notice of intent to use undisclosed line-up evidence), 321(e) (testimony of accused for limited purpose of line-ups), 412(c)(1) and (2) (intent of defense to use evidence of sexual misconduct by a victim); 505(h) (intent to disclose classified information), 506(h) (intent to disclose privilege government information), and 609(b) (intent to impeach with conviction over 10 years old).

(b) *Disclosure by the defense*. Except as otherwise provided in subsections (f) and (g)(2) of this rule, the defense shall provide the following information to the trial counsel—

(1) *Names of witnesses and statements*.

(A) Before the beginning of trial on the merits, the defense shall notify the trial counsel of the names and addresses of all witnesses, other than the accused, whom the defense intends to call during the defense case in chief, and provide all sworn or signed statements known by the defense to have been made by such witnesses in connection with the case.

(B) Upon request of the trial counsel, the defense shall also

(i) Provide the trial counsel with the names and addresses of any witnesses whom the defense intends to call at the presentencing proceedings under R.C.M. 1001(c); and

(ii) Permit the trial counsel to inspect any written material that will be presented by the defense at the presentencing proceeding.

Discussion

Such notice shall be in writing except when impracticable. *See* R.C.M. 701(f) for statements that would not be subject to disclosure.

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(2) *Notice of certain defenses*. The defense shall notify the trial counsel before the beginning of trial on the merits of its intent to offer the defense of alibi, innocent ingestion, or lack of mental responsibility, or its intent to introduce expert testimony as to the accused's mental condition. Such notice by the defense shall disclose, in the case of an alibi defense, the place or places at which the defense claims the accused to have been at the time of the alleged offense, and, in the case of an innocent ingestion defense, the place or places where, and the circumstances under which the defense claims the accused innocently ingested the substance in question, and the names and addresses of the witnesses upon whom the accused intends to rely to establish any such defenses.

Discussion

Such notice should be in writing except when impracticable. *See* R.C.M. 916(k) concerning the defense of lack of mental responsibility. *See* R.C.M. 706 concerning inquiries into the mental responsibility of the accused. *See* Mil. R. Evid. 302 concerning statements by the accused during such inquiries. If the defense needs more detail as to the time, date, or place of the offense to comply with this rule, it should request a bill of particulars. *See* R.C.M. 906(b)(6).

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(3) *Documents and tangible objects*. If the defense requests disclosure under subsection (a)(2)(A) of this rule, upon compliance with such request by the Government, the defense, on request of the trial counsel, shall permit the trial counsel to inspect books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defense and which the defense intends to introduce as evidence in the defense case-in-chief at trial.

(4) *Reports of examination and tests*. If the defense requests disclosure under subsection (a)(2)(B) of this rule, upon compliance with such request by the Government, the defense, on request of trial counsel, shall (except as provided in R.C.M. 706, Mil. R. Evid. 302, and Mil. R. Evid. 513) permit the trial counsel to inspect any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are within the

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possession, custody, or control of the defense that the defense intends to introduce as evidence in the defense case-in-chief at trial or that were prepared by a witness whom the defense intends to call at trial when the results or reports relate to that witness' testimony.

(5) *Inadmissibility of withdrawn defense*. If an intention to rely upon a defense under subsection (b)(2) of this rule is withdrawn, evidence of such intention and disclosures by the accused or defense counsel made in connection with such intention is not, in any court-martial, admissible against the accused who gave notice of the intention.

Discussion

In addition to the matters covered in subsection (b) of this rule, defense counsel is required to give notice or disclose evidence under certain Military Rules of Evidence: Mil. R. Evid. 201A(b) (judicial notice of foreign law), 304(f) (testimony by the accused for a limited purpose in relation to a confession), 311(b) (same, search), 321(e) (same, lineup), 412(c)(1) and (2) (intent to offer evidence of sexual misconduct by a victim), 505(h) (intent to disclose classified information), 506(h) (intent to disclose privileged government information), 609(b) (intent to impeach a witness with a conviction older than 10 years), 612(2) (writing used to refresh recollection), and 613(a) (prior inconsistent statements).

(c) *Failure to call witness*. The fact that a witness' name is on a list of expected or intended witnesses provided to an opposing party, whether required by this rule or not, shall not be ground for comment upon a failure to call the witness.

(d) *Continuing duty to disclose*. If, before or during the court-martial, a party discovers additional evidence or material previously requested or required to be produced, which is subject to discovery or inspection under this rule, that party shall promptly notify the other party or the military judge of the existence of the additional evidence or material.

(e) *Access to witnesses and evidence*. Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence. No party may unreasonably impede the access of another party to a witness or evidence.

Discussion

Convening authorities, commanders and members of their immediate staffs should make no statement, oral or written, and take no action which could reasonably be understood to discourage or prevent witnesses from testifying truthfully before a court-martial, or as a threat of retribution for such testimony.

(f) *Information not subject to disclosure*. Nothing in this rule shall be construed to require the disclosure of information protected from disclosure by the Military Rules of Evidence. Nothing in this rule shall require the disclosure or production of notes, memoranda, or similar working papers prepared by counsel and counsel's assistants and representatives.

(g) *Regulation of discovery*.

(1) *Time, place, and manner*. The military judge may, consistent with this rule, specify the time, place, and manner of making discovery and may prescribe such terms and conditions as are just.

(2) *Protective and modifying orders*. Upon a sufficient showing the military judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the military judge may permit the party to make such showing, in whole or in part, in writing to be inspected only by the military judge. If the military judge grants relief after such an ex parte showing, the entire text of the party's statement shall be sealed and attached to the record of trial as an appellate exhibit. Such material may be examined by reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

(3) *Failure to comply*. If at any time during the court-martial it is brought to the attention of the military judge that a party has failed to comply with this rule, the military judge may take one or more of the following actions:

(A) Order the party to permit discovery;

(B) Grant a continuance;

(C) Prohibit the party from introducing evidence, calling a witness, or raising a defense not disclosed; and

(D) Enter such other order as is just under the circumstances. This rule shall not limit the right of the accused to testify in the accused's behalf.

Discussion

Factors to be considered in determining whether to grant an exception to exclusion under subsection (3)(C) include: the extent of disadvantage that resulted from a failure to disclose; the reason for the failure to disclose; the extent to which later events miti-

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gated the disadvantage caused by the failure to disclose; and any other relevant factors.

The sanction of excluding the testimony of a defense witness should be used only upon finding that the defense counsel's failure to comply with this rule was willful and motivated by a desire to obtain a tactical advantage or to conceal a plan to present fabricated testimony. Moreover, the sanction of excluding the testimony of a defense witness should only be used if alternative sanctions could not have minimized the prejudice to the Government. Before imposing this sanction, the military judge must weigh the defendant's right to compulsory process against the countervailing public interests, including (1) the integrity of the adversary process; (2) the interest in the fair and efficient administration of military justice; and (3) the potential prejudice to the truth-determining function of the trial process.

Procedures governing refusal to disclose classified information are in Mil. R. Evid. 505. Procedures governing refusal to disclose other government information are in Mil. R. Evid. 506. Procedures governing refusal to disclose an informant's identity are in Mil. R. Evid. 507.

(h) *Inspect*. As used in this rule "inspect" includes the right to photograph and copy.

Rule 702. Depositions

(a) *In general*. A deposition may be ordered whenever, after preferral of charges, due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.

Discussion

A deposition is the out-of-court testimony of a witness under oath in response to questions by the parties, which is reduced to writing or recorded on videotape or audiotape or similar material. A deposition taken on oral examination is an oral deposition, and a deposition taken on written interrogatories is a written deposition. Written interrogatories are questions, prepared by the prosecution, defense, or both, which are reduced to writing before submission to a witness whose testimony is to be taken by deposition. The answers, reduced to writing and properly sworn to, constitute the deposition testimony of the witness.

Note that under subsection (i) of this rule a deposition may be taken by agreement of the parties without necessity of an order.

A deposition may be taken to preserve the testimony of a witness who is likely to be unavailable at the investigation under Article 32 (*see* R.C.M. 405(g)) or at the time of trial (*see* R.C.M. 703(b)). Part of all or a deposition, so far as otherwise admissible under the Military Rules of Evidence, may be used on the merits or on an interlocutory question as substantive evidence if the witness is unavailable under Mil. R. Evid. 804(a) except that a deposition may be admitted in a capital case only upon offer by the defense. *See* Mil. R. Evid. 804(b)(1). In any case, a deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. *See* Mil. R. Evid. 613. If only a part of a deposition is offered in evidence by a party, an adverse party may require the proponent to offer all which is relevant to the part offered, and any party may offer other parts. *See* Mil. R. Evid. 106.

A deposition which is transcribed is ordinarily read to the court-martial by the party offering it. *See also* subsection (g)(3) of this rule. The transcript of a deposition may not be inspected by the members. Objections may be made to testimony in a written deposition in the same way that they would be if the testimony were offered through the personal appearance of a witness.

Part or all of a deposition so far as otherwise admissible under the Military Rules of Evidence may be used in presentencing proceedings as substantive evidence as provided in R.C.M. 1001.

DD Form 456 (Interrogatories and Deposition) may be used in conjunction with this rule.

(b) *Who may order*. A convening authority who has the charges for disposition or, after referral, the convening authority or the military judge may order that a deposition be taken on request of a party.

(c) *Request to take deposition*.

(1) *Submission of request*. At any time after charges have been preferred, any party may request in writing that a deposition be taken.

Discussion

A copy of the request and any accompanying papers ordinarily should be served on the other parties when the request is submitted.

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(2) *Contents of request*. A request for a deposition shall include:

(A) The name and address of the person whose deposition is requested, or, if the name of the person is unknown, a description of the office or position of the person;

(B) A statement of the matters on which the person is to be examined;

(C) A statement of the reasons for taking the deposition; and

(D) Whether an oral or written deposition is requested.

(3) *Action on request*.

(A) *In general*. A request for a deposition may be denied only for good cause.

Discussion

Good cause for denial includes: failure to state a proper ground for taking a deposition; failure to show the probable relevance of

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the witness' testimony, or that the witness' testimony would be unnecessary. The fact that the witness is or will be available for trial is good cause for denial in the absence of unusual circumstances, such as improper denial of a witness request at an Article 32 hearing, unavailability of an essential witness at an Article 32 hearing, or when the Government has improperly impeded defense access to a witness.

(B) *Written deposition*. A request for a written deposition may not be approved without the consent of the opposing party except when the deposition is ordered solely in lieu of producing a witness for sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be adequately served by a written deposition.

Discussion

A request for an oral deposition may be approved without the consent of the opposing party.

(C) *Notification of decision*. The authority who acts on the request shall promptly inform the requesting party of the action on the request and, if the request is denied, the reasons for denial.

(D) *Waiver*. Failure to review before the military judge a request for a deposition denied by a convening authority waives further consideration of the request.

(d) *Action when request is approved*.

(1) *Detail of deposition officer*. When a request for a deposition is approved, the convening authority shall detail an officer to serve as deposition officer or request an appropriate civil officer to serve as deposition officer.

Discussion

See Article 49(c).

When a deposition will be at a point distant from the command, an appropriate authority may be requested to make available an officer to serve as deposition officer.

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(2) *Assignment of counsel*. If charges have not yet been referred to a court-martial when a request to take a deposition is approved, the convening authority who directed the taking of the deposition shall ensure that counsel qualified as required under R.C.M. 502(d) are assigned to represent each party.

Discussion

The counsel who represents the accused at a deposition ordinarily will form an attorney-client relationship with the accused which will continue through a later court-martial. *See* R.C.M. 506.

If the accused has formed an attorney-client relationship with military counsel concerning the charges in question, ordinarily that counsel should be appointed to represent the accused.

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(3) *Instructions*. The convening authority may give instructions not inconsistent with this rule to the deposition officer.

Discussion

Such instruction may include the time and place for taking the deposition.

(e) *Notice*. The party at whose request a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition and the name and address of each person to be examined. On motion of a party upon whom the notice is served the deposition officer may for cause shown extend or shorten the time or change the place for taking the deposition, consistent with any instructions from the convening authority.

(f) *Duties of the deposition officer*. In accordance with this rule, and subject to any instructions under subsection (d)(3) of this rule, the deposition officer shall:

(1) Arrange a time and place for taking the deposition and, in the case of an oral deposition, notify the party who requested the deposition accordingly;

(2) Arrange for the presence of any witness whose deposition is to be taken in accordance with the procedures for production of witnesses and evidence under R.C.M. 703(e);

(3) Maintain order during the deposition and protect the parties and witnesses from annoyance, embarrassment, or oppression;

(4) Administer the oath to each witness, the reporter, and interpreter, if any;

(5) In the case of a written deposition, ask the questions submitted by counsel to the witness;

(6) Cause the proceedings to be recorded so that a verbatim record is made or may be prepared;

(7) Record, but not rule upon, objections or motions and the testimony to which they relate;

(8) Authenticate the record of the deposition and

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

forward it to the authority who ordered the deposition; and

(9) Report to the convening authority any substantial irregularity in the proceeding.

Discussion

When any unusual problem, such as improper conduct by counsel or a witness, prevents an orderly and fair proceeding, the deposition officer should adjourn the proceedings and inform the convening authority.

The authority who ordered the deposition should forward copies to the parties.

(g) *Procedure*.

(1) *Oral depositions*.

(A) *Rights of accused*. At an oral deposition, the accused shall have the rights to:

(i) Be present except when: *(a)* the accused, absent good cause shown, fails to appear after notice of time and place of the deposition; *(b)* the accused is disruptive within the meaning of R.C.M. 804(b)(2); or *(c)* the deposition is ordered in lieu of production of a witness on sentencing under R.C.M. 1001 and the authority ordering the deposition determines that the interests of the parties and the court-martial can be served adequately by an oral deposition without the presence of the accused; and

(ii) Be represented by counsel as provided in R.C.M. 506.

(B) *Examination of witnesses*. Each witness giving an oral deposition shall be examined under oath. The scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself. The Government shall make available to each accused for examination and use at the taking of the deposition any statement of the witness which is in the possession of the United States and to which the accused would be entitled at the trial.

Discussion

As to objections, *see* subsections (f)(7) and (h) of this rule. As to production of prior statements of witnesses, *see* R.C.M. 914; Mil. R. Evid. 612, 613.

A sample oath for a deposition follows.

"You (swear) (affirm) that the evidence you give shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

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(2) *Written depositions*.

(A) *Rights of accused*. The accused shall have the right to be represented by counsel as provided in R.C.M. 506 for the purpose of taking a written deposition, except when the deposition is taken for use at a summary court-martial.

(B) *Presence of parties*. No party has a right to be present at a written deposition.

(C) *Submission of interrogatories to opponent*. The party requesting a written deposition shall submit to opposing counsel a list of written questions to be asked of the witness. Opposing counsel may examine the questions and shall be allowed a reasonable time to prepare cross-interrogatories and objections, if any.

Discussion

The interrogatories and cross-interrogatories should be sent to the deposition officer by the party who requested the deposition. *See* subsection (h)(3) of this rule concerning objections.

(D) *Examination of witnesses*. The deposition officer shall swear the witness, read each question presented by the parties to the witness, and record each response. The testimony of the witness shall be recorded on videotape, audiotape, or similar material or shall be transcribed. When the testimony is transcribed, the deposition shall, except when impracticable, be submitted to the witness for examination. The deposition officer may enter additional matters then stated by the witness under oath. The deposition shall be signed by the witness if the witness is available. If the deposition is not signed by the witness, the deposition officer shall record the reason. The certificate of authentication shall then be executed.

(3) *How recorded*. In the discretion of the authority who ordered the deposition, a deposition may be recorded by a reporter or by other means including videotape, audiotape, or sound film. In the discretion of the military judge, depositions recorded by videotape, audiotape, or sound film may be played for the court-martial or may be transcribed and read to the court-martial.

Discussion

A deposition read in evidence or one that is played during a court-martial, is recorded and transcribed by the reporter in the

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same way as any other testimony. The deposition need not be included in the record of trial.

(h) *Objections*.

(1) *In general*. A failure to object prior to the deposition to the taking of the deposition on grounds which may be corrected if the objection is made prior to the deposition waives such objection.

(2) *Oral depositions*. Objections to questions, testimony, or evidence at an oral deposition and the grounds for such objection shall be stated at the time of taking such deposition. If an objection relates to a matter which could have been corrected if the objection had been made during the deposition, the objection is waived if not made at the deposition.

Discussion

A party may show that an objection was made during the deposition but not recorded, but, in the absence of such evidence, the transcript of the deposition governs.

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(3) *Written depositions*. Objections to any question in written interrogatories shall be served on the party who proposed the question before the interrogatories are sent to the deposition officer or the objection is waived. Objections to answers in a written deposition may be made at trial.

(i) *Deposition by agreement not precluded*.

(1) *Taking deposition*. Nothing in this rule shall preclude the taking of a deposition without cost to the United States, orally or upon written questions, by agreement of the parties.

(2) *Use of deposition*. Subject to Article 49, nothing in this rule shall preclude the use of a deposition at the court-martial by agreement of the parties unless the military judge forbids its use for good cause.

Rule 703. Production of witnesses and evidence

(a) *In general*. The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process.

Discussion

See also R.C.M. 801(c) concerning the opportunity of the court-martial to obtain witnesses and evidence.

(b) *Right to witnesses*.

(1) *On the merits or on interlocutory questions*. Each party is entitled to the production of any witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary. With the consent of both the accused and Government, the military judge may authorize any witness to testify via remote means. Over a party's objection, the military judge may authorize any witness to testify on interlocutory questions via remote means or similar technology if the practical difficulties of producing the witness outweigh the significance of the witness' personal appearance (although such testimony will not be admissible over the accused's objection as evidence on the ultimate issue of guilt). Factors to be considered include, but are not limited to: the costs of producing the witness; the timing of the request for production of the witness; the potential delay in the interlocutory proceeding that may be caused by the production of the witness; the willingness of the witness to testify in person; the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training; and, for child witnesses, the traumatic effect of providing in-court testimony.

Discussion

See Mil. R. Evid. 401 concerning relevance.

Relevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B. An issue may arise as both an interlocutory question and a question that bears on the ultimate issue of guilt. See R.C.M. 801(e)(5). In such circumstances, this rule authorizes the admission of testimony by remote means or similar technology over the accused's objection only as evidence on the interlocutory question. In most instances, testimony taken over a party's objection will not be admissible as evidence on the question that bears on the ultimate issue of guilt; however, there may be certain limited circumstances where the testimony is admissible on the ultimate issue of guilt. Such determinations must be made based upon the relevant rules of evidence.

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(2) *On sentencing*. Each party is entitled to the

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production of a witness whose testimony on sentencing is required under R.C.M. 1001(e).

(3) *Unavailable witness*. Notwithstanding subsections (b)(1) and (2) of this rule, a party is not entitled to the presence of a witness who is unavailable within the meaning of Mil. R. Evid. 804(a). However, if the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings, unless the unavailability of the witness is the fault of or could have been prevented by the requesting party.

(c) *Determining which witness will be produced*.

(1) *Witnesses for the prosecution*. The trial counsel shall obtain the presence of witnesses whose testimony the trial counsel considers relevant and necessary for the prosecution.

(2) *Witnesses for the defense*.

(A) *Request*. The defense shall submit to the trial counsel a written list of witnesses whose production by the Government the defense requests.

(B) *Contents of request*.

(i) *Witnesses on merits or interlocutory questions*. A list of witnesses whose testimony the defense considers relevant and necessary on the merits or on an interlocutory question shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence and a synopsis of the expected testimony sufficient to show its relevance and necessity.

(ii) *Witnesses on sentencing*. A list of witnesses wanted for presentencing proceedings shall include the name, telephone number, if known, and address or location of the witness such that the witness can be found upon the exercise of due diligence, a synopsis of the testimony that it is expected the witness will give, and the reasons why the witness' personal appearance will be necessary under the standards set forth in R.C.M. 1001(e).

(C) *Time of request*. A list of witnesses under this subsection shall be submitted in time reasonably to allow production of each witness on the date when the witness' presence will be necessary. The military judge may set a specific date by which such lists must be submitted. Failure to submit the name of a witness in a timely manner shall permit denial of a motion for production of the witness, but relief from such denial may be granted for good cause shown.

(D) *Determination*. The trial counsel shall arrange for the presence of any witness listed by the defense unless the trial counsel contends that the witness' production is not required under this rule. If the trial counsel contends that the witness' production is not required by this rule, the matter may be submitted to the military judge. If the military judge grants a motion for a witness, the trial counsel shall produce the witness or the proceedings shall be abated.

Discussion

When significant or unusual costs would be involved in producing witnesses, the trial counsel should inform the convening authority, as the convening authority may elect to dispose of the matter by means other than a court-martial. *See* R.C.M. 906(b)(7). *See also* R.C.M. 905(j).

(d) *Employment of expert witnesses*. When the employment at Government expense of an expert is considered necessary by a party, the party shall, in advance of employment of the expert, and with notice to the opposing party, submit a request to the convening authority to authorize the employment and to fix the compensation for the expert. The request shall include a complete statement of reasons why employment of the expert is necessary and the estimated cost of employment. A request denied by the convening authority may be renewed before the military judge who shall determine whether the testimony of the expert is relevant and necessary, and, if so, whether the Government has provided or will provide an adequate substitute. If the military judge grants a motion for employment of an expert or finds that the Government is required to provide a substitute, the proceedings shall be abated if the Government fails to comply with the ruling. In the absence of advance authorization, an expert witness may not be paid fees other than those to which entitled under subsection (e)(2)(D) of this rule.

Discussion

See Mil. R. Evid. 702, 706.

(e) *Procedures for production of witnesses*.

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(1) *Military witnesses*. The attendance of a military witness may be obtained by notifying the commander of the witness of the time, place, and date the witness' presence is required and requesting the commander to issue any necessary orders to the witness.

Discussion

When military witnesses are located near the court-martial, their presence can usually be obtained through informal coordination with them and their commander. If the witness is not near the court-martial and attendance would involve travel at government expense, or if informal coordination is inadequate, the appropriate superior should be requested to issue the necessary order.

If practicable, a request for the attendance of a military witness should be made so that the witness will have at least 48 hours notice before starting to travel to attend the court-martial.

The attendance of persons not on active duty should be obtained in the manner prescribed in subsection (e)(2) of this rule.

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(2) *Civilian witnesses—subpoena*.

(A) *In general*. The presence of witnesses not on active duty may be obtained by subpoena.

Discussion

A subpoena is not necessary if the witness appears voluntarily at no expense to the United States.

Civilian employees of the Department of Defense may be directed by appropriate authorities to appear as witnesses in courts-martial as an incident of their employment. Appropriate travel orders may be issued for this purpose.

A subpoena may not be used to compel a civilian to travel outside the United States and its territories.

A witness must be subject to United States jurisdiction to be subject to a subpoena. Foreign nationals in a foreign country are not subject to subpoena. Their presence may be obtained through cooperation of the host nation.

(B) *Contents*. A subpoena shall state the command by which the proceeding is directed, and the title, if any, of the proceeding. A subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. A subpoena may also command the person to whom it is directed to produce books, papers, documents or other objects designated therein at the proceeding or at an earlier time for inspection by the parties.

Discussion

A subpoena may not be used to compel a witness to appear at an examination or interview before trial, but a subpoena may be used to obtain witnesses for a deposition or a court of inquiry.

A subpoena normally is prepared, signed, and issued in duplicate on the official forms. *See* Appendix 7 for an example of a Subpoena with certificate of service (DD Form 453) and a Travel Order (DD Form 453-1).

(C) *Who may issue*. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.

(D) *Service*. A subpoena may be served by the person authorized by this rule to issue it, a United States marshal, or any other person who is not less than 18 years of age. Service shall be made by delivering a copy of the subpoena to the person named and by tendering to the person named travel orders and fees as may be prescribed by the Secretary concerned.

Discussion

See Department of Defense Pay and Entitlements Manual.

If practicable, a subpoena should be issued in time to permit service at least 24 hours before the time the witness will have to travel to comply with the subpoena.

Informal service. Unless formal service is advisable, the person who issued the subpoena may mail it to the witness in duplicate, enclosing a postage-paid envelope bearing a return address, with the request that the witness sign the acceptance of service on the copy and return it in the envelope provided. The return envelope should be addressed to the person who issued the subpoena. The person who issued the subpoena should include with it a statement to the effect that the rights of the witness to fees and mileage will not be impaired by voluntary compliance with the request and that a voucher for fees and mileage will be delivered to the witness promptly on being discharged from attendance.

Formal service. Formal service is advisable whenever it is anticipated that the witness will not comply voluntarily with the subpoena. Appropriate fees and mileage must be paid or tendered. *See* Article 47. If formal service is advisable, the person who issued the subpoena must assure timely and economical service. That person may do so by serving the subpoena personally when the witness is in the vicinity. When the witness is not in the vicinity, the subpoena may be sent in duplicate to the commander of a military installation near the witness. Such commanders should give prompt and effective assistance, issuing travel orders for their personnel to serve the subpoena when necessary.

Service should ordinarily be made by a person subject to the code. The duplicate copy of the subpoena must have entered upon it proof of service as indicated on the form and must be promptly returned to the person who issued the subpoena. If service cannot

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be made, the person who issued the subpoena must be informed promptly. A stamped, addressed envelope should be provided for these purposes.

(E) *Place of service*.

(i) *In general*. A subpoena requiring the attendance of a witness at a deposition, court-martial, or court of inquiry may be served at any place within the United States, it Territories, Commonwealths, or possessions.

(ii) *Foreign territory*. In foreign territory, the attendance of civilian witnesses may be obtained in accordance with existing agreements or, in the absence of agreements, with principles of international law.

(iii) *Occupied territory*. In occupied enemy territory, the appropriate commander may compel the attendance of civilian witnesses located within the occupied territory.

(F) *Relief*. If a person subpoenaed requests relief on grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate.

(G) *Neglect or refusal to appear*.

(i) *Issuance of warrant of attachment*. The military judge or, if there is no military judge, the convening authority may, in accordance with this rule, issue a warrant of attachment to compel the attendance of a witness or production of documents.

Discussion

A warrant of attachment (DD Form 454) may be used when necessary to compel a witness to appear or produce evidence under this rule. A warrant of attachment is a legal order addressed to an official directing that official to have the person named in the order brought before a court.

Subpoenas issued under R.C.M. 703 are Federal process and a person not subject to the code may be prosecuted in a Federal civilian court under Article 47 for failure to comply with a subpoena issued in compliance with this rule and formally served.

Failing to comply with such a subpoena is a felony offense, and may result in a fine or imprisonment, or both, at the discretion of the district court. The different purposes of the warrant of attachment and criminal complaint under Article 47 should be borne in mind. The warrant of attachment, available without the intervention of civilian judicial proceedings, has as its purpose the obtaining of the witness' presence, testimony, or documents. The criminal complaint, prosecuted through the civilian Federal courts, has as its purpose punishment for failing to comply with process issued by military authority. It serves to vindicate the military interest in obtaining compliance with its lawful process.

(ii) *Requirements*. A warrant of attachment may be issued only upon probable cause to believe that the witness was duly served with a subpoena, that the subpoena was issued in accordance with these rules, that appropriate fees and mileage were tendered to the witness, that the witness is material, that the witness refused or willfully neglected to appear at the time and place specified on the subpoena, and that no valid excuse reasonably appears for the witness' failure to appear.

(iii) *Form*. A warrant of attachment shall be written. All documents in support of the warrant of attachment shall be attached to the warrant, together with the charge sheet and convening orders.

(iv) *Execution*. A warrant of attachment may be executed by a United States marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. Only such nondeadly force as may be necessary to bring the witness before the court-martial or other proceeding may be used to execute the warrant. A witness attached under this rule shall be brought before the court-martial or proceeding without delay and shall testify as soon as practicable and be released.

Discussion

In executing a warrant of attachment, no more force than necessary to bring the witness to the court-martial, deposition, or court of inquiry may be used.

(v) *Definition*. For purposes of subsection (e)(2)(G) of this rule "military judge" does not include a summary court-martial or the president of a special court-martial without a military judge.

(f) *Right to evidence*.

(1) *In general*. Each party is entitled to the production of evidence which is relevant and necessary.

Discussion

See Mil. R. Evid. 401 concerning relevance.

Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue. A matter is not in issue when it is stipulated as a fact.

As to the discovery and introduction of classified or other

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government information, *see* Mil. R. Evid. 505 and 506.

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(2) *Unavailable evidence*. Notwithstanding subsection (f)(1) of this rule, a party is not entitled to the production of evidence which is destroyed, lost, or otherwise not subject to compulsory process. However, if such evidence is of such central importance to an issue that it is essential to a fair trial, and if there is no adequate substitute for such evidence, the military judge shall grant a continuance or other relief in order to attempt to produce the evidence or shall abate the proceedings, unless the unavailability of the evidence is the fault of or could have been prevented by the requesting party.

(3) *Determining what evidence will be produced*. The procedures in subsection (c) of this rule shall apply to a determination of what evidence will be produced, except that any defense request for the production of evidence shall list the items of evidence to be produced and shall include a description of each item sufficient to show its relevance and necessity, a statement where it can be obtained, and, if known, the name, address, and telephone number of the custodian of the evidence.

(4) *Procedures for production of evidence*.

(A) *Evidence under the control of the Government*. Evidence under the control of the Government may be obtained by notifying the custodian of the evidence of the time, place, and date the evidence is required and requesting the custodian to send or deliver the evidence.

(B) *Evidence not under the control of the Government*. Evidence not under the control of the Government may be obtained by subpoena issued in accordance with subsection (e)(2) of this rule.

(C) *Relief*. If the person having custody of evidence requests relief on grounds that compliance with the subpoena or order of production is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena or order of production be withdrawn or modified. Subject to Mil. R. Evid. 505 and 506, the military judge may direct that the evidence be submitted to the military judge for an in camera inspection in order to determine whether such relief should be granted.

Rule 704. Immunity

(a) *Types of immunity*. Two types of immunity may be granted under this rule.

(1) *Transactional immunity*. A person may be granted transactional immunity from trial by court-martial for one or more offenses under the code.

(2) *Testimonial immunity*. A person may be granted immunity from the use of testimony, statements, and any information directly or indirectly derived from such testimony or statements by that person in a later court-martial.

Discussion

"Testimonial" immunity is also called "use" immunity.

Immunity ordinarily should be granted only when testimony or other information from the person is necessary to the public interest, including the needs of good order and discipline, and when the person has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

Testimonial immunity is preferred because it does not bar prosecution of the person for the offenses about which testimony or information is given under the grant of immunity.

In any trial of a person granted testimonial immunity after the testimony or information is given, the Government must meet a heavy burden to show that it has not used in any way for the prosecution of that person the person's statements, testimony, or information derived from them. In many cases this burden makes difficult a later prosecution of such a person for any offense that was the subject of that person's testimony or statements. Therefore, if it is intended to prosecute a person to whom testimonial immunity has been or will be granted for offenses about which that person may testify or make statements, it may be necessary to try that person before the testimony or statements are given.

(b) *Scope*. Nothing in this rule bars:

(1) A later court-martial for perjury, false swearing, making a false official statement, or failure to comply with an order to testify; or

(2) Use in a court-martial under subsection (b)(1) of this rule of testimony or statements derived from such testimony or statements.

(c) *Authority to grant immunity*. Only a general court-martial convening authority may grant immunity, and may do so only in accordance with this rule.

Discussion

Only general court-martial convening authorities are authorized to grant immunity. However, in some circumstances, when a person testifies or makes statements pursuant to a promise of immunity, or a similar promise, by a person with apparent authority to make it, such testimony or statements and evidence derived from them

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may be inadmissible in a later trial. Under some circumstances a promise of immunity by someone other than a general court-martial convening authority may bar prosecution altogether. Persons not authorized to grant immunity should exercise care when dealing with accused or suspects to avoid inadvertently causing statements to be inadmissible or prosecution to be barred.

A convening authority who grants immunity to a prosecution witness in a court-martial may be disqualified from taking post-trial action in the case under some circumstances.

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(1) *Persons subject to the code*. A general court-martial convening authority may grant immunity to any person subject to the code. However, a general court-martial convening authority may grant immunity to a person subject to the code extending to a prosecution in a United States District Court only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

When testimony or a statement for which a person subject to the code may be granted immunity may relate to an offense for which that person could be prosecuted in a United States District Court, immunity should not be granted without prior coordination with the Department of Justice. Ordinarily coordination with the local United States Attorney is appropriate. Unless the Department of Justice indicates it has no interest in the case, authorization for the grant of immunity should be sought from the Attorney General. A request for such authorization should be forwarded through the office of the Judge Advocate General concerned. Service regulations may provide additional guidance. Even if the Department of Justice expresses no interest in the case, authorization by the Attorney General for the grant of immunity may be necessary to compel the person to testify or make a statement if such testimony or statement would make the person liable for a Federal civilian offense.

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(2) *Persons not subject to the code*. A general court-martial convening authority may grant immunity to persons not subject to the code only when specifically authorized to do so by the Attorney General of the United States or other authority designated under 18 U.S.C. § 6004.

Discussion

See the discussion under subsection (c)(1) of this rule concerning forwarding a request for authorization to grant immunity to the Attorney General.

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(3) *Other limitations*. The authority to grant immunity under this rule may not be delegated. The authority to grant immunity may be limited by superior authority.

Discussion

Department of Defense Directive 1355.1 (21 July 1981) provides: "A proposed grant of immunity in a case involving espionage, subversion, aiding the enemy, sabotage, spying, or violation of rules or statutes concerning classified information or the foreign relations of the United States, shall be forwarded to the General Counsel of the Department of Defense for the purpose of consultation with the Department of Justice. The General Counsel shall obtain the view of other appropriate elements of the Department of defense in furtherance of such consultation."

(d) *Procedure*. A grant of immunity shall be written and signed by the convening authority who issues it. The grant shall include a statement of the authority under which it is made and shall identify the matters to which it extends.

Discussion

A person who has received a valid grant of immunity from a proper authority may be ordered to testify. In addition, a servicemember who has received a valid grant of immunity may be ordered to answer questions by investigators or counsel pursuant to that grant. *See* Mil. R. Evid. 301(c). A person who refuses to testify despite a valid grant of immunity may be prosecuted for such refusal. Persons subject to the code may be charged under Article 134. *See* paragraph 108, Part IV. A grant of immunity removes the right to refuse to testify or make a statement on self-incrimination grounds. It does not, however, remove other privileges against disclosure of information. *See* Mil. R. Evid., Section V.

An immunity order or grant must not specify the contents of the testimony it is expected the witness will give.

When immunity is granted to a prosecution witness, the accused must be notified in accordance with Mil. R. Evid. 301(c)(2).

(e) *Decision to grant immunity*. Unless limited by superior competent authority, the decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:

(1) The witness intends to invoke the right

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against self-incrimination to the extent permitted by law if called to testify; and

(2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

Rule 705. Pretrial agreements

(a) *In general*. Subject to such limitations as the Secretary concerned may prescribe, an accused and the convening authority may enter into a pretrial agreement in accordance with this rule.

Discussion

The authority of convening authorities to refer cases to trial and approve pretrial agreements extends only to trials by courts-martial. To ensure that such actions do not preclude appropriate action by Federal civilian authorities in cases likely to be prosecuted in the United States District Courts, convening authorities shall ensure that appropriate consultation under the "Memorandum of Understanding Between the Departments of Justice and Defense Relating to the Investigation and Prosecution of Crimes Over Which the Two Departments Have Concurrent Jurisdiction " has taken place prior to trial by court-martial or approval of a pretrial agreement in cases where such consultation is required. *See* Appendix 3.

(b) *Nature of agreement*. A pretrial agreement may include:

(1) A promise by the accused to plead guilty to, or to enter a confessional stipulation as to one or more charges and specifications, and to fulfill such additional terms or conditions which may be included in the agreement and which are not prohibited under this rule; and

(2) A promise by the convening authority to do one or more of the following:

(A) Refer the charges to a certain type of court-martial;

(B) Refer a capital offense as noncapital;

(C) Withdraw one or more charges or specifications from the court-martial;

Discussion

A convening authority may withdraw certain specifications and/or charges from a court-martial and dismiss them if the accused fulfills the accused's promises in the agreement. Except when jeopardy has attached (*see* R.C.M. 907(b)(2)(C)), such withdrawal and dismissal does not bar later reinstitution of the charges by the same or a different convening authority. A judicial determination that the accused breached the pretrial agreement is not required prior to reinstitution of withdrawn or dismissed specifications and/or charges. If the defense moves to dismiss the reinstituted specifications and/or charges on the grounds that the government remains bound by the terms of the pretrial agreement, the government will be required to prove, by a preponderance of the evidence, that the accused has breached the terms of the pretrial agreement. If the agreement is intended to grant immunity to an accused, *see* R.C.M. 704.

(D) Have the trial counsel present no evidence as to one or more specifications or portions thereof; and

(E) Take specified action on the sentence adjudged by the court-martial.

Discussion

For example, the convening authority may agree to approve no sentence in excess of a specified maximum, to suspend all or part of a sentence, to defer confinement, or to mitigate certain forms of punishment into less severe forms.

(c) *Terms and conditions*.

(1) *Prohibited terms or conditions*.

(A) *Not voluntary*. A term or condition in a pretrial agreement shall not be enforced if the accused did not freely and voluntarily agree to it.

(B) *Deprivation of certain rights*. A term or condition in a pretrial agreement shall not be enforced if it deprives the accused of: the right to counsel; the right to due process; the right to challenge the jurisdiction of the court-martial; the right to a speedy trial; the right to complete sentencing proceedings; the complete and effective exercise of post-trial and appellate rights.

Discussion

A pretrial agreement provision which prohibits the accused from making certain pretrial motions (*see* R.C.M. 905–907) may be improper.

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(2) *Permissible terms or conditions*. Subject to subsection (c)(1)(A) of this rule, subsection (c)(1)(B) of this rule does not prohibit either party from proposing the following additional conditions:

(A) A promise to enter into a stipulation of fact

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concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered;

(B) A promise to testify as a witness in the trial of another person;

Discussion

See R.C.M. 704(a)(2) concerning testimonial immunity. Only a general court-martial convening authority may grant immunity.

(C) A promise to provide restitution;

(D) A promise to conform the accused's conduct to certain conditions of probation before action by the convening authority as well as during any period of suspension of the sentence, provided that the requirements of R.C.M. 1109 must be complied with before an alleged violation of such terms may relieve the convening authority of the obligation to fulfill the agreement; and

(E) A promise to waive procedural requirements such as the Article 32 investigation, the right to trial by court-martial composed of members or the right to request trial by military judge alone, or the opportunity to obtain the personal appearance of witnesses at sentencing proceedings.

(d) *Procedure*.

(1) *Negotiation*. Pretrial agreement negotiations may be initiated by the accused, defense counsel, trial counsel, the staff judge advocate, convening authority, or their duly authorized representatives. Either the defense or the government may propose any term or condition not prohibited by law or public policy. Government representatives shall negotiate with defense counsel unless the accused has waived the right to counsel.

(2) *Formal submission*. After negotiation, if any, under subsection (d)(1) of this rule, if the accused elects to propose a pretrial agreement, the defense shall submit a written offer. All terms, conditions, and promises between the parties shall be written. The proposed agreement shall be signed by the accused and defense counsel, if any. If the agreement contains any specified action on the adjudged sentence, such action shall be set forth on a page separate from the other portions of the agreement.

Discussion

The first part of the agreement ordinarily contains an offer to plead guilty and a description of the offenses to which the offer extends. It must also contain a complete and accurate statement of any other agreed terms or conditions. For example, if the convening authority agrees to withdraw certain specifications, or if the accused agrees to waive the right to an Article 32 investigation, this should be stated. The written agreement should contain a statement by the accused that the accused enters it freely and voluntarily and may contain a statement that the accused has been advised of certain rights in connection with the agreement.

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(3) *Acceptance*. The convening authority may either accept or reject an offer of the accused to enter into a pretrial agreement or may propose by counteroffer any terms or conditions not prohibited by law or public policy. The decision whether to accept or reject an offer is within the sole discretion of the convening authority. When the convening authority has accepted a pretrial agreement, the agreement shall be signed by the convening authority or by a person, such as the staff judge advocate or trial counsel, who has been authorized by the convening authority to sign.

Discussion

The convening authority should consult with the staff judge advocate or trial counsel before acting on an offer to enter into a pretrial agreement.

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(4) *Withdrawal*.

(A) *By accused*. The accused may withdraw from a pretrial agreement at any time; however, the accused may withdraw a plea of guilty or a confessional stipulation entered pursuant to a pretrial agreement only as provided in R.C.M. 910(h) or 811(d), respectively.

(B) *By convening authority*. The convening authority may withdraw from a pretrial agreement at any time before the accused begins performance of promises contained in the agreement, upon the failure by the accused to fulfill any material promise or condition in the agreement, when inquiry by the military judge discloses a disagreement as to a material term in the agreement, or if findings are set aside because a plea of guilty entered pursuant to the agreement is held improvident on appellate review.

(e) *Nondisclosure of existence of agreement*. Except in a special court-martial without a military judge, no member of a court-martial shall be informed of the existence of a pretrial agreement. In addition, except as provided in Mil. R. Evid. 410, the fact that an accused offered to enter into a pretrial agreement, and any statements made by an accused in connec-

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tion therewith, whether during negotiations or during a providence inquiry, shall not be otherwise disclosed to the members.

Discussion

See also R.C.M. 910(f) (plea agreement inquiry).

Rule 706. Inquiry into the mental capacity or mental responsibility of the accused

(a) *Initial action*. If it appears to any commander who considers the disposition of charges, or to any investigating officer, trial counsel, defense counsel, military judge, or member that there is reason to believe that the accused lacked mental responsibility for any offense charged or lacks capacity to stand trial, that fact and the basis of the belief or observation shall be transmitted through appropriate channels to the officer authorized to order an inquiry into the mental condition of the accused. The submission may be accompanied by an application for a mental examination under this rule.

Discussion

See R.C.M. 909 concerning the capacity of the accused to stand trial and R.C.M. 916(k) concerning mental responsibility of the accused.

(b) *Ordering an inquiry*.

(1) *Before referral*. Before referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the convening authority before whom the charges are pending for disposition.

(2) *After referral*. After referral of charges, an inquiry into the mental capacity or mental responsibility of the accused may be ordered by the military judge. The convening authority may order such an inquiry after referral of charges but before beginning of the first session of the court-martial (including any Article 39(a) session) when the military judge is not reasonably available. The military judge may order a mental examination of the accused regardless of any earlier determination by the convening authority.

(c) *Inquiry*.

(1) *By whom conducted*. When a mental examination is ordered under subsection (b) of this rule, the matter shall be referred to a board consisting of one or more persons. Each member of the board shall be either a physician or a clinical psychologist. Normally, at least one member of the board shall be either a psychiatrist or a clinical psychologist. The board shall report as to the mental capacity or mental responsibility or both of the accused.

(2) *Matters in inquiry*. When a mental examination is ordered under this rule, the order shall contain the reasons for doubting the mental capacity or mental responsibility, or both, of the accused, or other reasons for requesting the examination. In addition to other requirements, the order shall require the board to make separate and distinct findings as to each of the following questions:

(A) At the time of the alleged criminal conduct, did the accused have a severe mental disease or defect? (The term "severe mental disease or defect" does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or minor disorders such as nonpsychotic behavior disorders and personality defects.)

(B) What is the clinical psychiatric diagnosis?

(C) Was the accused, at the time of the alleged criminal conduct and as a result of such severe mental disease or defect, unable to appreciate the nature and quality or wrongfulness of his or her conduct?

(D) Is the accused presently suffering from a mental disease or defect rendering the accused unable to understand the nature of the proceedings against the accused or to conduct or cooperate intelligently in the defense?

Other appropriate questions may also be included.

(3) *Directions to board*. In addition to the requirements specified in subsection (c)(2) of this rule, the order to the board shall specify:

(A) That upon completion of the board's investigation, a statement consisting only of the board's ultimate conclusions as to all questions specified in the order shall be submitted to the officer ordering the examination, the accused's commanding officer, the investigating officer, if any, appointed pursuant to Article 32 and to all counsel in the case, the convening authority, and, after referral, to the military judge;

(B) That the full report of the board may be released by the board or other medical personnel only to other medical personnel for medical pur-

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poses, unless otherwise authorized by the convening authority or, after referral of charges, by the military judge, except that a copy of the full report shall be furnished to the defense and, upon request, to the commanding officer of the accused; and

(C) That neither the contents of the full report nor any matter considered by the board during its investigation shall be released by the board or other medical personnel to any person not authorized to receive the full report, except pursuant to an order by the military judge.

Discussion

Based on the report, further action in the case may be suspended, the charges may be dismissed by the convening authority, administrative action may be taken to discharge the accused from the service or, subject to Mil. R. Evid. 302, the charges may be tried by court-martial.

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(4) *Additional examinations*. Additional examinations may be directed under this rule at any stage of the proceedings as circumstances may require.

(5) *Disclosure to trial counsel*. No person, other than the defense counsel, accused, or, after referral of charges, the military judge may disclose to the trial counsel any statement made by the accused to the board or any evidence derived from such statement.

Discussion

See Mil. R. Evid. 302.

Rule 707. Speedy trial

(a) *In general*. The accused shall be brought to trial within 120 days after the earlier of:

(1) Preferral of charges;

Discussion

Delay from the time of an offense to preferral of charges or the imposition of pretrial restraint is not considered for speedy trial purposes. *See also* Article 43 (statute of limitations). In some circumstances such delay may prejudice the accused and may result in dismissal of the charges or other relief. Offenses ordinarily should be disposed of promptly to serve the interests of good order and discipline. Priority shall be given to persons in arrest or confinement.

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(2) The imposition of restraint under R.C.M. 304(a)(2)–(4); or

(3) Entry on active duty under R.C.M. 204.

(b) *Accountability*.

(1) *In general*. The date of preferral of charges, the date on which pretrial restraint under R.C.M. 304 (a)(2)-(4) is imposed, or the date of entry on active duty under R.C.M. 204 shall not count for purpose of computing time under subsection (a) of this rule. The date on which the accused is brought to trial shall count. The accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904.

(2) *Multiple Charges*. When charges are preferred at different times, accountability for each charge shall be determined from the appropriate date under subsection (a) of this rule for that charge.

(3) *Events which affect time periods*.

(A) *Dismissal or mistrial*. If charges are dismissed, or if a mistrial is granted, a new 120-day time period under this rule shall begin on the date of dismissal or mistrial for cases in which there is no repreferral and cases in which the accused is in pretrial restraint. In all other cases, a new 120-day time period under the rule shall begin on the earlier of

(i) the date of repreferral; or

(ii) the date of imposition of restraint under R.C.M. 304(a)(2)–(4).

(B) *Release from restraint*. If the accused is released from pretrial restraint for a significant period, the 120-day time period under this rule shall begin on the earlier of

(i) the date of preferral of charges;

(ii) the date on which restraint under R.C.M. 304(a) (2)-(4) is reimposed; or

(iii) the date of entry on active duty under R.C.M. 204.

(C) *Government appeals*. If notice of appeal under R.C.M. 908 is filed, a new 120-day time period under this rule shall begin, for all charges neither proceeded on nor severed under R.C.M. 908(b)(4), on the date of notice to the parties under R.C.M. 908(b)(8) or 908(c)(3), unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was totally frivolous and without merit. After the decision of the Court of Criminal Appeals under R.C.M. 908, if

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there is a further appeal to the Court of Appeals for the Armed Forces or, subsequently, to the Supreme Court, a new 120-day time period under this rule shall begin on the date the parties are notified of the final decision of the Court of Appeals for the Armed Forces, or, if appropriate, the Supreme Court.

(D) *Rehearings*. If a rehearing is ordered or authorized by an appellate court, a new 120-day time period under this rule shall begin on the date that the responsible convening authority receives the record of trial and the opinion authorizing or directing a rehearing. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.C.M. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.C.M. 803.

(E) *Commitment of the incompetent accused*. If the accused is committed to the custody of the Attorney General for hospitalization as provided in R.C.M. 909(f), all periods of such commitment shall be excluded when determining whether the period in subsection (a) of this rule has run. If, at the end of the period of commitment, the accused is returned to the custody of the general court-martial convening authority, a new 120-day time period under this rule shall begin on the date of such return to custody.

(c) *Excludable delay*. All periods of time during which appellate courts have issued stays in the proceedings, or the accused is absent without authority, or the accused is hospitalized due to incompetence, or is otherwise in the custody of the Attorney General, shall be excluded when determining whether the period in subsection (a) of this rule has run. All other pretrial delays approved by a military judge or the convening authority shall be similarly excluded.

(1) *Procedure*. Prior to referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority or, if authorized under regulations prescribed by the Secretary concerned, to a military judge for resolution. After referral, such requests for pretrial delay will be submitted to the military judge for resolution.

Discussion

The decision to grant or deny a reasonable delay is a matter within the sole discretion of the convening authority or a military judge. This decision should be based on the facts and circumstances then and there existing. Reasons to grant a delay might, for example, include the need for: time to enable counsel to prepare for trial in complex cases; time to allow examination into the mental capacity of the accused; time to process a member of the reserve component to active duty for disciplinary action; time to complete other proceedings related to the case; time requested by the defense; time to secure the availability of the accused, substantial witnesses, or other evidence; time to obtain appropriate security clearances for access to classified information or time to declassify evidence; or additional time for other good cause.

Pretrial delays should not be granted ex parte, and when practicable, the decision granting the delay, together with supporting reasons and the dates covering the delay, should be reduced to writing.

Prior to referral, the convening authority may delegate the authority to grant continuances to an Article 32 investigating officer.

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(2) *Motions*. Upon accused's timely motion to a military judge under R.C.M. 905 for speedy trial relief, counsel should provide the court a chronology detailing the processing of the case. This chronology should be made a part of the appellate record.

(d) *Remedy*. A failure to comply with this rule will result in dismissal of the affected charges, or, in a sentence-only rehearing, sentence relief as appropriate.

(1) *Dismissal*. Dismissal will be with or without prejudice to the government's right to reinstitute court-martial proceedings against the accused for the same offense at a later date. The charges must be dismissed with prejudice where the accused has been deprived of his or her constitutional right to a speedy trial. In determining whether to dismiss charges with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case that lead to dismissal; the impact of a re-prosecution on the administration of justice; and any prejudice to the accused resulting from the denial of a speedy trial.

(2) *Sentence relief*. In determining whether or how much sentence relief is appropriate, the military judge shall consider, among others, each of the following factors: the length of the delay, the reasons for the delay, the accused's demand for speedy trial, and any prejudice to the accused from the delay. Any sentence relief granted will be applied against the sentence approved by the convening authority.

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Excerpts from the MCM and UCMJ

Discussion

See subsection (c)(1) and the accompanying Discussion concerning reasons for delay and procedures for parties to request delay.

(e) *Waiver*. Except as provided in R.C.M. 910(a)(2), a plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense.

Discussion

Speedy trial issues may also be waived by a failure to raise the issue at trial. *See* R.C.M. 905(e) and 907(b)(2).

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CHAPTER VIII. TRIAL PROCEDURE GENERALLY

Rule 801. Military judge's responsibilities; other matters

(a) *Responsibilities of military judge*. The military judge is the presiding officer in a court-martial.

Discussion

The military judge is responsible for ensuring that court-martial proceedings are conducted in a fair and orderly manner, without unnecessary delay or waste of time or resources. Unless otherwise specified, the president of a special court-martial without a military judge has the same authority and responsibility as a military judge. *See* R.C.M. 502(b)(2).

The military judge shall:

(1) Determine the time and uniform for each session of a court-martial;

Discussion

The military judge should consult with counsel concerning the scheduling of sessions and the uniform to be worn. The military judge recesses or adjourns the court-martial as appropriate. Subject to R.C.M. 504(d)(1), the military judge may also determine the place of trial. *See also* R.C.M. 906(b)(11).

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(2) Ensure that the dignity and decorum of the proceedings are maintained;

Discussion

See also R.C.M. 804 and 806. Courts-martial should be conducted in an atmosphere which is conducive to calm and detached deliberation and determination of the issues presented and which reflects the seriousness of the proceedings.

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(3) Subject to the code and this Manual, exercise reasonable control over the proceedings to promote the purposes of these rules and this Manual;

Discussion

See R.C.M. 102. The military judge may, within the framework established by the code and this Manual, prescribe the manner and order in which the proceedings may take place. Thus, the military judge may determine: when, and in what order, motions will be litigated (*see* R.C.M. 905); the manner in which voir dire will be conducted and challenges made (*see* R.C.M. 902(d) and 912); the order in which witnesses may testify (*see* R.C.M. 913; Mil. R. Evid. 611); the order in which the parties may argue on a motion or objection; and the time limits for argument (*see* R.C.M. 905; 919; 1001(g)).

The military judge should prevent unnecessary waste of time and promote the ascertainment of truth, but must avoid undue interference with the parties' presentations or the appearance of partiality. The parties are entitled to a reasonable opportunity to properly present and support their contentions on any relevant matter.

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(4) Subject to subsection (e) of this rule, rule on all interlocutory questions and all questions of law raised during the court-martial; and

(5) Instruct the members on questions of law and procedure which may arise.

Discussion

The military judge instructs the members concerning findings (*see* R.C.M. 920) and sentence (*see* R.C.M. 1005), and when otherwise appropriate. For example, preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate. *See* R.C.M. 913. Other instructions (for example, instructions on the limited purpose for which evidence has been introduced, *see* Mil. R. Evid. 105) may be given whenever the need arises.

(b) *Rules of court; contempt*. The military judge may:

(1) Subject to R.C.M. 108, promulgate and enforce rules of court.

(2) Subject to R.C.M. 809, exercise contempt power.

(c) *Obtaining evidence*. The court-martial may act to obtain evidence in addition to that presented by the parties. The right of the members to have additional evidence obtained is subject to an interlocutory ruling by the military judge.

Discussion

The members may request and the military judge may require that a witness be recalled, or that a new witness be summoned, or other evidence produced. The members or military judge may direct trial counsel to make an inquiry along certain lines to discover and produce additional evidence. *See also* Mil. R. Evid. 614. In taking such action, the court-martial must not depart from an impartial role.

(d) *Uncharged offenses*. If during the trial there is evidence that the accused may be guilty of an untried offense not alleged in any specification before the court-martial, the court-martial shall proceed with the trial of the offense charged.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Discussion

A report of the matter may be made to the convening authority after trial. If charges are preferred for an offense indicated by the evidence referred to in this subsection, no member of the court-martial who participated in the first trial should sit in any later trial. Such a member would ordinarily be subject to a challenge for cause. *See* R.C.M. 912. *See also* Mil. R. Evid. 105 concerning instructing the members on evidence of uncharged misconduct.

(e) *Interlocutory questions and questions of law*. For purposes of this subsection "military judge" does not include the president of a special court-martial without a military judge.

(1) *Rulings by the military judge*.

(A) *Finality of rulings*. Any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final.

(B) *Changing a ruling*. The military judge may change a ruling made by that or another military judge in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(C) *Article 39(a) sessions*. When required by this Manual or otherwise deemed appropriate by the military judge, interlocutory questions or questions of law shall be presented and decided at sessions held without members under R.C.M. 803.

Discussion

Sessions without members are appropriate for interlocutory questions, questions of law, and instructions. *See also* Mil. R. Evid. 103; 304; 311; 321. Such sessions should be used to the extent possible consistent with the orderly, expeditious progress of the proceedings.

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(2) *Ruling by the president of a special court-martial without a military judge*.

(A) *Questions of law*. Any ruling by the president of a special court-martial without a military judge on any question of law other than a motion for a finding of not guilty is final.

(B) *Questions of fact*. Any ruling by the president of a special court-martial without a military judge on any interlocutory question of fact, including a factual issue of mental capacity of the accused, or on a motion for a finding of not guilty, is final unless objected to by a member.

(C) *Changing a ruling*. The president of a special court-martial without a military judge may change a ruling made by that or another president in the case except a previously granted motion for a finding of not guilty, at any time during the trial.

(D) *Presence of members*. Except as provided in R.C.M. 505 and 912, all members will be present at all sessions of a special court-martial without a military judge, including sessions at which questions of law or interlocutory questions are litigated. However, the president of a special court-martial without a military judge may examine an offered item of real or documentary evidence before ruling on its admissibility without exposing it to other members.

(3) *Procedures for rulings by the president of a special court-martial without a military judge which are subject to objection by a member*.

(A) *Determination*. The president of a special court-martial without a military judge shall determine whether a ruling is subject to objection.

(B) *Instructions*. When a ruling by the president of a special court-martial without a military judge is subject to objection, the president shall so advise the members and shall give such instructions on the issue as may be necessary to enable the members to understand the issue and the legal standards by which they will determine it if objection is made.

(C) *Voting*. When a member objects to a ruling by the president of a special court-martial without a military judge which is subject to objection, the court-martial shall be closed, and the members shall vote orally, beginning with the junior in rank, and the question shall be decided by a majority vote. A tie vote on a motion for a finding of not guilty is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

(D) *Consultation*. The president of a special court-martial without a military judge may close the court-martial and consult with other members before ruling on a matter, when such ruling is subject to the objection of any member.

(4) *Standard of proof*. Questions of fact in an interlocutory question shall be determined by a preponderance of the evidence, unless otherwise stated in this Manual. In the absence of a rule in this Manual assigning the burden of persuasion, the party

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making the motion or raising the objection shall bear the burden of persuasion.

Discussion

A ruling on an interlocutory question should be preceded by any necessary inquiry into the pertinent facts and law. For example, the party making the objection, motion, or request may be required to furnish evidence or legal authority in support of the contention. An interlocutory issue may have a different standard of proof. *See*, for example, Mil. R. Evid. 314(e)(5), which requires consent for a search to be proved by clear and convincing evidence.

Most of the common motions are discussed in specific rules in this Manual, and the burden of persuasion is assigned therein. The prosecution usually bears the burden of persuasion (*see* Mil. R. Evid. 304(e); 311(e); *see also* R.C.M. 905 through 907) once an issue has been raised. What "raises" an issue may vary with the issue. Some issues may be raised by a timely motion or objection. *See*, for example, Mil. R. Evid. 304(e). Others may not be raised until the defense has made an offer of proof or presented evidence in support of its position. *See*, for example, Mil. R. Evid. 311(g)(2). The rules in this Manual and relevant decisions should be consulted when a question arises as to whether an issue is raised, as well as which side has the burden of persuasion. The military judge or president of a special court-martial may require a party to clarify a motion or objection or to make an offer of proof, regardless of the burden of persuasion, when it appears that the motion or objection is vague, inapposite, irrelevant, or spurious.

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(5) *Scope*. Subsection (e) of this rule applies to the disposition of questions of law and interlocutory questions arising during trial except the question whether a challenge should be sustained.

Discussion

Questions of law and interlocutory questions include all issues which arise during trial other than the findings (that is, guilty or not guilty), sentence, and administrative matters such as declaring recesses and adjournments. A question may be both interlocutory and a question of law. Challenges are specifically covered in R.C.M. 902 and 912.

Questions of the applicability of a rule of law to an undisputed set of facts are normally questions of law. Similarly, the legality of an act is normally a question of law. For example, the legality of an order when disobedience of an order is charged, the legality of restraint when there is a prosecution for breach of arrest, or the sufficiency of warnings before interrogation are normally questions of law. It is possible, however, for such questions to be decided solely upon some factual issue, in which case they would be questions of fact. For example, the question of what warnings, if any, were given by an interrogator to a suspect would be a factual question.

A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory. An issue may arise as both an interlocutory question and a question which may determine the ultimate issue of guilt. An issued is not purely interlocutory if an accused raises a defense or objection and the disputed facts involved determine the ultimate question of guilt. For example, if during a trial for desertion the accused moves to dismiss for lack of jurisdiction and presents some evidence that the accused is not a member of an armed force, the accused's status as a military person may determine the ultimate question of guilt because status is an element of the offense. If the motion is denied, the disputed facts must be resolved by each member in deliberation upon the findings. (The accused's status as a servicemember would have to be proved by a preponderance of the evidence to uphold jurisdiction, *see* R.C.M. 907, but beyond a reasonable doubt to permit a finding of guilty.) If, on the other hand, the accused was charged with larceny and presented the same evidence as to military status, the evidence would bear only upon amenability to trial and the issue would be disposed of solely as an interlocutory question.

Interlocutory questions may be questions of fact or questions of law. This distinction is important because the president of a special court-martial without a military judge rules finally on interlocutory questions of law, but not on interlocutory questions of fact. On interlocutory questions of fact the president of a special court-martial without a military judge rules subject to the objection of any other member. On mixed questions of fact and law, rulings by the president are subject to objection by any member to the extent that the issue of fact can be isolated and considered separately.

(f) *Rulings on record*. All sessions involving rulings or instructions made or given by the military judge or the president of a special court-martial without a military judge shall be made a part of the record. All rulings and instructions shall be made or given in open session in the presence of the parties and the members, except as otherwise may be determined in the discretion of the military judge. For purposes of this subsection [R.C.M. 801(f)] "military judge" does not include the president of a special court-martial without a military judge.

Discussion

See R.C.M. 808 and 1103 concerning preparation of the record of trial.

(g) *Effect of failure to raise defenses or objections*. Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual or by the military judge under authority of this Manual, or prior to any extension thereof made by the military judge, shall constitute waiver thereof, but the military judge for good cause shown may grant relief from the waiver.

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(1) "Proceeding" includes pretrial, trial, post-trial, appellate review, or other stages of litigation.

(2) The "degree of relationship" is calculated according to the civil law system.

Discussion

Relatives within the third degree of relationship are children, grandchildren, great grandchildren, parents, grandparents, great grandparents, brothers, sisters, uncles, aunts, nephews, and nieces.

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(3) "Military judge" does not include the president of a special court-martial without a military judge.

(d) *Procedure*.

(1) The military judge shall, upon motion of any party or *sua sponte*, decide whether the military judge is disqualified.

Discussion

There is no peremptory challenge against a military judge. A military judge should carefully consider whether any of the grounds for disqualification in this rule exist in each case. The military judge should broadly construe grounds for challenge but should not step down from a case unnecessarily.

Possible grounds for disqualification should be raised at the earliest reasonable opportunity. They may be raised at any time, and an earlier adverse ruling does not bar later consideration of the same issue, as, for example, when additional evidence is discovered.

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(2) Each party shall be permitted to question the military judge and to present evidence regarding a possible ground for disqualification before the military judge decides the matter.

Discussion

Nothing in this rule prohibits the military judge from reasonably limiting the presentation of evidence, the scope of questioning, and argument on the subject so as to ensure that only matters material to the central issue of the military judge's possible disqualification are considered, thereby, preventing the proceedings from becoming a forum for unfounded opinion, speculation or innuendo.

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(3) Except as provided under subsection (e) of this rule, if the military judge rules that the military judge is disqualified, the military judge shall recuse himself or herself.

(e) *Waiver*. No military judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b) of this rule. Where the ground for disqualification arises only under subsection (a) of this rule, waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

Rule 903. Accused's elections on composition of court-martial

(a) *Time of elections*.

(1) *Request for enlisted members*. Before the end of the initial Article 39(a) session or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether an enlisted accused elects to be tried by a court-martial including enlisted members. The military judge may, as a matter of discretion, permit the accused to defer requesting enlisted members until any time before assembly, which time may be determined by the military judge.

(2) *Request for trial by military judge alone*. Before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly, the military judge shall ascertain, as applicable, whether in a noncapital case, the accused requests trial by the military judge alone. The accused may defer requesting trial by military judge alone until any time before assembly.

Discussion

Only an enlisted accused may request that enlisted members be detailed to a court-martial. Trial by military judge alone is not permitted in capital cases (*see* R.C.M. 201(f)(1)(C)) or in special courts-martial in which no military judge has been detailed.

(b) *Form of election*.

(1) *Request for enlisted members*. A request for the membership of the court-martial to include enlisted persons shall be in writing and signed by the accused or shall be made orally on the record.

(2) *Request for trial by military judge alone*. A request for trial by military judge alone shall be in writing and signed by the accused or shall be made orally on the record.

(c) *Action on election*.

(1) *Request for enlisted members*. Upon notice of a timely request for enlisted members by an enlisted accused, the convening authority shall detail enlisted members to the court-martial in accordance with R.C.M. 503 or prepare a detailed written statement explaining why physical conditions or military exi-

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gencies prevented this. The trial of the general issue shall not proceed until this is done.

(2) *Request for military judge alone*. Upon receipt of a timely request for trial by military judge alone the military judge shall:

(A) Ascertain whether the accused has consulted with defense counsel and has been informed of the identity of the military judge and of the right to trial by members; and

Discussion

Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding. Failure to do so is not error, however, where such knowledge and understanding otherwise appear on the record.

DD Form 1722 (Request for Trial Before Military Judge Alone (Art.16, UCMJ)) should normally be used for the purpose of requesting trial by military judge alone under this rule, if a written request is used.

(B) Approve or disapprove the request, in the military judge's discretion.

Discussion

A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as factfinder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record.

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(3) *Other*. In the absence of a request for enlisted members or a request for trial by military judge alone, trial shall be by a court-martial composed of officers.

Discussion

Ordinarily if no request for enlisted members or trial by military judge alone is submitted, the military judge should inquire whether such a request will be made (*see* subsection (a)(1) of this rule) unless these elections are not available to the accused.

(d) *Right to withdraw request*.

(1) *Enlisted members*. A request for enlisted members may be withdrawn by the accused as a matter of right any time before the end of the initial Article 39(a) session, or, in the absence of such a session, before assembly.

(2) *Military judge*. A request for trial by military judge alone may be withdrawn by the accused as a matter of right any time before it is approved, or even after approval, if there is a change of the military judge.

Discussion

Withdrawal of a request for enlisted members or trial by military judge alone should be shown in the record.

(e) *Untimely requests*. Failure to request, or failure to withdraw a request for enlisted members or trial by military judge alone in a timely manner shall waive the right to submit or to withdraw such a request. However, the military judge may until the beginning of the introduction of evidence on the merits, as a matter of discretion, approve an untimely request or withdrawal of a request.

Discussion

In exercising discretion whether to approve an untimely request or withdrawal of a request, the military judge should balance the reason for the request (for example, whether it is a mere change of tactics or results from a substantial change of circumstances) against any expense, delay, or inconvenience which would result from granting the request.

(f) *Scope*. For purposes of this rule, "military judge" does not include the president of a special court-martial without a military judge.

Rule 904. Arraignment

Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

Discussion

Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment.

When authorized by regulations of the Secretary concerned, the arraignment should be conducted at an Article 39(a) session when a military judge has been detailed. The accused may not be arraigned at a conference under R.C.M. 802.

Once the accused has been arraigned, no additional charges against that accused may be referred to that court-martial for trial with the previously referred charges. *See* R.C.M. 601(e)(2).

The defense should be asked whether it has any motions to make before pleas are entered. Some motions ordinarily must be made before a plea is entered. *See* R.C.M. 905(b).

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begin anew on the date the general court-martial convening authority takes custody of the accused at the end of any period of commitment.

Rule 910. Pleas

(a) *Alternatives*.

(1) *In general*. An accused may plead as follows: guilty; not guilty to an offense as charged, but guilty of a named lesser included offense; guilty with exceptions, with or without substitutions, not guilty of the exceptions, but guilty of the substitutions, if any; or, not guilty. A plea of guilty may not be received as to an offense for which the death penalty may be adjudged by the court-martial.

Discussion

See paragraph 2, Part IV, concerning lesser included offenses. When the plea is to a lesser included offense without the use of exceptions and substitutions, the defense counsel should provide a written revised specification accurately reflecting the plea and request that the revised specification be included in the record as an appellate exhibit. In 2010, the court held in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010), that the elements test is the proper method of determining lesser included offenses. As a result, "named" lesser included offenses listed in the Manual are not binding and must be analyzed on a case-by-case basis in conformity with *Jones*. *See* discussion following paragraph 3b(1)(c) in Part IV of this Manual and the related analysis in Appendix 23.

A plea of guilty to a lesser included offense does not bar the prosecution from proceeding on the offense as charged. *See* also subsection (g) of this rule.

A plea of guilty does not prevent the introduction of evidence, either in support of the factual basis for the plea, or, after findings are entered, in aggravation. *See* R.C.M. 1001(b)(4).

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(2) *Conditional pleas*. With the approval of the military judge and the consent of the Government, an accused may enter a conditional plea of guilty, reserving the right, on further review or appeal, to review of the adverse determination of any specified pretrial motion. If the accused prevails on further review or appeal, the accused shall be allowed to withdraw the plea of guilty. The Secretary concerned may prescribe who may consent for Government; unless otherwise prescribed by the Secretary concerned, the trial counsel may consent on behalf of the Government.

(b) *Refusal to plead; irregular plea*. If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.

Discussion

An irregular plea includes pleas such as guilty without criminality or guilty to a charge but not guilty to all specifications thereunder. When a plea is ambiguous, the military judge should have it clarified before proceeding further.

(c) *Advice to accused*. Before accepting a plea of guilty, the military judge shall address the accused personally and inform the accused of, and determine that the accused understands, the following:

(1) The nature of the offense to which the plea is offered, the mandatory minimum penalty, if any, provided by law, and the maximum possible penalty provided by law;

Discussion

The elements of each offense to which the accused has pleaded guilty should be described to the accused. *See also* subsection (e) of this rule.

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(2) In a general or special court-martial, if the accused is not represented by counsel, that the accused has the right to be represented by counsel at every stage of the proceedings;

Discussion

In a general or special court-martial, if the accused is not represented by counsel, a plea of guilty should not be accepted.

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(3) That the accused has the right to plead not guilty or to persist in that plea if already made, and that the accused has the right to be tried by a court-martial, and that at such trial the accused has the right to confront and cross-examine witnesses against the accused, and the right against self-incrimination;

(4) That if the accused pleads guilty, there will not be a trial of any kind as to those offenses to which the accused has so pleaded, so that by pleading guilty the accused waives the rights described in subsection (c)(3) of this Rule; and

(5) That if the accused pleads guilty, the military judge will question the accused about the offenses to which the accused has pleaded guilty, and, if the accused answers these questions under oath, on the record, and in the presence of counsel, the accused's

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answers may later be used against the accused in a prosecution for perjury or false statement.

Discussion

The advice in subsection (5) is inapplicable in a court-martial in which the accused is not represented by counsel.

(d) *Ensuring that the plea is voluntary*. The military judge shall not accept a plea of guilty without first, by addressing the accused personally, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement under R.C.M. 705. The military judge shall also inquire whether the accused's willingness to plead guilty results from prior discussions between the convening authority, a representative of the convening authority, or trial counsel, and the accused or defense counsel.

(e) *Determining accuracy of plea*. The military judge shall not accept a plea of guilty without making such inquiry of the accused as shall satisfy the military judge that there is a factual basis for the plea. The accused shall be questioned under oath about the offenses.

Discussion

A plea of guilty must be in accord with the truth. Before the plea is accepted, the accused must admit every element of the offense(s) to which the accused pleaded guilty. Ordinarily, the elements should be explained to the accused. If any potential defense is raised by the accused's account of the offense or by other matter presented to the military judge, the military judge should explain such a defense to the accused and should not accept the plea unless the accused admits facts which negate the defense. If the statute of limitations would otherwise bar trial for the offense, the military judge should not accept a plea of guilty to it without an affirmative waiver by the accused. *See* R.C.M. 907(b)(2)(B).

The accused need not describe from personal recollection all the circumstances necessary to establish a factual basis for the plea. Nevertheless the accused must be convinced of, and able to describe all the facts necessary to establish guilt. For example, an accused may be unable to recall certain events in an offense, but may still be able to adequately describe the offense based on witness statements or similar sources which the accused believes to be true.

The accused should remain at the counsel table during questioning by the military judge.

(f) *Plea agreement inquiry*.

(1) *In general*. A plea agreement may not be accepted if it does not comply with R.C.M. 705.

(2) *Notice*. The parties shall inform the military judge if a plea agreement exists.

Discussion

The military judge should ask whether a plea agreement exists. *See* subsection (d) of this rule. Even if the military judge fails to so inquire or the accused answers incorrectly, counsel have an obligation to bring any agreements or understandings in connection with the plea to the attention of the military judge.

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(3) *Disclosure*. If a plea agreement exists, the military judge shall require disclosure of the entire agreement before the plea is accepted, provided that in trial before military judge alone the military judge ordinarily shall not examine any sentence limitation contained in the agreement until after the sentence of the court-martial has been announced.

(4) *Inquiry*. The military judge shall inquire to ensure:

(A) That the accused understands the agreement; and

(B) That the parties agree to the terms of the agreement.

Discussion

If the plea agreement contains any unclear or ambiguous terms, the military judge should obtain clarification from the parties. If there is doubt about the accused's understanding of any terms in the agreement, the military judge should explain those terms to the accused.

(g) *Findings*. Findings based on a plea of guilty may be entered immediately upon acceptance of the plea at an Article 39(a) session unless:

(1) Such action is not permitted by regulations of the Secretary concerned;

(2) The plea is to a lesser included offense and the prosecution intends to proceed to trial on the offense as charged; or

(3) Trial is by a special court-martial without a military judge, in which case the president of the court-martial may enter findings based on the pleas without a formal vote except when subsection (g)(2) of this rule applies.

Discussion

If the accused has pleaded guilty to some offenses but not to others, the military judge should ordinarily defer informing the members of the offenses to which the accused has pleaded guilty until after findings on the remaining offenses have been entered.

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See R.C.M. 913(a), Discussion and R.C.M. 920(e), Discussion, paragraph 3.

(h) *Later action*.

(1) *Withdrawal by the accused*. If after acceptance of the plea but before the sentence is announced the accused requests to withdraw a plea of guilty and substitute a plea of not guilty or a plea of guilty to a lesser included offense, the military judge may as a matter of discretion permit the accused to do so.

(2) *Statements by accused inconsistent with plea*. If after findings but before the sentence is announced the accused makes a statement to the court-martial, in testimony or otherwise, or presents evidence which is inconsistent with a plea of guilty on which a finding is based, the military judge shall inquire into the providence of the plea. If, following such inquiry, it appears that the accused entered the plea improvidently or through lack of understanding of its meaning and effect a plea of not guilty shall be entered as to the affected charges and specifications.

Discussion

When the accused withdraws a previously accepted plea for guilty or a plea of guilty is set aside, counsel should be given a reasonable time to prepare to proceed. In a trial by military judge alone, recusal of the military judge or disapproval of the request for trial by military judge alone will ordinarily be necessary when a plea is rejected or withdrawn after findings; in trial with members, a mistrial will ordinarily be necessary.

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(3) *Pretrial agreement inquiry*. After sentence is announced the military judge shall inquire into any parts of a pretrial agreement which were not previously examined by the military judge. If the military judge determines that the accused does not understand the material terms of the agreement, or that the parties disagree as to such terms, the military judge shall conform, with the consent of the Government, the agreement to the accused's understanding or permit the accused to withdraw the plea.

Discussion

See subsection (f)(3) of this rule.

(i) *Record of proceedings*. A verbatim record of the guilty plea proceedings shall be made in cases in which a verbatim record is required under R.C.M. 1103. In other special courts-martial, a summary of the explanation and replies shall be included in the record of trial. As to summary courts-martial, *see* R.C.M. 1305.

(j) *Waiver*. Except as provided in subsection (a)(2) of this rule, a plea of guilty which results in a finding of guilty waives any objection, whether or not previously raised, insofar as the objection relates to the factual issue of guilt of the offense(s) to which the plea was made.

Rule 911. Assembly of the court-martial

The military judge shall announce the assembly of the court-martial.

Discussion

When trial is by a court-martial with members, the court-martial is ordinarily assembled immediately after the members are sworn. The members are ordinarily sworn at the first session at which they appear, as soon as all parties and personnel have been announced. The members are seated with the president, who is the senior member, in the center, and the other members alternately to the president's right and left according to rank. If the rank of a member is changed, or if the membership of the court-martial changes, the members should be reseated accordingly.

When trial is by military judge alone, the court-martial is ordinarily assembled immediately following approval of the request for trial by military judge alone.

Assembly of the court-martial is significant because it marks the point after which: substitution of the members and military judge may no longer take place without good cause (*see* Article 29; R.C.M. 505; 902; 912); the accused may no longer, as a matter of right, request trial by military judge alone or withdraw such a request previously approved (*see* Article 16; R.C.M. 903(a)(2)(d)); and the accused may no longer request, even with the permission of the military judge, or withdraw from a request for, enlisted members (*see* Article 25(c)(1); R.C.M. 903(a)(1)(d)).

Rule 912. Challenge of selection of members; examination and challenges of members

(a) *Pretrial matters*.

(1) *Questionnaires*. Before trial the trial counsel may, and shall upon request of the defense counsel, submit to each member written questions requesting the following information:

(A) Date of birth;

(B) Sex;

(C) Race;

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(D) Marital status and sex, age, and number of dependents;

(E) Home of record;

(F) Civilian and military education, including, when available, major areas of study, name of school or institution, years of education, and degrees received;

(G) Current unit to which assigned;

(H) Past duty assignments;

(I) Awards and decorations received;

(J) Date of rank; and

(K) Whether the member has acted as accuser, counsel, investigating officer, convening authority, or legal officer or staff judge advocate for the convening authority in the case, or has forwarded the charges with a recommendation as to disposition.

Additional information may be requested with the approval of the military judge. Each member's responses to the questions shall be written and signed by the member.

Discussion

Using questionnaires before trial may expedite voir dire and may permit more informed exercise of challenges.

If the questionnaire is marked or admitted as an exhibit at the court-martial it must be attached to or included in the record of trial. *See* R.C.M. 1103(b)(2)(D)(iv) and (b)(3)(B).

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(2) *Other materials*. A copy of any written materials considered by the convening authority in selecting the members detailed to the court-martial shall be provided to any party upon request, except that such materials pertaining solely to persons who were not selected for detail as members need not be provided unless the military judge, for good cause, so directs.

(b) *Challenge of selection of members*.

(1) *Motion*. Before the examination of members under subsection (d) of this rule begins, or at the next session after a party discovered or could have discovered by the exercise of diligence, the grounds therefor, whichever is earlier, that party may move to stay the proceedings on the ground that members were selected improperly.

Discussion

See R.C.M. 502(a) and 503(a) concerning selection of members. Members are also improperly selected when, for example, a certain group or class is arbitrarily excluded from consideration as members.

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(2) *Procedure*. Upon a motion under subsection (b)(1) of this rule containing an offer of proof of matters which, if true, would constitute improper selection of members, the moving party shall be entitled to present evidence, including any written materials considered by the convening authority in selecting the members. Any other party may also present evidence on the matter. If the military judge determines that the members have been selected improperly, the military judge shall stay any proceedings requiring the presence of members until members are properly selected.

(3) *Waiver*. Failure to make a timely motion under this subsection shall waive the improper selection unless it constitutes a violation of R.C.M. 501(a), 502(a)(1), or 503(a)(2).

(c) *Stating grounds for challenge*. The trial counsel shall state any ground for challenge for cause against any member of which the trial counsel is aware.

(d) *Examination of members*. The military judge may permit the parties to conduct the examination of members or may personally conduct the examination. In the latter event the military judge shall permit the parties to supplement the examination by such further inquiry as the military judge deems proper or the military judge shall submit to the members such additional questions by the parties as the military judge deems proper. A member may be questioned outside the presence of other members when the military judge so directs.

Discussion

Examination of the members is called "voir dire." If the members have not already been placed under oath for the purpose of voir dire (*see* R.C.M. 807(b)(2) Discussion (B)), they should be sworn before they are questioned.

The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case.

The nature and scope of the examination of members is within the discretion of the military judge. Members may be questioned individually or collectively. Ordinarily, the military judge should permit counsel to personally question the members. Trial counsel ordinarily conducts an inquiry before the defense. Whether trial counsel will question all the members before the defense begins or whether some other procedure will be followed depends on the circumstances. For example, when members are

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questioned individually outside the presence of other members, each party would ordinarily complete questioning that member before another member is questioned. The military judge and each party may conduct additional questioning, after initial questioning by a party, as necessary.

Ordinarily the members should be asked whether they are aware of any ground for challenge against them. This may expedite further questioning. The members should be cautioned, however, not to disclose information in the presence of other members which might disqualify them.

(e) *Evidence*. Any party may present evidence relating to whether grounds for challenge exist against a member.

(f) *Challenges and removal for cause*.

(1) *Grounds*. A member shall be excused for cause whenever it appears that the member:

(A) Is not competent to serve as a member under Article 25(a), (b), or (c);

(B) Has not been properly detailed as a member of the court-martial;

(C) Is an accuser as to any offense charged;

(D) Will be a witness in the court-martial;

(E) Has acted as counsel for any party as to any offense charged;

(F) Has been an investigating officer as to any offense charged;

(G) Has acted in the same case as convening authority or as the legal officer or staff judge advocate to the convening authority;

(H) Will act in the same case as reviewing authority or as the legal officer or staff judge advocate to the reviewing authority;

(I) Has forwarded charges in the case with a personal recommendation as to disposition;

(J) Upon a rehearing or new or other trial of the case, was a member of the court-martial which heard the case before;

(K) Is junior to the accused in grade or rank, unless it is established that this could not be avoided;

(L) Is in arrest or confinement;

(M) Has formed or expressed a definite opinion as to the guilt or innocence of the accused as to any offense charged;

(N) Should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality.

Discussion

Examples of matters which may be grounds for challenge under subsection (N) are that the member: has a direct personal interest in the result of the trial; is closely related to the accused, a counsel, or a witness in the case; has participated as a member or counsel in the trial of a closely related case; has a decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged.

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(2) *When made*.

(A) *Upon completion of examination*. Upon completion of any examination under subsection (d) of this rule and the presentation of evidence, if any, on the matter, each party shall state any challenges for cause it elects to make.

(B) *Other times*. A challenge for cause may be made at any other time during trial when it becomes apparent that a ground for challenge may exist. Such examination of the member and presentation of evidence as may be necessary may be made in order to resolve the matter.

(3) *Procedure*. Each party shall be permitted to make challenges outside the presence of the members. The party making a challenge shall state the grounds for it. Ordinarily the trial counsel shall enter any challenges for cause before the defense counsel. The military judge shall rule finally on each challenge. When a challenge for cause is granted, the member concerned shall be excused. The burden of establishing that grounds for a challenge exist is upon the party making the challenge. A member successfully challenged shall be excused.

(4) *Waiver*. The grounds for challenge in subsection (f)(1)(A) of this rule may not be waived except that membership of enlisted members in the same unit as the accused may be waived. Membership of enlisted members in the same unit as the accused and any other ground for challenge is waived if the party knew of or could have discovered by the exercise of diligence the ground for challenge and failed to raise it in a timely manner. Notwithstanding the absence of a challenge or waiver of a challenge by the parties, the military judge may, in the interest of justice, excuse a member against whom a challenge for cause would lie. When a challenge for cause has been denied the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge

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of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review.

Discussion

See also Mil. R. Evid. 606(b) when a member may be a witness.

(g) *Peremptory challenges*.

(1) *Procedure*. Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenge before the defense.

Discussion

Generally, no reason is necessary for a peremptory challenge. *But see Batson v. Kentucky* 476 U.S. 79 (1986); *United States v. Curtis*, 33 M.J. 101 (C.M.A. 1991), *cert. denied*, 112 S.Ct. 1177 (1992); *United States v. Moore*, 28 M.J. 366 (C.M.A. 1989); *United States v. Santiago-Davilla*, 26 M.J. 380 (C.M.A. 1988).

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(2) *Waiver*. Failure to exercise a peremptory challenge when properly called upon to do so shall waive the right to make such a challenge. The military judge may, for good cause shown, grant relief from the waiver, but a peremptory challenge may not be made after the presentation of evidence before the members has begun. However, nothing in this subsection shall bar the exercise of a previously unexercised peremptory challenge against a member newly detailed under R.C.M. 505(c)(2)(B), even if presentation of evidence on the merits has begun.

Discussion

When the membership of the court-martial has been reduced below a quorum (*see* R.C.M. 501) or, when enlisted members have been requested, the fraction of enlisted members has been reduced below one-third, the proceedings should be adjourned and the convening authority notified so that new members may be detailed. *See* R.C.M. 505. *See also* R.C.M. 805(d) concerning other procedures when new members are detailed.

(h) *Special courts-martial without a military judge*. In a special court-martial without a military judge, the procedures in this rule shall apply, except that challenges shall be made in the presence of the members and a ruling on any challenge for cause shall be decided by a majority vote of the members upon secret written ballot in closed session. The challenged member shall not be present at the closed session at which the challenge is decided. A tie vote on a challenge disqualifies the member challenged. Before closing, the president shall give such instructions as may be necessary to resolve the challenge. Each challenge shall be decided separately, and all unexcused members except the challenged member shall participate. When only three members are present and one is challenged, the remaining two may decide the challenge. When the president is challenged, the next senior member shall act as president for purposes of deciding the challenge.

(i) *Definitions*.

(1) *Military judge*. For purpose of this rule, "military judge" does not include the president of a special court-martial without a military judge.

(2) *Witness*. For purposes of this rule, "witness" includes one who testifies at a court-martial and anyone whose declaration is received in evidence for any purpose, including written declarations made by affidavit or otherwise.

Discussion

For example, a person who by certificate has attested or otherwise authenticated an official record or other writing introduced in evidence is a witness.

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(3) *Investigating officer*. For purposes of this rule, "investigating officer" includes any person who has investigated charges under R.C.M. 405 and any person who as counsel for a member of a court of inquiry, or otherwise personally has conducted an investigation of the general matter involving the offenses charged.

Rule 913. Presentation of the case on the merits

(a) *Preliminary instructions*. The military judge may give such preliminary instructions as may be appropriate. If mixed pleas have been entered, the military judge should ordinarily defer informing the members of the offenses to which the accused pleaded guilty

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Excerpts from the MCM and UCMJ

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) *Required instructions*. Instructions on findings shall include:

(1) A description of the elements of each offense charged, unless findings on such offenses are unnecessary because they have been entered pursuant to a plea of guilty;

(2) A description of the elements of each lesser included offense in issue, unless trial of a lesser included offense is barred by the statute of limitations (Article 43) and the accused refuses to waive the bar;

(3) A description of any special defense under R.C.M. 916 in issue;

(4) A direction that only matters properly before the court-martial may be considered;

(5) A charge that—

(A) The accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond reasonable doubt;

(B) In the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(C) If, when a lesser included offense is in issue, there is a reasonable doubt as to the degree of guilt of the accused, the finding must be in a lower degree as to which there is not reasonable doubt; and

(D) The burden of proof to establish the guilt of the accused is upon the Government. [When the issue of lack of mental responsibility is raised, add: The burden of proving the defense of lack of mental responsibility by clear and convincing evidence is upon the accused. When the issue of mistake of fact under R.C.M. 916(j)(2) or (j)(3) is raised, add: The accused has the burden of proving the defense of mistake of fact as to consent or age by a preponderance of the evidence.]

(6) Directions on the procedures under R.C.M. 921 for deliberations and voting; and

(7) Such other explanations, descriptions, or directions as may be necessary and which are properly requested by a party or which the military judge determines, *sua sponte*, should be given.

Discussion

A matter is "in issue" when some evidence, without regard to its source or credibility, has been admitted upon which members might rely if they choose. An instruction on a lesser included offense is proper when an element from the charged offense which distinguishes thatoffense from the lesser offense is in dispute.

See R.C.M. 918(c) and discussion as to reasonable doubt and other matters relating to the basis for findings which may be the subject of an instruction.

Other matters which may be the subject of instruction in appropriate cases included: inferences (*see* the explanations in Part IV concerning inferences relating to specific offenses); the limited purpose for which evidence was admitted (regardless of whether such evidence was offered by the prosecution of defense) (*see* Mil. R. Evid. 105); the effect of character evidence (*see* Mil. R. Evid. 404; 405); the effect of judicial notice (*see* Mil. R. Evid. 201, 201A); the weight to be given a pretrial statement (*see* Mil. R. Evid. 340(e)); the effect of stipulations (*see* R.C.M. 811); that, when a guilty plea to a lesser included offense has been accepted, the members should accept as proved the matters admitted by the plea, but must determine whether the remaining elements are established; that a plea of guilty to one offense may not be the basis for inferring the existence of a fact or element of another offense; the absence of the accused from trial should not be held against the accused; and that no adverse inferences may be drawn from an accused's failure to testify (*see* Mil. R. Evid. 301(g)).

The military judge may summarize and comment upon evidence in the case in instructions. In doing so, the military judge should present an accurate, fair, and dispassionate statement of what the evidence shows; not depart from an impartial role; not assume as true the existence or nonexistence of a fact in issue when the evidence is conflicting or disputed, or when there is no evidence to support the matter; and make clear that the members must exercise their independent judgment as to the facts.

(f) *Waiver*. Failure to object to an instruction or to omission of an instruction before the members close to deliberate constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify of what respect the instructions given were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 921. Deliberations and voting on findings

(a) *In general*. After the military judge instructs the members on findings, the members shall deliberate and vote in a closed session. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner in an

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

attempt to control the independence of members in the exercise of their judgment.

(b) *Deliberations*. Deliberations properly include full and free discussion of the merits of the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such request.

(c) *Voting*.

(1) *Secret ballot*. Voting on the findings for each charge and specification shall be by secret written ballot. All members present shall vote.

(2) *Numbers of votes required to convict*.

(A) *Death penalty mandatory*. A finding of guilty of an offense for which the death penalty is mandatory results only if all members present vote for a finding of guilty.

Discussion

Article 106 is the only offense under the code for which the death penalty is mandatory.

(B) *Other offenses*. As to any offense for which the death penalty is not mandatory, a finding of guilty results only if at least two-thirds of the members present vote for a finding of guilty.

Discussion

In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, if there are five members, the concurrence of at least four would be required to convict. The military judge should instruct the members on the specific number of votes required to convict.

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(3) *Acquittal*. If fewer than two-thirds of the members present vote for a finding of guilty—or, when the death penalty is mandatory, if fewer than all the members present vote for a finding of guilty—a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

(4) *Not guilty only by reason of lack of mental responsibility*. When the defense of lack of mental responsibility is in issue under R.C.M. 916(k)(1), the members shall first vote on whether the prosecution has proven the elements of the offense beyond a reasonable doubt. If at least two-thirds of the members present (all members for offenses where the death penalty is mandatory) vote for a finding of guilty, then the members shall vote on whether the accused has proven lack of mental responsibility. If a majority of the members present concur that the accused has proven lack of mental responsibility by clear and convincing evidence, a finding of not guilty only by reason of lack of mental responsibility results. If the vote on lack of mental responsibility does not result in a finding of not guilty only by reason of lack of mental responsibility, then the defense of lack of mental responsibility has been rejected and the finding of guilty stands.

Discussion

If lack of mental responsibility is in issue with regard to more than one specification, the members should determine the issue of lack of mental responsibility on each specification separately.

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(5) *Included offenses*. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each such offense.

(6) *Procedure for voting*.

(A) *Order*. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

(B) *Counting votes*. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

Once findings have been reached, they may be reconsidered only in accordance with R.C.M. 924.

(d) *Action after findings are reached*. After the

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

members have reached findings on each charge and specification before them, the court-martial shall be opened and the president shall inform the military judge that findings have been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the findings and may assist the members in putting the findings in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the findings.

Discussion

Ordinarily a findings worksheet should be provided to the members as an aid to putting the findings in proper form. *See* Appendix 10 for a format for findings. If the military judge examines any writing by the members or otherwise assists them to put findings in proper form, this must be done in an open session and counsel should be given the opportunity to examine such a writing and to be heard on any instructions the military judge may give. *See* Article 39(b).

The president should not disclose any specific number of votes for or against any finding.

Rule 922. Announcement of findings

(a) *In general*. Findings shall be announced in the presence of all parties promptly after they have been determined.

Discussion

See Appendix 10. A finding of an offense about which no instructions were given is not proper.

(b) *Findings by members*. The president shall announce the findings by the members.

(1) If a finding is based on a plea of guilty, the president shall so state.

(2) In a capital case, if a finding of guilty is unanimous with respect to a capital offense, the president shall so state. This provision shall not apply during reconsideration under R.C.M. 924(a) of a finding of guilty previously announced in open court unless the prior finding was announced as unanimous.

Discussion

If the findings announced are ambiguous, the military judge should seek clarification. *See also* R.C.M. 924. A nonunanimous finding of guilty as to a capital offense may be reconsidered, but not for the purpose of rendering a unanimous verdict in order to authorize a capital sentencing proceeding. The president shall not make a statement regarding unanimity with respect to reconsideration of findings as to an offense in which the prior findings were not unanimous.

(c) *Findings by military judge*. The military judge shall announce the findings when trial is by military judge alone or when findings may be entered upon R.C.M. 910(g).

(d) *Erroneous announcement*. If an error was made in the announcement of the findings of the court-martial, the error may be corrected by a new announcement in accordance with this rule. The error must be discovered and the new announcement made before the final adjournment of the court-martial in the case.

Discussion

See R.C.M. 1102 concerning the action to be taken if the error in the announcement is discovered after final adjournment.

(e) *Polling prohibited*. Except as provided in Mil. R. Evid. 606, members may not be questioned about their deliberations and voting.

Rule 923. Impeachment of findings

Findings which are proper on their face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

Deliberations of the members ordinarily are not subject to disclosure. *See* Mil. R. Evid. 606. Unsound reasoning by a member, misconception of the evidence, or misapplication of the law is not a proper basis for challenging the findings. However, when a showing of a ground for impeaching the verdict has been made, members may be questioned about such a ground. The military judge determines, as an interlocutory matter, whether such an inquiry will be conducted and whether a finding has been impeached.

Rule 924. Reconsideration of findings

(a) *Time for reconsideration*. Members may reconsider any finding reached by them before such finding is announced in open session.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

section (c)(3) of this rule, they may be relaxed during rebuttal and surrebuttal to the same degree.

(e) *Production of witnesses*.

(1) *In general*. During the presentence proceedings, there shall be much greater latitude than on the merits to receive information by means other than testimony presented through the personal appearance of witnesses. Whether a witness shall be produced to testify during presentence proceedings is a matter within the discretion of the military judge, subject to the limitations in subsection (e)(2) of this rule.

Discussion

See R.C.M. 703 concerning the procedures for production of witnesses.

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(2) *Limitations*. A witness may be produced to testify during presentence proceedings through a subpoena or travel orders at Government expense only if—

(A) The testimony expected to be offered by the witness is necessary for consideration of a matter of substantial significance to a determination of an appropriate sentence, including evidence necessary to resolve an alleged inaccuracy or dispute as to a material fact;

(B) The weight or credibility of the testimony is of substantial significance to the determination of an appropriate sentence;

(C) The other party refuses to enter into a stipulation of fact containing the matters to which the witness is expected to testify, except in an extraordinary case when such a stipulation of fact would be an insufficient substitute for the testimony;

(D) Other forms of evidence, such as oral depositions, written interrogatories, former testimony, or testimony by remote means would not be sufficient to meet the needs of the court-martial in the determination of an appropriate sentence; and

(E) The significance of the personal appearance of the witness to the determination of an appropriate sentence, when balanced against the practical difficulties of producing the witness, favors production of the witness. Factors to be considered include the costs of producing the witness, the timing of the request for production of the witness, the potential delay in the presentencing proceeding that may be caused by the production of the witness, and the likelihood of significant interference with military operational deployment, mission accomplishment, or essential training.

Discussion

The procedures for receiving testimony via remote means and the definition thereof are contained in R.C.M. 914B.

(f) *Additional matters to be considered*. In addition to matters introduced under this rule, the court-martial may consider—

(1) That a plea of guilty is a mitigating factor; and

(2) Any evidence properly introduced on the merits before findings, including:

(A) Evidence of other offenses or acts of misconduct even if introduced for a limited purpose; and

(B) Evidence relating to any mental impairment or deficiency of the accused.

Discussion

The fact that the accused is of low intelligence or that, because of a mental or neurological condition the accused's ability to adhere to the right is diminished, may be extenuating. On the other hand, in determining the severity of a sentence, the court-martial may consider evidence tending to show that an accused has little regard for the rights of others.

(g) *Argument*. After introduction of matters relating to sentence under this rule, counsel for the prosecution and defense may argue for an appropriate sentence. Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relative to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Rule 1002. Sentence determination

Subject to limitations in this Manual, the sentence

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

to be adjudged is a matter within the discretion of the court-martial; except when a mandatory minimum sentence is prescribed by the code, a court-martial may adjudge any punishment authorized in this Manual, including the maximum punishment or any lesser punishment, or may adjudge a sentence of no punishment.

Discussion

See R.C.M. 1003 concerning authorized punishments and limitations on punishments. *See also* R.C.M. 1004 in capital cases.

Rule 1003. Punishments

(a) *In general*. Subject to the limitations in this Manual, the punishments authorized in this rule may be adjudged in the case of any person found guilty of an offense by a court-martial.

Discussion

"Any person" includes officers, enlisted persons, person in custody of the armed forces serving a sentence imposed by a court-martial, and, insofar as the punishments are applicable, any other person subject to the code. *See* R.C.M. 202.

(b) *Authorized punishments*. Subject to the limitations in this Manual, a court-martial may adjudge only the following punishments:

(1) *Reprimand*. A court-martial shall not specify the terms or wording of a reprimand. A reprimand, if approved, shall be issued, in writing, by the convening authority;

Discussion

A reprimand adjudged by a court-martial is a punitive censure.

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(2) *Forfeiture of pay and allowances*. Unless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last.

Allowances shall be subject to forfeiture only when the sentence includes forfeiture of all pay and allowances. The maximum authorized amount of a partial forfeiture shall be determined by using the basic pay, retired pay, or retainer pay, as applicable, or, in the case of reserve component personnel on inactive-duty, compensation for periods of inactive-duty training, authorized by the cumulative years of service of the accused, and, if no confinement is adjudged, any sea or hardship duty pay. If the sentence also includes reduction in grade, expressly or by operation of law, the maximum forfeiture shall be based on the grade to which the accused is reduced.

Discussion

A forfeiture deprives the accused of the amount of pay (and allowances) specified as it accrues. Forfeitures accrue to the United States.

Forfeitures of pay and allowances adjudged as part of a court-martial sentence, or occurring by operation of Article 58b are effective 14 days after the sentence is adjudged or when the sentence is approved by the convening authority, whichever is earlier.

"Basic pay" does not include pay for special qualifications, such as diving pay, or incentive pay such as flying, parachuting, or duty on board a submarine.

Forfeiture of pay and allowances under Article 58b is not a part of the sentence, but is an administrative result thereof.

At general courts-martial, if both a punitive discharge and confinement are adjudged, then the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only confinement is adjudged, then if that confinement exceeds six months, the operation of Article 58b results in total forfeiture of pay and allowances during that period of confinement. If only a punitive discharge is adjudged, Article 58b has no effect on pay and allowances. A death sentence results in total forfeiture of pay and allowances.

At a special court-martial, if a bad-conduct discharge and confinement are adjudged, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during that period of confinement. If only confinement is adjudged, and that confinement exceeds six months, then the operation of Article 58b results in a forfeiture of two-thirds of pay only (not allowances) during the period of confinement. If only a bad conduct discharge is adjudged, Article 58b has no effect on pay.

If the sentence, as approved by the convening authority or other competent authority, does not result in forfeitures by the operation of Article 58b, then only adjudged forfeitures are effective.

Article 58b has no effect on summary courts-martial.

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(3) *Fine*. Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not ad-

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

judge a fine in excess of two-thirds of one year of the highest rate of officer pay. To enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the court-martial;

Discussion

A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. In the case of a civilian subject to military law, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged, regardless of whether unjust enrichment is present.

See R.C.M. 1113(e)(3) concerning imposition of confinement when the accused fails to pay a fine.

Where the sentence adjudged at a special court-martial includes a fine, see R.C.M. 1107(d)(5) for limitations on convening authority action on the sentence.

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(4) *Reduction in pay grade*. Except as provided in R.C.M. 1301(d), a court-martial may sentence an enlisted member to be reduced to the lowest or any intermediate pay grade;

Discussion

Reduction under Article 58a is not a part of the sentence but is an administrative result thereof.

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(5) *Restriction to specified limits*. Restriction may be adjudged for no more than 2 months for each month of authorized confinement and in no case for more than 2 months. Confinement and restriction may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection;

Discussion

Restriction does not exempt the person on whom it is imposed from any military duty. Restriction and hard labor without confinement may be adjudged in the same case provided they do not exceed the maximum limits for each. *See* subsection (c)(1)(A)(ii) of this rule. The sentence adjudged should specify the limits of the restriction.

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(6) *Hard labor without confinement*. Hard labor without confinement may be adjudged for no more than 1-1/2 months for each month of authorized confinement and in no case for more than three months. Hard labor without confinement may be adjudged only in the cases of enlisted members. The court-martial shall not specify the hard labor to be performed. Confinement and hard labor without confinement may be adjudged in the same case, but they may not together exceed the maximum authorized period of confinement, calculating the equivalency at the rate specified in this subsection.

Discussion

Hard labor without confinement is performed in addition to other regular duties and does not excuse or relieve a person from performing regular duties. Ordinarily, the immediate commander of the accused will designate the amount and character of the labor to be performed. Upon completion of the daily assignment, the accused should be permitted to take leave or liberty to which entitled.

See R.C.M. 1301(d) concerning limitations on hard labor without confinement in summary courts-martial.

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(7) *Confinement*. The place of confinement shall not be designated by the court-martial. When confinement for life is authorized, it may be with or without eligibility for parole. A court-martial shall not adjudge a sentence to solitary confinement or to confinement without hard labor;

Discussion

The authority executing a sentence to confinement may require hard labor whether or not the words "at hard labor" are included in the sentence. *See* Article 58(b). To promote uniformity, the words "at hard labor" should be omitted in a sentence to confinement.

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(8) *Punitive separation*. A court-martial may not adjudge an administrative separation from the service. There are three types of punitive separation.

(A) *Dismissal*. Dismissal applies only to commissioned officers, commissioned warrant officers, cadets, and midshipmen and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dismissal may be adjudged for any

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

offense of which a commissioned officer, commissioned warrant officer, cadet, or midshipman has been found guilty;

(B) *Dishonorable discharge*. A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial. Regardless of the maximum punishment specified for an offense in Part IV of this Manual, a dishonorable discharge may be adjudged for any offense of which a warrant officer who is not commissioned has been found guilty. A dishonorable discharge should be reserved for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment; and

Discussion

See also subsection (d)(1) of this rule regarding when a dishonorable discharge is authorized as an additional punishment.

See Article 56a.

(C) *Bad conduct discharge*. A bad-conduct discharge applies only to enlisted persons and may be adjudged by a general court-martial and by a special court-martial which has met the requirements of R.C.M. 201(f)(2)(B). A bad-conduct discharge is less severe than a dishonorable discharge and is designed as a punishment for bad-conduct rather than as a punishment for serious offenses of either a civilian or military nature. It is also appropriate for an accused who has been convicted repeatedly of minor offenses and whose punitive separation appears to be necessary;

Discussion

See also subsections (d)(2) and (3) of this rule regarding when a bad-conduct discharge is authorized as an additional punishment.

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(9) *Death*. Death may be adjudged only in accordance with R.C.M. 1004; and

(10) *Punishments under the law of war*. In cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.

(c) *Limits on punishments*.

(1) *Based on offenses*.

(A) *Offenses listed in Part IV*.

(i) *Maximum punishment*. The maximum limits for the authorized punishments of confinement, forfeitures and punitive discharge (if any) are set forth for each offense listed in Part IV of this Manual. These limitations are for each separate offense, not for each charge. When a dishonorable discharge is authorized, a bad-conduct discharge is also authorized.

(ii) *Other punishments*. Except as otherwise specifically provided in this Manual, the types of punishments listed in subsections (b)(1), (3), (4), (5), (6) and (7) of this rule may be adjudged in addition to or instead of confinement, forfeitures, a punitive discharge (if authorized), and death (if authorized).

(B) *Offenses not listed Part IV*.

(i) *Included or related offenses*. For an offense not listed in Part IV of this Manual which is included in or closely related to an offense listed therein the maximum punishment shall be that of the offense listed; however if an offense not listed is included in a listed offense, and is closely related to another or is equally closely related to two or more listed offenses, the maximum punishment shall be the same as the least severe of the listed offenses.

(ii) *Not included or related offenses*. An offense not listed in Part IV and not included in or closely related to any offense listed therein is punishable as authorized by the United States Code, or as authorized by the custom of the service. When the United States Code provides for confinement for a specified period or not more than a specified period the maximum punishment by court-martial shall include confinement for that period. If the period is 1 year or longer, the maximum punishment by court-martial also includes a dishonorable discharge and forfeiture of all pay and allowances; if 6 months or more, a bad-conduct discharge and forfeiture of all pay and allowances; if less than 6 months, forfeiture of two-thirds pay per month for the authorized period of confinement.

(C) *Multiplicity*. When the accused is found guilty of two or more offenses, the maximum authorized punishment may be imposed for each separate offense. Except as provided in paragraph 5 of Part IV, offenses are not separate if each does not require proof of an element not required to prove the other. If the offenses are not separate, the maximum punishment for those offenses shall be the maximum

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

authorized punishment for the offense carrying the greatest maximum punishment.

Discussion

[Note: The use of the phrase "multiplicity in sentencing" has been deemed confusing. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). The word "multiplicity" refers to the protection against Double Jeopardy, as determined using the *Blockberger/Teters* analysis. After *Campbell*, "unreasonable multiplication of charges as applied to sentence" encompasses what had previously been described as "multiplicity in sentencing." *See Campbell*, 71 M.J. at 26. Subparagraph (c)(1)(C) confusingly merges multiplicity and unreasonable multiplication of charges; therefore, practitioners are encouraged to read and comply with *Campbell*.]

See also R.C.M. 906(b)(12); 907(b)(3)(B).

Even if charges are not multiplicious, a military judge may rule on a motion that the prosecutor abused his discretion under R.C.M. 307(c)(4) or a motion that an unreasonable multiplication of charges requires relief under R.C.M. 1003(b)(1). Rather than the "single impulse" test previously noted in this Discussion, "[t]he better approach is to allow the military judge, in his or her discretion, to merge the offenses for sentencing purposes…" by determining whether the Quiroz test is fulfilled. *United States v. Campbell*, 71 M.J. 19 (C.A.A.F. 2012). (citing *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001).

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(2) *Based on rank of accused.*

(A) *Commissioned or warrant officers, cadets, and midshipmen.*

(i) A commissioned or warrant officer or a cadet, or midshipman may not be reduced in grade by any court-martial. However, in time of war or national emergency the Secretary concerned, or such Under Secretary or Assistant Secretary as may be designated by the Secretary concerned, may commute a sentence of dismissal to reduction to any enlisted grade.

(ii) Only a general court-martial may sentence a commissioned or warrant officer or a cadet, or midshipman to confinement.

(iii) A commissioned or warrant officer or a cadet or midshipman may not be sentenced to hard labor without confinement.

(iv) Only a general court-martial, upon conviction of any offense in violation of the Code, may sentence a commissioned or warrant officer or a cadet or midshipman to be separated from the service with a punitive separation. In the case of commissioned officers, cadets, midshipmen, and commissioned warrant officers, the separation shall be by dismissal. In the case of all other warrant officers, the separation shall by dishonorable discharge.

(B) *Enlisted persons*. *See* subsection (b)(9) of this rule and R.C.M. 1301(d).

(3) *Based on reserve status in certain circumstances.*

(A) *Restriction on liberty*. A member of a reserve component whose order to active duty is approved pursuant to Article 2(d)(5) may be required to serve any adjudged restriction on liberty during that period of active duty. Other members of a reserve component ordered to active duty pursuant to Article 2(d)(1) or tried by summary court-martial while on inactive duty training may not—

(i) by sentenced to confinement; or

(ii) be required to serve a court-martial punishment consisting of any other restriction on liberty except during subsequent periods of inactive-duty training or active duty.

(B) *Forfeiture*. A sentence to forfeiture of pay of a member not retained on active duty after completion of disciplinary proceedings may be collected from active duty and inactive-duty training pay during subsequent periods of duty.

Discussion

For application of this subsection, *see* R.C.M. 204. At the conclusion of nonjudicial punishment proceedings or final adjournment of the court-martial, the reserve component member who was ordered to active duty for the purpose of conducting disciplinary proceedings should be released from active duty within one working day unless the order to active duty was approved by the Secretary concerned and confinement or other restriction on liberty was adjudged. Unserved punishments may be carried over to subsequent periods of inactive-duty training or active duty.

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(4) *Based on status as a person serving with or accompanying an armed force in the field*. In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation.

(5) *Based on other rules*. The maximum limits on punishments in this rule may be further limited by other Rules of Courts-martial.

Discussion

The maximum punishment may be limited by: the jurisdictional limits of the court-martial (*see* R.C.M. 201(f) and 1301(d)); the

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

nature of the proceedings (*see* R.C.M. 810(d) (sentence limitations in rehearings, new trials, and other trials)); and by instructions by a convening authority (*see* R.C.M. 601(e)(1)). *See also* R.C.M. 1107(d)(4) concerning limits on the maximum punishment which may be approved depending on the nature of the record.

(d) *Circumstances permitting increased punishments*.

(1) *Three or more convictions*. If an accused is found guilty of an offense or offenses for none of which a dishonorable discharge is otherwise authorized, proof of three or more previous convictions adjudged by a court-martial during the year next preceding the commission of any offense of which the accused stands convicted shall authorize a dishonorable discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 1 year, confinement for 1 year. In computing the 1-year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection, the court-martial convictions must be final.

(2) *Two or more convictions*. If an accused is found guilty of an offense or offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, proof of two or more previous convictions adjudged by a court-martial during the 3 years next preceding the commission of any offense of which the accused stands convicted shall authorize a bad-conduct discharge and forfeiture of all pay and allowances and, if the confinement otherwise authorized is less than 3 months, confinement for 3 months. In computing the 3 year period preceding the commission of any offense, periods of unauthorized absence shall be excluded. For purposes of this subsection the court-martial convictions must be final.

(3) *Two or more offenses*. If an accused is found guilty of two or more offenses for none of which a dishonorable or bad-conduct discharge is otherwise authorized, the fact that the authorized confinement for these offenses totals 6 months or more shall, in addition, authorize a bad-conduct discharge and forfeiture of all pay and allowances.

Discussion

All of these increased punishments are subject to all other limitations on punishments set forth elsewhere in this rule. Convictions by summary court-martial may not be used to increase the maximum punishment under this rule. However they may be admitted and considered under R.C.M. 1001.

Rule 1004. Capital cases

(a) *In general*. Death may be adjudged only when:

(1) Death is expressly authorized under Part IV of this Manual for an offense of which the accused has been found guilty or is authorized under the law of war for an offense of which the accused has been found guilty under the law of war; and

(2) The accused was convicted of such an offense by the concurrence of all the members of the court-martial present at the time the vote was taken; and

(3) The requirements of subsections (b) and (c) of this rule have been met.

(b) *Procedure*. In addition to the provisions in R.C.M. 1001, the following procedures shall apply in capital cases—

(1) *Notice*.

(A) *Referral*. The convening authority shall indicate that the case is to be tried as a capital case by including a special instruction in the referral block of the charge sheet. Failure to include this special instruction at the time of the referral shall not bar the convening authority from later adding the required special instruction, provided:

(i) that the convening authority has otherwise complied with the notice requirement of subsection (B); and

(ii) that if the accused demonstrates specific prejudice from such failure to include the special instruction, a continuance or a recess is an adequate remedy.

(B) *Arraignment*. Before arraignment, trial counsel shall give the defense written notice of which aggravating factors under subsection (c) of this rule the prosecution intends to prove. Failure to provide timely notice under this subsection of any aggravating factors under subsection (c) of this rule shall not bar later notice and proof of such additional aggravating factors unless the accused demonstrates specific prejudice from such failure and that a continuance or a recess is not an adequate remedy.

(2) *Evidence of aggravating factors*. Trial counsel may present evidence in accordance with R.C.M. 1001(b)(4) tending to establish one or more of the aggravating factors in subsection (c) of this rule.

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Discussion

See also subsection (b)(5) of this rule.

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(3) *Evidence in extenuation and mitigation*. The accused shall be given broad latitude to present evidence in extenuation and mitigation.

Discussion

See R.C.M. 1001(c).

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(4) *Necessary findings*. Death may not be adjudged unless—

(A) The members find that at least one of the aggravating factors under subsection (c) existed;

(B) Notice of such factor was provided in accordance with paragraph (1) of this subsection and all members concur in the finding with respect to such factor; and

(C) All members concur that any extenuating or mitigating circumstances are substantially outweighed by any aggravating circumstances admissible under R.C.M. 1001(b)(4), including the factors under subsection (c) of this rule.

(5) *Basis for findings*. The findings in subsection (b)(4) of this rule may be based on evidence introduced before or after findings under R.C.M. 921, or both.

(6) *Instructions*. In addition to the instructions required under R.C.M. 1005, the military judge shall instruct the members of such aggravating factors under subsection (c) of this rule as may be in issue in the case, and on the requirements and procedures under subsections (b)(4), (5), (7), and (8) of this rule. The military judge shall instruct the members that they must consider all evidence in extenuation and mitigation before they may adjudge death.

(7) *Voting*. In closed session, before voting on a sentence, the members shall vote by secret written ballot separately on each aggravating factor under subsection (c) of this rule on which they have been instructed. Death may not be adjudged unless all members concur in a finding of the existence of at least one such aggravating factor. After voting on all the aggravating factors on which they have been instructed, the members shall vote on a sentence in accordance with R.C.M. 1006.

(8) *Announcement*. If death is adjudged, the president shall, in addition to complying with R.C.M. 1007, announce which aggravating factors under subsection (c) of this rule were found by the members.

(c) *Aggravating factors*. Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

(1) That the offense was committed before or in the presence of the enemy, except that this factor shall not apply in the case of a violation of Article 118 or 120;

Discussion

See paragraph 23, Part IV, for a definition of "before or in the presence of the enemy."

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(2) That in committing the offense the accused—

(A) Knowingly created a grave risk of substantial damage to the national security of the United States; or

(B) Knowingly created a grave risk of substantial damage to a mission, system, or function of the United States, provided that this subparagraph shall apply only if substantial damage to the national security of the United States would have resulted had the intended damage been effected;

(3) That the offense caused substantial damage to the national security of the United States, whether or not the accused intended such damage, except that this factor shall not apply in case of a violation of Article 118 or 120;

(4) That the offense was committed in such a way or under circumstances that the life of one or more persons other than the victim was unlawfully and substantially endangered, except that this factor shall not apply to a violation of Articles 104, 106a, or 120;

(5) That the accused committed the offense with the intent to avoid hazardous duty;

(6) That, only in the case of a violation of Article 118 or 120, the offense was committed in time of war and in territory in which the United States or an ally of the United States was then an occupying power or in which the armed forces of the United States were then engaged in active hostilities;

(7) That, only in the case of a violation of Article 118(1):

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(A) The accused was serving a sentence of confinement for 30 years or more or for life at the time of the murder;

(B) The murder was committed: while the accused was engaged in the commission or attempted commission of any robbery, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, aggravated arson, sodomy, burglary, kidnapping, mutiny, sedition, or piracy of an aircraft or vessel; or while the accused was engaged in the commission or attempted commission of any offense involving the wrongful distribution, manufacture, or introduction or possession, with intent to distribute, of a controlled substance; or, while the accused was engaged in flight or attempted flight after the commission or attempted commission of any such offense.

(C) The murder was committed for the purpose of receiving money or a thing of value;

(D) The accused procured another by means of compulsion, coercion, or a promise of an advantage, a service, or a thing of value to commit the murder;

(E) The murder was committed with the intent to avoid or to prevent lawful apprehension or effect an escape from custody or confinement;

(F) The victim was the President of the United States, the President-elect, the Vice President, or, if there was no Vice President, the officer in the order of succession to the office of President of the United States, the Vice-President-elect, or any individual who is acting as President under the Constitution and laws of the United States, any Member of Congress (including a Delegate to, or Resident Commissioner in, the Congress) or Member-of-Congress elect, justice or judge of the United States, a chief of state or head of government (or the political equivalent) of a foreign nation, or a foreign official (as such term is defined in section 1116(b)(3)(A) of title 18, United States Code), if the official was on official business at the time of the offense and was in the United States or in a place described in Mil. R. Evid.315(c)(2), 315(c)(3);

(G) The accused then knew that the victim was any of the following persons in the execution of office: a commissioned, warrant, noncommissioned, or petty officer of the armed services of the United States; a member of any law enforcement or security activity or agency, military or civilian, including correctional custody personnel; or any firefighter;

(H) The murder was committed with intent to obstruct justice;

(I) The murder was preceded by the intentional infliction of substantial physical harm or prolonged, substantial mental or physical pain and suffering to the victim. For purposes of this section, "substantial physical harm" means fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, or other serious bodily injuries. The term "substantial physical harm" does not mean minor injuries, such as a black eye or bloody nose. The term "substantial mental or physical pain or suffering" is accorded its common meaning and includes torture.

(J) The accused has been found guilty in the same case of another violation of Article 118;

(K) The victim of the murder was under 15 years of age.

(8) That only in the case of a violation of Article 118(4), the accused was the actual perpetrator of the killing or was a principal whose participation in the burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson was major and who manifested a reckless indifference for human life.

Discussion

Conduct amounts to "reckless indifference" when it evinces a wanton disregard of consequences under circumstances involving grave danger to the life of another, although no harm is necessarily intended. The accused must have had actual knowledge of the grave danger to others or knowledge of circumstances that would cause a reasonable person to realize the highly dangerous character of such conduct. In determining whether participation in the offense was major, the accused's presence at the scene and the extent to which the accused aided, abetted, assisted, encouraged, or advised the other participants should be considered. *See United States v. Berg*, 31 M.J. 38 (C.M.A. 1990); *United States v. McMonagle* 38 M.J. 53 (C.M.A. 1993).

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(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim;

(10) That, only in the case of a violation of the

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law of war, death is authorized under the law of war for the offense;

(11) That, only in the case of a violation of Article 104 or 106a:

(A) The accused has been convicted of another offense involving espionage or treason for which either a sentence of death or imprisonment for life was authorized by statute; or

(B) That in committing the offense, the accused knowingly created a grave risk of death to a person other than the individual who was the victim.

For purposes of this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without.

Discussion

Examples of substantial damage of the national security of the United States include: impeding the performance of a combat mission or operation; impeding the performance of an important mission in a hostile fire or imminent danger pay area (*see* 37 U.S.C. § 310(a)); and disclosing military plans, capabilities, or intelligence such as to jeopardize any combat mission or operation of the armed services of the United States or its allies or to materially aid an enemy of the United States.

(d) *Spying*. If the accused has been found guilty of spying under Article 106, subsections (a)(2), (b), and (c) of this rule and R.C.M. 1006 and 1007 shall not apply. Sentencing proceedings in accordance with R.C.M. 1001 shall be conducted, but the military judge shall announce that by operation of law a sentence of death has been adjudged.

(e) *Other penalties*. Except for a violation of Article 106, when death is an authorized punishment for an offense, all other punishments authorized under R.C.M. 1003 are also authorized for that offense, including confinement for life, with or without eligibility for parole, and may be adjudged in lieu of the death penalty, subject to limitations specifically prescribed in this Manual. A sentence of death includes a dishonorable discharge or dismissal as appropriate. Confinement is a necessary incident of a sentence of death, but not a part of it.

Discussion

A sentence of death may not be ordered executed until approved by the President. *See* R.C.M. 1207. A sentence to death which has been finally ordered executed will be carried out in the manner prescribed by the Secretary concerned. *See* R.C.M. 1113(e)(1).

Rule 1005. Instructions on sentence

(a) *In general*. The military judge shall give the members appropriate instructions on sentence.

Discussion

Instructions should be tailored to the facts and circumstances of the individual case.

(b) *When given*. Instructions on sentence shall be given after arguments by counsel and before the members close to deliberate on sentence, but the military judge may, upon request of the members, any party, or *sua sponte*, give additional instructions at a later time.

(c) *Requests for instructions*. After presentation of matters relating to sentence or at such other time as the military judge may permit, any party may request that the military judge instruct the members on the law as set forth in the request. The military judge may require the requested instruction to be written. Each party shall be given the opportunity to be heard on any proposed instruction on sentence before it is given. The military judge shall inform the parties of the proposed action on such requests before their closing arguments on sentence.

Discussion

Requests for and objections to instructions should be resolved at an Article 39(a) session. *But see* R.C.M. 801(e)(1)(C); 803.

The military judge is not required to give the specific instruction requested by counsel if the matter is adequately covered in the instructions.

The military judge should not identify the source of any instruction when addressing the members.

All written requests for instructions should be marked as appellate exhibits, whether or not they are given.

(d) *How given*. Instructions on sentence shall be given orally on the record in the presence of all parties and the members. Written copies of the instructions, or unless a party objects, portions of

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Excerpts from the MCM and UCMJ

them, may also be given to the members for their use during deliberations.

Discussion

A copy of any written instructions delivered to the members should be marked as an appellate exhibit.

(e) *Required instructions*. Instructions on sentence shall include:

(1) A statement of the maximum authorized punishment that may be adjudged and of the mandatory minimum punishment, if any;

Discussion

The maximum punishment that may be adjudged is the lowest of the total permitted by the applicable paragraph(s) in Part IV for each separate offense of which the accused was convicted (*see also* R.C.M. 1003 concerning additional limits on punishments and additional punishments which may be adjudged) or the jurisdictional limit of the court-martial (*see* R.C.M. 201(f) and R.C.M. 1301(d)). *See also* Discussion to R.C.M. 810(d). The military judge may upon request or when otherwise appropriate instruct on lesser punishments. *See* R.C.M. 1003. If an additional punishment is authorized under R.C.M. 1003(d), the members must be informed of the basis for the increased punishment.

A carefully drafted sentence worksheet ordinarily should be used and should include reference to all authorized punishments in the case.

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(2) A statement of the effect any sentence announced including a punitive discharge and confinement, or confinement in excess of six months, will have on the accused's entitlement to pay and allowances;

(3) A statement of the procedures for deliberation and voting on the sentence set out in R.C.M. 1006;

Discussion

See also R.C.M. 1004 concerning additional instructions required in capital cases.

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(4) A statement informing the members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority; and

Discussion

See also R.C.M. 1002.

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(5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).

Discussion

For example, tailored instructions on sentencing should bring attention to the reputation or record of the accused in the service for good conduct, efficiency, fidelity, courage, bravery, or other traits of good character, and any pretrial restraint imposed on the accused.

(f) *Waiver*. Failure to object to an instruction or to omission of an instruction before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error. The military judge may require the party objecting to specify in what respect the instructions were improper. The parties shall be given the opportunity to be heard on any objection outside the presence of the members.

Rule 1006. Deliberations and voting on sentence

(a) *In general*. The members shall deliberate and vote after the military judge instructs the members on sentence. Only the members shall be present during deliberations and voting. Superiority in rank shall not be used in any manner to control the independence of members in the exercise of their judgment.

(b) *Deliberations*. Deliberations may properly include full and free discussion of the sentence to be imposed in the case. Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any, any exhibits admitted in evidence, and any written instructions. Members may request that the court-martial be reopened and that portions of the record be read to them or additional evidence introduced. The military judge may, in the exercise of discretion, grant such requests.

(c) *Proposal of sentences*. Any member may propose a sentence. Each proposal shall be in writing and shall contain the complete sentence proposed.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

The junior member shall collect the proposed sentences and submit them to the president.

Discussion

A proposal should state completely each kind and, where appropriate, amount of authorized punishment proposed by that member. For example, a proposal of confinement for life would state whether it is with or without eligibility for parole. *See* R.C.M.1003(b).

(d) *Voting*.

(1) *Duty of members*. Each member has the duty to vote for a proper sentence for the offenses of which the court-martial found the accused guilty, regardless of the member's vote or opinion as to the guilt of the accused.

(2) *Secret ballot*. Proposed sentences shall be voted on by secret written ballot.

(3) *Procedure*.

(A) *Order*. All members shall vote on each proposed sentence in its entirety beginning with the least severe and continuing, as necessary, with the next least severe, until a sentence is adopted by the concurrence of the number of members required under subsection (d)(4) of this rule. The process of proposing sentences and voting on them may be repeated as necessary until a sentence is adopted.

(B) *Counting votes*. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

Discussion

A sentence adopted by the required number of members may be reconsidered only in accordance with R.C.M. 1009.

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(4) *Number of votes required*.

(A) *Death*. A sentence which includes death may be adjudged only if all members present vote for that sentence.

Discussion

See R.C.M. 1004.

(B) *Confinement for life, with or without eligibility for parole, or more than 10 years*. A sentence that includes confinement for life, with or without eligibility for parole, or more than 10 years may be adjudged only if at least three-fourths of the members present vote for that sentence.

(C) *Other*. A sentence other than those described in subsection (d)(4)(A) or (B) of this rule may be adjudged only if at least two-thirds of the members present vote for that sentence.

Discussion

In computing the number of votes required to adopt a sentence, any fraction of a vote is rounded up to the next whole number. For example, if there are seven members, at least six would have to concur to impose a sentence requiring a three-fourths vote, while at least five would have to concur to impose a sentence requiring a two-thirds vote.

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(5) *Mandatory sentence*. When a mandatory minimum is prescribed under Article 118 the members shall vote on a sentence in accordance with this rule.

(6) *Effect of failure to agree*. If the required number of members do not agree on a sentence after a reasonable effort to do so, a mistrial may be declared as to the sentence and the case shall be returned to the convening authority, who may order a rehearing on sentence only or order that a sentence of no punishment be imposed.

(e) *Action after a sentence is reached*. After the members have agreed upon a sentence, the court-martial shall be opened and the president shall inform the military judge that a sentence has been reached. The military judge may, in the presence of the parties, examine any writing which the president intends to read to announce the sentence and may assist the members in putting the sentence in proper form. Neither that writing nor any oral or written clarification or discussion concerning it shall constitute announcement of the sentence.

Discussion

Ordinarily a sentence worksheet should be provided to the members as an aid to putting the sentence in proper form. *See* Appendix 11 for a format for forms of sentences. If a sentence worksheet has been provided, the military judge should examine it before the president announces the sentence. If the military judge intends to instruct the members after such examination, counsel should be permitted to examine the worksheet and to be heard on any instructions the military judge may give.

The president should not disclose any specific number of votes for or against any sentence.

If the sentence is ambiguous or apparently illegal, *see* R.C.M. 1009.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Rule 1007. Announcement of sentence

(a) *In general*. The sentence shall be announced by the president or, in a court-martial composed of a military judge alone, by the military judge, in the presence of all parties promptly after it has been determined.

Discussion

See Appendix 11.

An element of a sentence adjudged by members about which no instructions were given and which is not listed on a sentence worksheet is not proper.

(b) *Erroneous announcement*. If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

Discussion

For procedures governing reconsideration of the sentence, *see* R.C.M. 1009. *See also* R.C.M. 1102 concerning the action to be taken if the error in the announcement is discovered after the record is authenticated and forwarded to the convening authority.

(c) *Polling prohibited*. Except as provided in Mil. R. Evid. 606, members may not otherwise be questioned about their deliberations and voting.

Rule 1008. Impeachment of sentence

A sentence which is proper on its face may be impeached only when extraneous prejudicial information was improperly brought to the attention of a member, outside influence was improperly brought to bear upon any member, or unlawful command influence was brought to bear upon any member.

Discussion

See R.C.M. 923 Discussion concerning impeachment of findings.

Rule 1009. Reconsideration of sentence

(a) *Reconsideration*. Subject to this rule, a sentence may be reconsidered at any time before such sentence is announced in open session of the court.

(b) *Exceptions*.

(1) If the sentence announced in open session was less than the mandatory minimum prescribed for an offense of which the accused has been found guilty, the court that announced the sentence may reconsider such sentence upon reconsideration in accordance with subsection (e) of this rule.

(2) If the sentence announced in open session exceeds the maximum permissible punishment for the offense or the jurisdictional limitation of the court-martial, the sentence may be reconsidered after announcement in accordance with subsection (e) of this rule.

(c) *Clarification of sentence*. A sentence may be clarified at any time prior to action of the convening authority on the case.

(1) *Sentence adjudged by the military judge*. When a sentence adjudged by the military judge is ambiguous, the military judge shall call a session for clarification as soon as practical after the ambiguity is discovered.

(2) *Sentence adjudged by members*. When a sentence adjudged by members is ambiguous, the military judge shall bring the matter to the attention of the members if the matter is discovered before the court-martial is adjourned. If the matter is discovered after adjournment, the military judge may call a session for clarification by the members who adjudged the sentence as soon as practical after the ambiguity is discovered.

(d) *Action by the convening authority*. When a sentence adjudged by the court-martial is ambiguous, the convening authority may return the matter to the court-martial for clarification. When a sentence adjudged by the court-martial is apparently illegal, the convening authority may return the matter to the court-martial for reconsideration or may approve a sentence no more severe than the legal, unambiguous portions of the adjudged sentence.

(e) *Reconsideration procedure*. Any member of the court-martial may propose that a sentence reached by the members be reconsidered.

(1) *Instructions*. When a sentence has been reached by members and reconsideration has been initiated, the military judge shall instruct the members on the procedure for reconsideration.

(2) *Voting*. The members shall vote by secret

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M.R.E. 305

Rule 305. Warnings about Rights

(a) *General Rule*. A statement obtained in violation of this rule is involuntary and will be treated under Mil. R. Evid. 304.

(b) *Definitions*. As used in this rule:

(1) "Person subject to the code" means a person subject to the Uniform Code of Military Justice as contained in Chapter 47 of Title 10, United States Code. This term includes, for purposes of subdivision (c) of this rule, a knowing agent of any such person or of a military unit.

(2) "Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of such questioning.

(3) "Custodial interrogation" means questioning that takes place while the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way.

(c) *Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements*.

(1) *Article 31 Rights Warnings*. A statement obtained from the accused in violation of the accused's rights under Article 31 is involuntary and therefore inadmissible against the accused except as provided in subdivision (d). Pursuant to Article 31, a person subject to the code may not interrogate or request any statement from an accused or a person suspected of an offense without first:

(A) informing the accused or suspect of the nature of the accusation;

(B) advising the accused or suspect that the accused or suspect has the right to remain silent; and

(C) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

(2) *Fifth Amendment Right to Counsel*. If a person suspected of an offense and subjected to custodial interrogation requests counsel, any statement made in the interrogation after such request, or evidence derived from the interrogation after such request, is inadmissible against the accused unless counsel was present for the interrogation.

(3) *Sixth Amendment Right to Counsel*. If an accused against whom charges have been preferred is interrogated on matters concerning the preferred charges by anyone acting in a law enforcement capacity, or the agent of such a person, and the accused requests counsel, or if the accused has appointed or retained counsel, any statement made in the interrogation, or evidence derived from the interrogation, is inadmissible unless counsel was present for the interrogation.

(4) *Exercise of Rights*. If a person chooses to exercise the privilege against self-incrimination, questioning must cease immediately. If a person who is subjected to interrogation under the circumstances described in subdivisions (c)(2) or (c)(3) of this rule chooses to exercise the right to counsel, questioning must cease until counsel is present.

(d) *Presence of Counsel*. When a person entitled to counsel under this rule requests counsel, a judge advocate or an individual certified in accordance with Article 27(b) will be provided by the United States at no expense to the person and without regard to the person's indigency and must be present before the interrogation may proceed. In addition to counsel supplied by the United States, the person may retain civilian counsel at no expense to the United States. Unless otherwise provided by regulations of the Secretary concerned, an accused or suspect does not have a right under this rule to have military counsel of his or her own selection.

(e) *Waiver*.

(1) *Waiver of the Privilege Against Self-Incrimination*. After receiving applicable warnings under this rule, a person may waive the rights described therein and in Mil. R. Evid. 301 and make a statement. The waiver must be made freely, knowingly, and intelligently. A written waiver is not required. The accused or suspect must affirmatively acknowledge that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement.

(2) *Waiver of the Right to Counsel*. If the right to counsel is applicable under this rule and the accused or suspect does not affirmatively decline the right to counsel, the prosecution must

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demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

(3) *Waiver After Initially Invoking the Right to Counsel*.

(A) *Fifth Amendment Right to Counsel*. If an accused or suspect subjected to custodial interrogation requests counsel, any subsequent waiver of the right to counsel obtained during a custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

(i) the accused or suspect initiated the communication leading to the waiver; or

(ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver.

(B) *Sixth Amendment Right to Counsel*. If an accused or suspect interrogated after preferral of charges as described in subdivision (c)(1) requests counsel, any subsequent waiver of the right to counsel obtained during an interrogation concerning the same offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that the accused or suspect initiated the communication leading to the waiver.

(f) *Standards for Nonmilitary Interrogations*.

(1) *United States Civilian Interrogations*. When a person subject to the code is interrogated by an official or agent of the United States, of the District of Columbia, or of a State, Commonwealth, or possession of the United States, or any political subdivision of such a State, Commonwealth, or possession, the person's entitlement to rights warnings and the validity of any waiver of applicable rights will be determined by the principles of law generally recognized in the trial of criminal cases in the United States district courts involving similar interrogations.

(2) *Foreign Interrogations*. Warnings under Article 31 and the Fifth and Sixth Amendments to the United States Constitution are not required during an interrogation conducted outside of a State, district, Commonwealth, territory, or possession of the United States by officials of a foreign government or their agents unless such interrogation is conducted, instigated, or participated in by military personnel or their agents or by those officials or agents listed in subdivision (f)(1). A statement obtained from a foreign interrogation is admissible unless the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement. An interrogation is not "participated in" by military personnel or their agents or by the officials or agents listed in subdivision (f)(1) merely because such a person was present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation.

Rule 306. Statements by One of Several Accused

When two or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination.

Rule 311. Evidence Obtained from Unlawful Searches and Seizures

(a) *General Rule*. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

(1) the accused makes a timely motion to suppress or an objection to the evidence under this rule; and

(2) the accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the Constitution of the United States as applied to members of the armed forces.

(b) *Definition*. As used in this rule, a search or seizure is "unlawful" if it was conducted, instigated, or participated in by:

(1) military personnel or their agents and was in violation of the Constitution of the United States

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Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The military judge may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the members, undue delay, wasting time, or needlessly presenting cumulative evidence.

Rule 404. Character Evidence; Crimes or Other Acts

(a) *Character Evidence*.

(1) *Prohibited Uses*. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for an Accused or Victim*.

(A) The accused may offer evidence of the accused's pertinent trait, and if the evidence is admitted, the prosecution may offer evidence to rebut it.

(B) Subject to the limitations in Mil. R. Evid. 412, the accused may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecution may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the accused's same trait; and

(C) in a homicide or assault case, the prosecution may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) *Exceptions for a Witness*. Evidence of a witness's character may be admitted under Mil R. Evid. 607, 608, and 609.

(b) *Crimes, Wrongs, or Other Acts*.

(1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by the accused, the prosecution must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecution intends to offer at trial; and

(B) do so before trial – or during trial if the military judge, for good cause, excuses lack of pretrial notice.

Rule 405. Methods of Proving Character

(a) *By Reputation or Opinion*. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the military judge may allow an inquiry into relevant specific instances of the person's conduct.

(b) *By Specific Instances of Conduct*. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

(c) *By Affidavit*. The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subdivision, the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under these rules.

(d) *Definitions*. "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. "Community" in the armed forces includes a post, camp, ship, station, or other military organization regardless of size.

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The military judge may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

Rule 407. Subsequent Remedial Measures

(a) When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

(1) negligence;

(2) culpable conduct;

(3) a defect in a product or its design; or

(4) a need for a warning or instruction.

(b) The military judge may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

Rule 408. Compromise Offers and Negotiations

(a) *Prohibited Uses*. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in order to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim – except when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) *Exceptions*. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Rule 409. Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

Rule 410. Pleas, Plea Discussions, and Related Statements

(a) *Prohibited Uses*. Evidence of the following is not admissible against the accused who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) any statement made in the course of any judicial inquiry regarding either of the foregoing pleas; or

(4) any statement made during plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) *Exceptions*. The military judge may admit a statement described in subdivision (a)(3) or (a)(4):

(1) when another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a proceeding for perjury or false statement, if the accused made the statement under oath, on the record, and with counsel present.

(c) *Request for Administrative Disposition*. A "statement made during plea discussions" includes a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial; "on the record" includes the written statement submitted by the accused in furtherance of such request.

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice or proving agency, ownership, or control.

Rule 412. Sex Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) *Evidence generally inadmissible*. The following evidence is not admissible in any proceeding involving

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

an alleged sexual offense except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) *Exceptions*.

(1) In a proceeding, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person
other than the accused was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person
accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the accused.

(c) *Procedure to determine admissibility*.

(1) A party intending to offer evidence under subsection (b) must—

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is offered unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party and the military judge and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule, the military judge must conduct a hearing, which shall be closed. At this hearing, the parties may call witnesses, including the alleged victim, and offer relevant relevant evidence. The alleged victim must be afforded a reasonable opportunity to attend and be heard. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members pursuant to Article 39(a). The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

(3) If the military judge determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence that the accused seeks to offer is relevant for a purpose under subsection (b) and that the probative value of such evidence outweighs the danger of unfair prejudice to the alleged victim's privacy, such evidence shall be admissible under this rule to the extent an order made by the military judge specifies evidence that may be
offered and areas with respect to which the alleged victim may be examined or cross-examined. Such evidence is still subject to challenge under Mil. R. Evid. 403.

(d) For purposes of this rule, the term "sexual offense" includes any sexual misconduct punishable under the Uniform Code of Military Justice, federal law or state law. "Sexual behavior" includes any sexual behavior not encompassed by the alleged offense. The term "sexual predisposition" refers to an alleged victim's mode of dress, speech, or lifestyle that does not directly refer to sexual activities or thoughts but that may have a sexual connotation for the factfinder.

(e) A "nonconsensual sexual offense" is a sexual offense in which consent by the victim is an affirmative defense or in which the lack of consent is an element of the offense. This term includes rape, forcible sodomy, assault with intent to commit rape or forcible sodomy, indecent assault, and attempts to commit such offenses.

Rule 413. Similar Crimes in Sexual Offense Cases

(a) *Permitted Uses*. In a court-martial proceeding for a sexual offense, the military judge may admit evidence that the accused committed any other sexual offense. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Accused*. If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including any witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

M.R.E. 413(d)

(d) *Definition*. As used in this rule, "sexual offense" means an offense punishable under the Uniform Code of Military Justice, or a crime under federal or state law (as "state" is defined in 18 U.S.C. § 513), involving:

(1) any conduct prohibited by Article 120;

(2) any conduct prohibited by 18 U.S.C. chapter 109A;

(3) contact, without consent, between any part of the accused's body, or an object held or controlled by the accused, and another person's genitals or anus;

(4) contact, without consent, between the accused's genitals or anus and any part of another person's body;

(5) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or

(6) an attempt or conspiracy to engage in conduct described in subdivisions (d)(1)-(5).

Rule 414. Similar Crimes in Child-Molestation Cases

(a) *Permitted Uses*. In a court-martial proceeding in which an accused is charged with an act of child molestation, the military judge may admit evidence that the accused committed any other offense of child molestation. The evidence may be considered on any matter to which it is relevant.

(b) *Disclosure to the Accused*. If the prosecution intends to offer this evidence, the prosecution must disclose it to the accused, including witnesses' statements or a summary of the expected testimony. The prosecution must do so at least 5 days prior to entry of pleas or at a later time that the military judge allows for good cause.

(c) *Effect on Other Rules*. This rule does not limit the admission or consideration of evidence under any other rule.

(d) *Definitions*. As used in this rule:

(1) "Child" means a person below the age of 16; and

(2) "Child molestation" means an offense punishable under the Uniform Code of Military Justice, or a crime under federal law or under state law (as "state" is defined in 18 U.S.C. § 513), that involves:

(A) any conduct prohibited by Article 120 and committed with a child;

(B) any conduct prohibited by 18 U.S.C. chapter 109A and committed with a child;

(C) any conduct prohibited by 18 U.S.C. chapter 110;

(D) contact between any part of the accused's body, or an object held or controlled by the accused, and a child's genitals or anus;

(E) contact between the accused's genitals or anus and any part of a child's body;

(F) contact with the aim of deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on a child; or

(G) an attempt or conspiracy to engage in conduct described in subdivisions (d)(2)(A)-(F).

Rule 501. Privilege in General

(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) the United States Constitution as applied to members of the armed forces;

(2) a federal statute applicable to trials by courts- martial;

(3) these rules;

(4) this Manual; or

(4) the principles of common law generally recognized in the trial of criminal cases in the United States district courts under rule 501 of the Federal Rules of Evidence, insofar as the application of such principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Uniform Code of Military Justice, these rules, or this Manual.

(b) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or producing any object or writing.

(c) The term "person" includes an appropriate representative of the Federal Government, a State, or political subdivision thereof, or any other entity claiming to be the holder of a privilege.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

(d) Notwithstanding any other provision of these rules, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity.

Rule 502. Lawyer-Client Privilege

(a) *General Rule*. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) between the client or the client's representative and the lawyer or the lawyer's representative;

(2) between the lawyer and the lawyer's representative;

(3) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;

(4) between representatives of the client or between the client and a representative of the client; or

(5) between lawyers representing the client.

(b) *Definitions*. As used in this rule:

(1) "Client" means a person, public officer, corporation, association, organization, or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law; or a member of the armed forces detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Article 1, unless the member:

(A) is detailed, assigned, or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

(B) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

(C) is authorized to practice law and renders professional legal services during off-duty employment.

(3) "Lawyer's representative" means a person employed by or assigned to assist a lawyer in providing professional legal services.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule under any of the following circumstances:

(1) *Crime or Fraud*. If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) *Claimants through Same Deceased Client*. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) *Breach of Duty by Lawyer or Client*. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

(4) *Document Attested by the Lawyer*. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

M.R.E. 502(d)(5)

(5) *Joint Clients*. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

Rule 503. Communications to Clergy

(a) *General Rule*. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant, if such communication is made either as a formal act of religion or as a matter of conscience.

(b) *Definitions*. As used in this rule:

(1) "Clergyman" means a minister, priest, rabbi, chaplain, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

(2) "Clergyman's assistant" means a person employed by or assigned to assist a clergyman in his capacity as a spiritual advisor.

(3) A communication is "confidential" if made to a clergyman in the clergyman's capacity as a spiritual adviser or to a clergyman's assistant in the assistant's official capacity and is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication."

(c) *Who May Claim the Privilege*. The privilege may be claimed by the person, guardian, or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary.

Rule 504. Husband-Wife Privilege

(a) *Spousal Incapacity*. A person has a privilege to refuse to testify against his or her spouse.

(b) *Confidential Communication Made During the Marriage*.

(1) *General Rule*. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

(2) *Definition*. As used in this rule, a communication is "confidential" if made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

(3) *Who May Claim the Privilege*. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused regardless of whether the spouse who made the communication objects to its disclosure.

(c) *Exceptions*.

(1) *To Spousal Incapacity Only*. There is no privilege under subdivision (a) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

(2) *To Spousal Incapacity and Confidential Communications*. There is no privilege under subdivisions (a) or (b):

(A) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

(B) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and with respect to the privilege in subdivision (a), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or with respect to the privilege in subdivision (b), the relationship was a sham at the time of the communication; or

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

(C) In proceedings in which a spouse is charged, in accordance with Article 133 or 134, with importing the other spouse as an alien for prostitution or other immoral purpose in violation of 18 U.S.C. §1328; with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 U.S.C. §§ 2421–2424; or with violation of such other similar statutes under which such privilege may not be claimed in the trial of criminal cases in the United States district courts.

(D) Where both parties have been substantial participants in illegal activity, those communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated are not marital communications for purposes of the privilege in subdivision (b) and are not entitled to protection under the privilege in subdivision (b).

(d) *Definitions*. As used in this rule:

(1) "A child of either" means a biological child, adopted child, or ward of one of the spouses and includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this rule only, a child is:

(A) an individual under the age of 18; or

(B) an individual with a mental handicap who functions under the age of 18.

(2) "Temporary physical custody" means a parent has entrusted his or her child with another. There is no minimum amount of time necessary to establish temporary physical custody, nor is a written agreement required. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances where a parent entrusts another with the care of their child for recurring care or during absences due to temporary duty or deployments.

Rule 505. Classified Information

(a) *General Rule*. Classified information must be protected and is privileged from disclosure if disclosure would be detrimental to the national security. Under no circumstances may a military judge order the release of classified information to any person not authorized to receive such information. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities.

(b) *Definitions*. As used in this rule:

(1) "Classified information" means any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulations, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).

(2) "National security" means the national defense and foreign relations of the United States.

(3) "In camera hearing" means a session under Article 39(a) from which the public is excluded.

(4) "In camera review" means an inspection of documents or other evidence conducted by the military judge alone in chambers and not on the record.

(5) "Ex parte" means a discussion between the military judge and either the defense counsel or prosecution, without the other party or the public present. This discussion can be on or off the record, depending on the circumstances. The military judge will grant a request for an ex parte discussion or hearing only after finding that such discussion or hearing is necessary to protect classified information or other good cause. Prior to granting a request from one party for an ex parte discussion or hearing, the military judge must provide notice to the opposing party on the record. If the ex parte discussion is conducted off the record, the military judge should later state on the record that such ex parte discussion took place and generally summarize the subject matter of the discussion, as appropriate.

(c) *Access to Evidence*. Any information admitted into evidence pursuant to any rule, procedure, or order by the military judge must be provided to the accused.

(d) *Declassification*. Trial counsel should, when practicable, seek declassification of evidence that may be used at trial, consistent with the requirements of national security. A decision not to declassify evidence under this section is not subject to review by a military judge or upon appeal.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Excerpts from the MCM and UCMJ

M.R.E. 513

Rule 513. Psychotherapist—Patient Privilege

(a) *General Rule*. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the patient and a psychotherapist or an assistant to the psychotherapist, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

(b) *Definitions*. As used in this rule:

(1) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis, or treatment of a mental or emotional condition.

(2) "Psychotherapist" means a psychiatrist, clinical psychologist, or clinical social worker who is licensed in any State, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide such services from any military health care facility, or is a person reasonably believed by the patient to have such license or credentials.

(3) "Assistant to a psychotherapist" means a person directed by or assigned to assist a psychotherapist in providing professional services, or is reasonably believed by the patient to be such.

(4) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for such transmission of the communication.

(5) "Evidence of a patient's records or communications" means testimony of a psychotherapist, or assistant to the same, or patient records that pertain to communications by a patient to a psychotherapist, or assistant to the same, for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant to the psychotherapist who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the patient is dead;

(2) when the communication is evidence of child abuse or of neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

(3) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

(4) when a psychotherapist or assistant to a psychotherapist believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

(5) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

(6) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission;

(7) when an accused offers statements or other evidence concerning his mental condition in defense, extenuation, or mitigation, under circumstances not covered by R.C.M. 706 or Mil. R. Evid. 302. In such situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

(8) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to Determine Admissibility of Patient Records or Communications*.

(1) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practical, notify the patient or the patient's guardian, conservator, or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a patient's records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient must be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Rule 514. Victim Advocate—Victim Privilege

(a) *General Rule*. A victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim.

(b) *Definitions*. As used in this rule:

(1) "Victim" means any person who is alleged to have suffered direct physical or emotional harm as the result of a sexual or violent offense.

(2) "Victim advocate" means a person who:

(A) is designated in writing as a victim advocate in accordance with service regulation;

(B) is authorized to perform victim advocate duties in accordance with service regulation and is acting in the performance of those duties; or

(C) is certified as a victim advocate pursuant to federal or state requirements.

(3) A communication is "confidential" if made in the course of the victim advocate - victim relationship and not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of advice or assistance to the alleged victim or those reasonably necessary for such transmission of the communication.

(4) "Evidence of a victim's records or communications" means testimony of a victim advocate, or records that pertain to communications by a victim to a victim advocate, for the purposes of advising or providing supportive assistance to the victim.

(c) *Who May Claim the Privilege*. The privilege may be claimed by the victim or the guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a defense counsel representing the victim to claim the privilege on his or her behalf. The victim advocate who received the communication may claim the privilege on behalf of the victim. The authority of such a victim advocate, guardian, conservator, or a defense counsel representing the victim to so assert the privilege is presumed in the absence of evidence to the contrary.

(d) *Exceptions*. There is no privilege under this rule:

(1) when the victim is dead;

(2) when federal law, state law, or service regulation imposes a duty to report information contained in a communication;

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

M.R.E. 514(d)(3)

(3) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger to any person, including the victim;

(4) if the communication clearly contemplated the future commission of a fraud or crime, or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

(5) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information, or the accomplishment of a military mission; or

(6) when admission or disclosure of a communication is constitutionally required.

(e) *Procedure to Determine Admissibility of Victim Records or Communications*.

(1) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party must:

(A) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

(B) serve the motion on the opposing party, the military judge and, if practicable, notify the victim or the victim's guardian, conservator, or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subdivision (e)(2).

(2) Before ordering the production or admission of evidence of a victim's records or communication, the military judge must conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim must be afforded a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings may not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge must conduct the hearing outside the presence of the members.

(3) The military judge may examine the evidence or a proffer thereof in camera, if such examination is necessary to rule on the motion.

(4) To prevent unnecessary disclosure of evidence of a victim's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

(5) The motion, related papers, and the record of the hearing must be sealed in accordance with R.C.M. 1103A and must remain under seal unless the military judge or an appellate court orders otherwise.

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Mil. R. Evid. 703.

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

Rule 605. Military Judge's Competency as a Witness

(a) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.

cross-examine the witness. When the members wish to call or recall a witness, the military judge must determine whether the testimony would be relevant and not barred by any rule or provision of this Manual.

(b) *Examining*. The military judge or members may examine a witness regardless of who calls the witness. Members must submit their questions to the military judge in writing. Following the opportunity for review by both parties, the military judge must rule on the propriety of the questions, and ask the questions in an acceptable form on behalf of the members. When the military judge or the members call a witness who has not previously testified, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

(c) *Objections*. A party may object to the court-martial's calling or examining a witness either at that time or at the next opportunity when the members are not present.

Rule 615. Excluding Witnesses

At a party's request, the military judge must order witnesses excluded so that they cannot hear other witnesses' testimony, or the military judge may do so *sua sponte*. This rule does not authorize excluding:

(a) the accused;

(b) a member of an armed service or an employee of the United States after being designated as a representative of the United States by the trial counsel;

(c) a person whose presence a party shows to be essential to presenting the party's case;

(d) a person authorized by statute to be present; or

(e) a victim of an offense from the trial of an accused for that offense, when the sole basis for exclusion would be that the victim may testify or present information during the presentencing phase of the trial.

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

(c) not based on scientific, technical, or other specialized knowledge within the scope of Mil. R. Evid. 702.

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. If the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the members of a court-martial only if the military judge finds that their probative value in helping the members evaluate the opinion substantially outweighs their prejudicial effect.

Rule 704. Opinion on an Ultimate Issue

An opinion is not objectionable just because it embraces an ultimate issue.

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the military judge orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

SEC. 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(1) RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

(2) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.—The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the H. R. 4310—128 amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125 Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.—

(1) COMPOSITION.—

(A) RESPONSE SYSTEMS PANEL.—The panel required by subsection (a)(1) shall be composed of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the chairman and ranking member of the Committees on Armed Services of the Senate and the House of Representatives.

(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—

(A) RESPONSE SYSTEMS PANEL.—All original appointments to the panel required by subsection (a)(1) shall be made not later than 120 days after the date of the enactment of this Act.

(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(1) RESPONSE SYSTEMS PANEL.—The panel established under subsection (a)(1) shall terminate upon the earlier of the following:

(A) Thirty days after the panel has submitted a report of its findings and recommendations, through the Secretary of Defense, to the Committees on Armed Services of the Senate and the House of Representatives.

(B) Eighteen months after the first meeting of the panel, by which date the panel is expected to have made its report.

(2) JUDICIAL PROCEEDINGS PANEL.—

(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.

(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.

Legislation

(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(1) RESPONSE SYSTEMS PANEL.—In conducting a systemic review and assessment, the panel required by subsection (a)(1) shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice). The review shall include the following:

(A) Using criteria the panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the Uniform Code of the Military Justice, and the investigation, prosecution, and adjudication, of adult sexual assault crimes during the period 2007 through 2011.

(B) A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims and the identification of civilian best practices that may be incorporated into any phase of the military system.

(C) An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial.

(D) An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems.

(E) An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences.

(F) An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault.

(G) An assessment of the strengths and weakness of proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

(H) An assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by section 3771 of title 18, United States Code, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2.

(I) Such other matters and materials the panel considers appropriate.

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:

(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).

(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.

(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.

(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.

(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice),and any instances in which prior sexual conduct was determined to be inadmissible.

(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.

(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.

(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.

(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

Legislation

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22 **SEC. 1702. REVISION OF ARTICLE 32 AND ARTICLE 60, UNI-**

23 **FORM CODE OF MILITARY JUSTICE.**

24 (a) USE OF PRELIMINARY HEARINGS.—

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1 (1) IN GENERAL.—Section 832 of title 10,
2 United States Code (article 32 of the Uniform Code
3 of Military Justice), is amended to read as follows:
4 **"§ 832. Art. 32. Preliminary hearing**
5 "(a) PRELIMINARY HEARING REQUIRED.—(1) No
6 charge or specification may be referred to a general court-
7 martial for trial until completion of a preliminary hearing.
8 "(2) The purpose of the preliminary hearing shall be
9 limited to the following:
10 "(A) Determining whether there is probable
11 cause to believe an offense has been committed and
12 the accused committed the offense.
13 "(B) Determining whether the convening au-
14 thority has court-martial jurisdiction over the of-
15 fense and the accused.
16 "(C) Considering the form of charges.
17 "(D) Recommending the disposition that should
18 be made of the case.
19 "(b) HEARING OFFICER.—(1) A preliminary hearing
20 under subsection (a) shall be conducted by an impartial
21 judge advocate certified under section 827(b) of this title
22 (article 27(b)) whenever practicable or, in exceptional cir-
23 cumstances in which the interests of justice warrant, by
24 an impartial hearing officer who is not a judge advocate.
25 If the hearing officer is not a judge advocate, a judge ad-

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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713

1 vocate certified under section 827(b) of this title (article
2 27(b)) shall be available to provide legal advice to the
3 hearing officer.
4 "(2) Whenever practicable, when the judge advocate
5 or other hearing officer is detailed to conduct the prelimi-
6 nary hearing, the officer shall be equal to or senior in
7 grade to military counsel detailed to represent the accused
8 or the Government at the preliminary hearing.
9 "(c) REPORT OF RESULTS.—After conducting a pre-
10 liminary hearing under subsection (a), the judge advocate
11 or other officer conducting the preliminary hearing shall
12 prepare a report that addresses the matters specified in
13 subsections (a)(2) and (f).
14 "(d) RIGHTS OF ACCUSED AND VICTIM.—(1) The ac-
15 cused shall be advised of the charges against the accused
16 and of the accused's right to be represented by counsel
17 at the preliminary hearing under subsection (a). The ac-
18 cused has the right to be represented at the preliminary
19 hearing as provided in section 838 of this title (article 38)
20 and in regulations prescribed under that section.
21 "(2) The accused may cross-examine witnesses who
22 testify at the preliminary hearing and present additional
23 evidence in defense and mitigation, relevant to the limited
24 purposes of the hearing, as provided for in paragraph (4)
25 and subsection (a)(2).

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December 10, 2013 (5:04 p.m.)

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714

1 "(3) A victim may not be required to testify at the
2 preliminary hearing. A victim who declines to testify shall
3 be deemed to be not available for purposes of the prelimi-
4 nary hearing.
5 "(4) The presentation of evidence and examination
6 (including cross-examination) of witnesses at a prelimi-
7 nary hearing shall be limited to the matters relevant to
8 the limited purposes of the hearing, as provided in sub-
9 section (a)(2).
10 "(e) RECORDING OF PRELIMINARY HEARING.—A
11 preliminary hearing under subsection (a) shall be recorded
12 by a suitable recording device. The victim may request the
13 recording and shall have access to the recording as pre-
14 scribed by the Manual for Courts-Martial.
15 "(f) EFFECT OF EVIDENCE OF UNCHARGED OF-
16 FENSE.—If evidence adduced in a preliminary hearing
17 under subsection (a) indicates that the accused committed
18 an uncharged offense, the hearing officer may consider the
19 subject matter of that offense without the accused having
20 first been charged with the offense if the accused—
21 "(1) is present at the preliminary hearing;
22 "(2) is informed of the nature of each un-
23 charged offense considered; and

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December 10, 2013 (5:04 p.m.)

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715

1 "(3) is afforded the opportunities for represen-
2 tation, cross-examination, and presentation con-
3 sistent with subsection (d).
4 "(g) EFFECT OF VIOLATION.—The requirements of
5 this section are binding on all persons administering this
6 chapter, but failure to follow the requirements does not
7 constitute jurisdictional error.
8 "(h) VICTIM DEFINED.—In this section, the term
9 'victim' means a person who—
10 "(1) is alleged to have suffered a direct phys-
11 ical, emotional, or pecuniary harm as a result of the
12 matters set forth in a charge or specification being
13 considered; and
14 "(2) is named in one of the specifications.".
15 (2) CLERICAL AMENDMENT.—The table of sec-
16 tions at the beginning of subchapter VI of chapter
17 47 of such title is amended by striking the item re-
18 lating to section 832 and inserting the following new
19 item:

"832. Art 32. Preliminary hearing.".

20 (b) ELIMINATION OF UNLIMITED COMMAND PRE-
21 ROGATIVE AND DISCRETION; IMPOSITION OF ADDITIONAL
22 LIMITATIONS.—Subsection (c) of section 860 of title 10,
23 United States Code (article 60 of the Uniform Code of
24 Military Justice), is amended to read as follows:

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December 10, 2013 (5:04 p.m.)

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716

1 "(c)(1) Under regulations of the Secretary concerned,
2 a commissioned officer commanding for the time being,
3 a successor in command, or any person exercising general
4 court-martial jurisdiction may act under this section in
5 place of the convening authority.
6 "(2)(A) Action on the sentence of a court-martial
7 shall be taken by the convening authority or by another
8 person authorized to act under this section. Subject to reg-
9 ulations of the Secretary concerned, such action may be
10 taken only after consideration of any matters submitted
11 by the accused under subsection (b) or after the time for
12 submitting such matters expires, whichever is earlier.
13 "(B) Except as provided in paragraph (4), the con-
14 vening authority or another person authorized to act
15 under this section may approve, disapprove, commute, or
16 suspend the sentence of the court-martial in whole or in
17 part.
18 "(C) If the convening authority or another person au-
19 thorized to act under this section acts to disapprove, com-
20 mute, or suspend, in whole or in part, the sentence of the
21 court-martial for an offense (other than a qualifying of-
22 fense), the convening authority or other person shall pro-
23 vide, at that same time, a written explanation of the rea-
24 sons for such action. The written explanation shall be
25 made a part of the record of the trial and action thereon.

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717

1 "(3)(A) Action on the findings of a court-martial by
2 the convening authority or by another person authorized
3 to act under this section is not required.
4 "(B) If the convening authority or another person au-
5 thorized to act under this section acts on the findings of
6 a court-martial, the convening authority or other person—
7 "(i) may not dismiss any charge or specifica-
8 tion, other than a charge or specification for a quali-
9 fying offense, by setting aside a finding of guilty
10 thereto; or
11 "(ii) may not change a finding of guilty to a
12 charge or specification, other than a charge or speci-
13 fication for a qualifying offense, to a finding of
14 guilty to an offense that is a lesser included offense
15 of the offense stated in the charge or specification.
16 "(C) If the convening authority or another person au-
17 thorized to act under this section acts on the findings to
18 dismiss or change any charge or specification for an of-
19 fense (other than a qualifying offense), the convening au-
20 thority or other person shall provide, at that same time,
21 a written explanation of the reasons for such action. The
22 written explanation shall be made a part of the record of
23 the trial and action thereon.
24 "(D)(i) In this subsection, the term 'qualifying of-
25 fense' means, except in the case of an offense excluded

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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718

1 pursuant to clause (ii), an offense under this chapter for
2 which—
3 "(I) the maximum sentence of confinement that
4 may be adjudged does not exceed two years; and
5 "(II) the sentence adjudged does not include
6 dismissal, a dishonorable or bad-conduct discharge,
7 or confinement for more than six months.
8 "(ii) Such term does not include any of the following:
9 "(I) An offense under subsection (a) or (b) of
10 section 920 of this title (article 120).
11 "(II) An offense under section 920b or 925 of
12 this title (articles 120b and 125).
13 "(III) Such other offenses as the Secretary of
14 Defense may specify by regulation.
15 "(4)(A) Except as provided in subparagraph (B) or
16 (C), the convening authority or another person authorized
17 to act under this section may not disapprove, commute,
18 or suspend in whole or in part an adjudged sentence of
19 confinement for more than six months or a sentence of
20 dismissal, dishonorable discharge, or bad conduct dis-
21 charge.
22 "(B) Upon the recommendation of the trial counsel,
23 in recognition of the substantial assistance by the accused
24 in the investigation or prosecution of another person who
25 has committed an offense, the convening authority or an-

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December 10, 2013 (5:04 p.m.)

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719

1 other person authorized to act under this section shall
2 have the authority to disapprove, commute, or suspend the
3 adjudged sentence in whole or in part, even with respect
4 to an offense for which a mandatory minimum sentence
5 exists.
6 "(C) If a pre-trial agreement has been entered into
7 by the convening authority and the accused, as authorized
8 by Rule for Courts–Martial 705, the convening authority
9 or another person authorized to act under this section
10 shall have the authority to approve, disapprove, commute,
11 or suspend a sentence in whole or in part pursuant to the
12 terms of the pre-trial agreement, subject to the following
13 limitations for convictions of offenses that involve a man-
14 datory minimum sentence:
15 "(i) If a mandatory minimum sentence of a dis-
16 honorable discharge applies to an offense for which
17 the accused has been convicted, the convening au-
18 thority or another person authorized to act under
19 this section may commute the dishonorable dis-
20 charge to a bad conduct discharge pursuant to the
21 terms of the pre-trial agreement.
22 "(ii) Except as provided in clause (i), if a man-
23 datory minimum sentence applies to an offense for
24 which the accused has been convicted, the convening
25 authority or another person authorized to act under

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720

this section may not disapprove, otherwise commute, or suspend the mandatory minimum sentence in whole or in part, unless authorized to do so under subparagraph (B).''.

(c) CONFORMING AMENDMENTS.—

(1) REFERENCES TO SOLE DISCRETION AND OTHER PERSONS AUTHORIZED TO ACT UNDER ARTICLE 60.—Section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is further amended—

(A) in subsection (b)(2), by striking ''or other person taking action under this section'' and inserting ''or another person authorized to act under this section'';

(B) in subsection (d), by striking ''or other person taking action under this section'' the first place it appears and inserting ''or another person authorized to act under this section'';

(C) in subsection (e)(1), by striking ''or other person taking action under this section, in his sole discretion,'' and inserting ''or another person authorized to act under this section''; and

(D) in subsection (e)(3), by striking ''or other person taking action under this section''

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721

and inserting "or another person authorized to act under this section".

(2) OTHER AUTHORITY FOR CONVENING AUTHORITY TO SUSPEND SENTENCE.—Section 871(d) of such title (article 71(d) of the Uniform Code of Military Justice) is amended by adding at the end the following new sentence: "Paragraphs (2) and (4) of subsection (c) of section 860 of this title (article 60) shall apply to any decision by the convening authority or another person authorized to act under this section to suspend the execution of any sentence or part thereof under this subsection.".

(3) REFERENCES TO ARTICLE 32 INVESTIGATION.—(A) Section 802(d)(1)(A) of such title (article 2(d)(1)(A) of the Uniform Code of Military Justice) is amended by striking "investigation under section 832" and inserting "a preliminary hearing under section 832".

(B) Section 834(a)(2) of such title (article 34(a)(2) of the Uniform Code of Military Justice) is amended by striking "investigation under section 832 of this title (article 32) (if there is such a report)" and inserting "a preliminary hearing under section 832 of this title (article 32)".

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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722

(C) Section 838(b)(1) of such title (article 38(b)(1) of the Uniform Code of Military Justice) is amended by striking "an investigation under section 832" and inserting "a preliminary hearing under section 832".

(D) Section 847(a)(1) of such title (article 47(a)(1) of the Uniform Code of Military Justice) is amended by striking "an investigation pursuant to section 832(b) of this title (article 32(b))" and inserting "a preliminary hearing pursuant to section 832 of this title (article 32)".

(E) Section 948b(d)(1)(C) of such title is amended by striking "pretrial investigation" and inserting "preliminary hearing".

(d) EFFECTIVE DATES.—

(1) ARTICLE 32 AMENDMENTS.—The amendments made by subsections (a) and (c)(3) shall take effect one year after the date of the enactment of this Act and shall apply with respect to offenses committed under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), on or after that effective date.

(2) ARTICLE 60 AMENDMENTS.—The amendments made by subsection (b) and paragraphs (1) and (2) of subsection (c) shall take effect 180 days

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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723

1 after the date of the enactment of this Act and shall
2 apply with respect to offenses committed under
3 chapter 47 of title 10, United States Code (the Uni-
4 form Code of Military Justice), on or after that ef-
5 fective date.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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SEC. 1704. DEFENSE COUNSEL INTERVIEW OF VICTIM OF AN ALLEGED SEX-RELATED OFFENSE IN PRESENCE OF TRIAL COUNSEL, COUNSEL FOR THE VICTIM, OR A SEXUAL ASSAULT VICTIM ADVOCATE.

Section 846 of title 10, United States Code (article 46 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a) OPPORTUNITY TO OBTAIN WITNESSES AND OTHER EVIDENCE.—"before "The trial counsel";

(2) by striking "Process issued" and inserting the following:

"(c) PROCESS.—Process issued"; and

(3) by inserting after subsection (a), as designated by paragraph (1), the following new subsection (b):

"(b) DEFENSE COUNSEL INTERVIEW OF VICTIM OF ALLEGED SEX-RELATED OFFENSE.—(1) Upon notice by trial counsel to defense counsel of the name of an alleged victim of an alleged sex-related offense who trial counsel intends to call to testify at a preliminary hearing under section 832 of this title (article 32) or a court-martial

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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725

1 under this chapter, defense counsel shall make any request
2 to interview the victim through trial counsel.
3 "(2) If requested by an alleged victim of an alleged
4 sex-related offense who is subject to a request for inter-
5 view under paragraph (1), any interview of the victim by
6 defense counsel shall take place only in the presence of
7 trial counsel, a counsel for the victim, or a Sexual Assault
8 Victim Advocate.
9 "(3) In this subsection, the term 'alleged sex-related
10 offense' means any allegation of—
11 "(A) a violation of section 920, 920a, 920b,
12 920c, or 925 of this title (article 120, 120a, 120b,
13 120c, or 125); or
14 "(B) an attempt to commit an offense specified
15 in a paragraph (1) as punishable under section 880
16 of this title (article 80).".
17 **SEC. 1705. DISCHARGE OR DISMISSAL FOR CERTAIN SEX-**
18 **RELATED OFFENSES AND TRIAL OF SUCH OF-**
19 **FENSES BY GENERAL COURTS-MARTIAL.**
20 (a) MANDATORY DISCHARGE OR DISMISSAL RE-
21 QUIRED.—
22 (1) IMPOSITION.—Section 856 of title 10,
23 United States Code (article 56 of the Uniform Code
24 of Military Justice), is amended—

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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726

1 (A) by inserting "(a)" before "The punish-
2 ment"; and
3 (B) by adding at the end the following new
4 subsection:
5 "(b)(1) While a person subject to this chapter who
6 is found guilty of an offense specified in paragraph (2)
7 shall be punished as a general court-martial may direct,
8 such punishment must include, at a minimum, dismissal
9 or dishonorable discharge, except as provided for in sec-
10 tion 860 of this title (article 60).
11 "(2) Paragraph (1) applies to the following offenses:
12 "(A) An offense in violation of subsection (a) or
13 (b) of section 920 of this title (article 120(a) or (b)).
14 "(B) Rape and sexual assault of a child under
15 subsection (a) or (b) of section 920b of this title (ar-
16 ticle 120b).
17 "(C) Forcible sodomy under section 925 of this
18 title (article 125).
19 "(D) An attempt to commit an offense specified
20 in subparagraph (A), (B), or (C) that is punishable
21 under section 880 of this title (article 80).".
22 (2) CLERICAL AMENDMENTS.—
23 (A) SECTION HEADING.—The heading of
24 such section is amended to read as follows:

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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727

1 **"§ 856. Art. 56. Maximum and minimum limits".**

2 (B) TABLE OF SECTIONS.—The table of
3 sections at the beginning of subchapter VIII of
4 chapter 47 of such title is amended by striking
5 the item relating to section 856 and inserting
6 the following new item:

"856. Art 56. Maximum and minimum limits.".

7 (b) JURISDICTION LIMITED TO GENERAL COURTS-
8 MARTIAL.—Section 818 of title 10, United States Code
9 (article 18 of the Uniform Code of Military Justice), is
10 amended—

11 (1) by inserting "(a)" before the first sentence;
12 (2) in the third sentence, by striking "However,
13 a general court-martial" and inserting the following:
14 "(b) A general court-martial"; and
15 (3) by adding at the end the following new sub-
16 section:
17 "(c) Consistent with sections 819, 820, and 856(b)
18 of this title (articles 19, 20, and 56(b)), only general
19 courts-martial have jurisdiction over an offense specified
20 in section 856(b)(2) of this title (article 56(b)(2)).".
21 (c) EFFECTIVE DATE.—The amendments made by
22 this section shall take effect 180 days after the date of
23 the enactment of this Act, and apply to offenses specified
24 in section 856(b)(2) of title 10, United States Code (arti-
25 cle 56(b)(2) of the Uniform Code of Military Justice), as

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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728

1 added by subsection (a)(1), committed on or after that
2 date.

3 **SEC. 1706. PARTICIPATION BY VICTIM IN CLEMENCY PHASE**
4 **OF COURTS-MARTIAL PROCESS.**

5 (a) VICTIM SUBMISSION OF MATTERS FOR CONSID-
6 ERATION BY CONVENING AUTHORITY.—Section 860 of
7 title 10, United States Code (article 60 of the Uniform
8 Code of Military Justice), as amended by section 1702,
9 is further amended—

10 (1) by redesignating subsections (d) and (e) as
11 subsections (e) and (f), respectively; and

12 (2) by inserting after subsection (c) the fol-
13 lowing new subsection:

14 "(d)(1) In any case in which findings and sentence
15 have been adjudged for an offense that involved a victim,
16 the victim shall be provided an opportunity to submit mat-
17 ters for consideration by the convening authority or by an-
18 other person authorized to act under this section before
19 the convening authority or such other person takes action
20 under this section.

21 "(2)(A) Except as provided in subparagraph (B), the
22 submission of matters under paragraph (1) shall be made
23 within 10 days after the later of—

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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729

1 "(i) the date on which the victim has been given
2 an authenticated record of trial in accordance with
3 section 854(e) of this title (article 54(e)); and
4 "(ii) if applicable, the date on which the victim
5 has been given the recommendation of the staff
6 judge advocate or legal officer under subsection (e).
7 "(B) In the case of a summary court-martial, the
8 submission of matters under paragraph (1) shall be made
9 within seven days after the date on which the sentence
10 is announced.
11 "(3) If a victim shows that additional time is required
12 for submission of matters under paragraph (1), the con-
13 vening authority or other person taking action under this
14 section, for good cause, may extend the submission period
15 under paragraph (2) for not more than an additional 20
16 days.
17 "(4) A victim may waive the right under this sub-
18 section to make a submission to the convening authority
19 or other person taking action under this section. Such a
20 waiver shall be made in writing and may not be revoked.
21 For the purposes of subsection (c)(2), the time within
22 which a victim may make a submission under this sub-
23 section shall be deemed to have expired upon the submis-
24 sion of such waiver to the convening authority or such
25 other person.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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730

1 "(5) In this section, the term 'victim' means a person
2 who has suffered a direct physical, emotional, or pecuniary
3 loss as a result of a commission of an offense under this
4 chapter (the Uniform Code of Military Justice) and on
5 which the convening authority or other person authorized
6 to take action under this section is taking action under
7 this section.".
8 (b) LIMITATIONS ON CONSIDERATION OF VICTIM'S
9 CHARACTER.—Subsection (b) of section 860 of title 10,
10 United States Code (article 60 of the Uniform Code of
11 Military Justice), is amended by adding at the end the
12 following new paragraph:
13 "(5) The convening authority or other person taking
14 action under this section shall not consider under this sec-
15 tion any submitted matters that relate to the character
16 of a victim unless such matters were presented as evidence
17 at trial and not excluded at trial.".
18 (c) CONFORMING AMENDMENT.—Subsection (b)(1)
19 of section 860 of title 10, United States Code (article 60
20 of the Uniform Code of Military Justice), is amended by
21 striking "subsection (d)" and inserting "subsection (e)".

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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732

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SEC. 1708. MODIFICATION OF MANUAL FOR COURTS-MARTIAL TO ELIMINATE FACTOR RELATING TO CHARACTER AND MILITARY SERVICE OF THE ACCUSED IN RULE ON INITIAL DISPOSITION OF OFFENSES.

Not later than 180 days after the date of the enactment of this Act, the discussion pertaining to Rule 306 of the Manual for Courts-Martial (relating to policy on initial disposition of offenses) shall be amended to strike the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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753

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Subtitle C—Amendments to Other Laws

SEC. 1721. TRACKING OF COMPLIANCE OF COMMANDING OFFICERS IN CONDUCTING ORGANIZATIONAL CLIMATE ASSESSMENTS FOR PURPOSES OF PREVENTING AND RESPONDING TO SEXUAL ASSAULTS.

Section 572 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1753; 10 U.S.C. 1561 note) is amended by adding at the end the following new subsection:

"(d) TRACKING OF ORGANIZATIONAL CLIMATE ASSESSMENT COMPLIANCE.—The Secretary of Defense shall direct the Secretaries of the military departments to verify

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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754

1 and track the compliance of commanding officers in con-
2 ducting organizational climate assessments, as required by
3 subsection (a)(3).''.

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f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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756

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9 **SEC. 1725. QUALIFICATIONS AND SELECTION OF DEPART-**
10 **MENT OF DEFENSE SEXUAL ASSAULT PRE-**
11 **VENTION AND RESPONSE PERSONNEL AND**
12 **REQUIRED AVAILABILITY OF SEXUAL AS-**
13 **SAULT NURSE EXAMINERS.**

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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757

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17 (b) AVAILABILITY OF SEXUAL ASSAULT NURSE EX-
18 AMINERS AT MILITARY MEDICAL TREATMENT FACILI-
19 TIES.—
20 (1) FACILITIES WITH FULL-TIME EMERGENCY
21 DEPARTMENT.—The Secretary of a military depart-
22 ment shall require the assignment of at least one
23 full-time sexual assault nurse examiner to each mili-
24 tary medical treatment facility under the jurisdiction
25 of that Secretary in which an emergency department

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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758

1 operates 24 hours per day. The Secretary may as-
2 sign additional sexual assault nurse examiners based
3 on the demographics of the patients who utilize the
4 military medical treatment facility.
5 (2) OTHER FACILITIES.—In the case of a mili-
6 tary medical treatment facility not covered by para-
7 graph (1), the Secretary of the military department
8 concerned shall require that a sexual assault nurse
9 examiner be made available to a patient of the facil-
10 ity, consistent with the Department of Justice Na-
11 tional Protocol for Sexual Assault Medical Forensic
12 Examinations, Adult/Adolescent, when a determina-
13 tion is made regarding the patient's need for the
14 services of a sexual assault nurse examiner.
15 (3) QUALIFICATIONS.—A sexual assault nurse
16 examiner assigned under paragraph (1) or made
17 available under paragraph (2) shall meet such train-
18 ing and certification requirements as are prescribed
19 by the Secretary of Defense.
20 (c) REPORT ON TRAINING, QUALIFICATIONS, AND
21 EXPERIENCE OF SEXUAL ASSAULT PREVENTION AND RE-
22 SPONSE PERSONNEL.—
23 (1) REPORT REQUIRED.—The Secretary shall
24 prepare a report on the review, conducted pursuant
25 to the Secretary of Defense Memorandum of May

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

F:\SLC\ASCR14\NDAA14BL.XML

759

1 17, 2013, of the adequacy of the training, qualifica-
2 tions, and experience of each member of the Armed
3 Forces and civilian employee of the Department of
4 Defense who is assigned to a position that includes
5 responsibility for sexual assault prevention and re-
6 sponse within the Armed Forces for the successful
7 discharge of such responsibility.
8 (2) REPORT ELEMENTS.—The report shall in-
9 clude the following:
10 (A) An assessment of the adequacy of the
11 training and certifications required for members
12 and employees described in paragraph (1).
13 (B) The number of such members and em-
14 ployees who did not have the training, qualifica-
15 tions, or experience required to successfully dis-
16 charge their responsibility for sexual assault
17 prevention and response within the Armed
18 Forces.
19 (C) The actions taken by the Secretary of
20 Defense with respect to such members and em-
21 ployees who were found to lack the training,
22 qualifications, or experience to successfully dis-
23 charge such responsibility.
24 (D) Such improvements as the Secretary
25 considers appropriate in the process used to se-

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

F:\SLC\ASCR14\NDAA14BL.XML

760

lect and assign members and employees to positions that include responsibility for sexual assault prevention and response within the Armed Forces in order to ensure the highest caliber candidates are selected and assigned to such positions.

(3) SUBMISSION.—Not later than 120 days after the date of the enactment of this Act, the Secretary of Defense shall submit the report to the Committees on Armed Services of the Senate and the House of Representatives.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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Subtitle D—Studies, Reviews, Policies, and Reports

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) ADDITIONAL DUTIES FOR RESPONSE SYSTEMS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "response systems panel", shall conduct the following:

(A) An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), would have on overall reporting and prosecution of sexual assault cases.

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

F:\SLC\ASCR14\NDAA14BL.XML

763

1 (B) An assessment regarding whether the
2 roles, responsibilities, and authorities of Special
3 Victims' Counsel to provide legal assistance
4 under section 1044e of title 10, United States
5 Code, as added by section 1716, to victims of
6 alleged sex-related offenses should be expanded
7 to include legal standing to represent the victim
8 during investigative and military justice pro-
9 ceedings in connection with the prosecution of
10 the offense.
11 (C) An assessment of the feasibility and
12 appropriateness of extending to victims of
13 crimes covered by chapter 47 of title 10, United
14 States Code (the Uniform Code of Military Jus-
15 tice), the right afforded a crime victim in civil-
16 ian criminal legal proceedings under subsection
17 (a)(4) of section 3771 of title 18, United States
18 Code, and the legal standing to seek enforce-
19 ment of crime victim rights provided by sub-
20 section (d) of such section.
21 (D) An assessment of the means by which
22 the name, if known, and other necessary identi-
23 fying information of an alleged offender that is
24 collected as part of a restricted report of a sex-
25 ual assault could be compiled into a protected,

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

F:\SLC\ASCR14\NDAA14BL.XML

764

1 searchable database accessible only to military
2 criminal investigators, Sexual Assault Response
3 Coordinators, or other appropriate personnel
4 only for the purposes of identifying individuals
5 who are subjects of multiple accusations of sex-
6 ual assault and encouraging victims to make an
7 unrestricted report of sexual assault in those
8 cases in order to facilitate increased prosecu-
9 tions, particularly of serial offenders. The as-
10 sessment should include an evaluation of the
11 appropriate content to be included in the data-
12 base, as well as the best means to maintain the
13 privacy of those making a restricted report.
14 (E) As part of the comparison of military
15 and civilian systems for the investigation, pros-
16 ecution, and adjudication of adult sexual as-
17 sault crimes, as required by subsection
18 (d)(1)(B) of section 576 of the National De-
19 fense Authorization Act for Fiscal Year 2013,
20 an assessment of the opportunities for clemency
21 provided in the military and civilian systems,
22 the appropriateness of clemency proceedings in
23 the military system, the manner in which clem-
24 ency is used in the military system, and wheth-
25 er clemency in the military justice system could

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

F:\SLC\ASCR14\NDAA14BL.XML

765

be reserved until the end of the military appeals process.

(F) An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the response systems panel recommends such a formal statement, the response systems panel shall provide key elements or principles that should be included in the formal statement.

(2) SUBMISSION OF RESULTS.—The response systems panel shall include the results of the assessments required by paragraph (1) in the report required by subsection (c)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013, as amended by section 1722.

(b) ADDITIONAL DUTIES FOR JUDICIAL PROCEEDINGS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

F:\SLC\ASCR14\NDAA14BL.XML

766

of Defense under subsection (a)(2) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "judicial proceedings panel", shall conduct the following:

(A) An assessment of the likely consequences of amending the definition of rape and sexual assault under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), to expressly cover a situation in which a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

(B) An assessment of the implementation and effect of section 1044e of title 10, United States Code, as added by section 1716, and make such recommendations for modification of such section 1044e as the judicial proceedings panel considers appropriate.

(C) An assessment of the implementation and effect of the mandatory minimum sentences established by section 856(b) of title 10, United

f:\VHLC\121013\121013.144.xml (565815|12)
December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

1 States Code (article 56(b) of the Uniform Code
2 of Military Justice), as added by section 1705,
3 and the appropriateness of statutorily mandated
4 minimum sentencing provisions for additional
5 offenses under chapter 47 of title 10, United
6 States Code (the Uniform Code of Military Jus-
7 tice).
8 (D) An assessment of the adequacy of the
9 provision of compensation and restitution for
10 victims of offenses under chapter 47 of title 10,
11 United States Code (the Uniform Code of Mili-
12 tary Justice), and develop recommendations on
13 expanding such compensation and restitution,
14 including consideration of the options as fol-
15 lows:
16 (i) Providing the forfeited wages of in-
17 carcerated members of the Armed Forces
18 to victims of offenses as compensation.
19 (ii) Including bodily harm among the
20 injuries meriting compensation for redress
21 under section 939 of title 10, United
22 States Code (article 139 of the Uniform
23 Code of Military Justice).
24 (iii) Requiring restitution by members
25 of the Armed Forces to victims of their of-

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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768

1 fenses upon the direction of a court-mar-
2 tial.
3 (2) SUBMISSION OF RESULTS.—The judicial
4 proceedings panel shall include the results of the as-
5 sessments required by paragraph (1) in one of the
6 reports required by subsection (c)(2)(B) of section
7 576 of the National Defense Authorization Act for
8 Fiscal Year 2013.
9 **SEC. 1732. REVIEW AND POLICY REGARDING DEPARTMENT**
10 **OF DEFENSE INVESTIGATIVE PRACTICES IN**
11 **RESPONSE TO ALLEGATIONS OF UNIFORM**
12 **CODE OF MILITARY JUSTICE VIOLATIONS.**
13 (a) REVIEW.—Not later than 180 days after the date
14 of the enactment of this Act, the Secretary of Defense
15 shall conduct a review of the practices of the military
16 criminal investigative organizations (Army Criminal Inves-
17 tigation Command, Naval Criminal Investigative Service,
18 and Air Force Office of Special Investigation) in response
19 to an allegation that a member of the Armed Forces has
20 committed an offense under the Uniform Code of Military
21 Justice, including the extent to which the military criminal
22 investigative organizations make a recommendation re-
23 garding whether an allegation appears founded or un-
24 founded.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

F:\SLC\ASCR14\NDAA14BL.XML

769

1 (b) POLICY.—After conducting the review required by
2 subsection (a), the Secretary of Defense shall develop a
3 uniform policy for the Armed Forces, to the extent prac-
4 ticable, regarding the use of case determinations to record
5 the results of the investigation of an alleged violation of
6 the Uniform Code of Military Justice. In developing the
7 policy, the Secretary shall consider the feasibility of adopt-
8 ing case determination methods, such as the uniform
9 crime report, used by nonmilitary law enforcement agen-
10 cies.

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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13 **SEC. 1742. COMMANDING OFFICER ACTION ON REPORTS**
14 **ON SEXUAL OFFENSES INVOLVING MEMBERS**
15 **OF THE ARMED FORCES.**

16 (a) IMMEDIATE ACTION REQUIRED.—A commanding
17 officer who receives a report of a sex-related offense in-
18 volving a member of the Armed Forces in the chain of
19 command of such officer shall act upon the report in ac-
20 cordance with subsection (b) immediately after receipt of
21 the report by the commanding officer.

22 (b) ACTION REQUIRED.—The action required by this
23 subsection with respect to a report described in subsection
24 (a) is the referral of the report to the military criminal
25 investigation organization with responsibility for inves-

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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779

1 tigating that offense of the military department concerned
2 or such other investigation service of the military depart-
3 ment concerned as the Secretary of the military depart-
4 ment concerned may specify for purposes of this section.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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782

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22 **SEC. 1744. REVIEW OF DECISIONS NOT TO REFER CHARGES**
23 **OF CERTAIN SEX-RELATED OFFENSES FOR**
24 **TRIAL BY COURT-MARTIAL.**

25 (a) REVIEW REQUIRED.—

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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783

1 (1) IN GENERAL.—The Secretary of Defense
2 shall require the Secretaries of the military depart-
3 ments to provide for review of decisions not to refer
4 charges for trial by court-martial in cases where a
5 sex-related offense has been alleged by a victim of
6 the alleged offense.
7 (2) SPECIFIC REVIEW REQUIREMENTS.—As
8 part of a review conducted pursuant to paragraph
9 (1), the Secretary of a military department shall re-
10 quire that—
11 (A) consideration be given to the victim's
12 statement provided during the course of the
13 criminal investigation regarding the alleged sex-
14 related offense perpetrated against the victim;
15 and
16 (B) a determination be made whether the
17 victim's statement and views concerning dis-
18 position of the alleged sex-related offense were
19 considered by the convening authority in mak-
20 ing the referral decision.
21 (b) SEX-RELATED OFFENSE DEFINED.—In this sec-
22 tion, the term ''sex-related offense'' means any of the fol-
23 lowing:
24 (1) Rape or sexual assault under subsection (a)
25 or (b) of section 920 of title 10, United States Code

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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784

(article 120 of the Uniform Code of Military Justice).

(2) Forcible sodomy under section 925 of such title (article 125 of the Uniform Code of Military Justice).

(3) An attempt to commit an offense specified in paragraph (1) or (2) as punishable under section 880 of such title (article 80 of the Uniform Code of Military Justice).

(c) REVIEW OF CASES NOT REFERRED TO COURT-MARTIAL FOLLOWING STAFF JUDGE ADVOCATE RECOMMENDATION OF REFERRAL FOR TRIAL.—In any case where a staff judge advocate, pursuant to section 834 of title 10, United States Code (article 34 of the Uniform Code of Military Justice), recommends that charges of a sex-related offense be referred for trial by court-martial and the convening authority decides not to refer any charges to a court-martial, the convening authority shall forward the case file to the Secretary of the military department concerned for review as a superior authorized to exercise general court-martial convening authority.

(d) REVIEW OF CASES NOT REFERRED TO COURT-MARTIAL FOLLOWING STAFF JUDGE ADVOCATE RECOMMENDATION NOT TO REFER FOR TRIAL.—In any case where a staff judge advocate, pursuant to section 834 of

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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785

1 title 10, United States Code (article 34 of the Uniform
2 Code of Military Justice), recommends that charges of a
3 sex-related offense should not be referred for trial by
4 court-martial and the convening authority decides not to
5 refer any charges to a court-martial, the convening au-
6 thority shall forward the case file for review to the next
7 superior commander authorized to exercise general court-
8 martial convening authority.
9 (e) ELEMENTS OF CASE FILE.—A case file forwarded
10 to higher authority for review pursuant to subsection (c)
11 or (d) shall include the following:
12 (1) All charges and specifications preferred
13 under section 830 of title 10, United States Code
14 (article 30 of the Uniform Code of Military Justice).
15 (2) All reports of investigations of such charges,
16 including the military criminal investigative organi-
17 zation investigation report and the report prepared
18 under section 832 of title 10, United States Code
19 (article 32 of the Uniform Code of Military Justice),
20 as amended by section 1702.
21 (3) A certification that the victim of the alleged
22 sex-related offense was notified of the opportunity to
23 express views on the victim's preferred disposition of
24 the alleged offense for consideration by the con-
25 vening authority.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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786

1 (4) All statements of the victim provided to the
2 military criminal investigative organization and to
3 the victim's chain of command relating to the al-
4 leged sex-related offense and any statement provided
5 by the victim to the convening authority expressing
6 the victim's view on the victim's preferred disposi-
7 tion of the alleged offense.
8 (5) The written advice of the staff judge advo-
9 cate to the convening authority pursuant to section
10 834 of title 10, United States Code (article 34 of the
11 Uniform Code of Military Justice).
12 (6) A written statement explaining the reasons
13 for the convening authority's decision not to refer
14 any charges for trial by court-martial.
15 (7) A certification that the victim of the alleged
16 sex-related offense was informed of the convening
17 authority's decision to forward the case as provided
18 in subsection (c) or (d).
19 (f) NOTICE ON RESULTS OR REVIEW.—The victim of
20 the alleged sex-related offense shall be notified of the re-
21 sults of the review conducted under subsection (c) or (d)
22 in the manner prescribed by the victims and witness as-
23 sistance program of the Armed Force concerned.
24 (g) VICTIM ALLEGATION OF SEX-RELATED OF-
25 FENSE.—The Secretary of Defense shall require the Sec-

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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787

1 retaries of the military departments to develop a system
2 to ensure that a victim of a possible sex-related offense
3 under the Uniform Code of Military Justice is given the
4 opportunity to state, either at the time of making an unre-
5 stricted report of the allegation or during the criminal in-
6 vestigation of the allegation, whether or not the victim be-
7 lieves that the offense alleged is a sex-related offense sub-
8 ject to the requirements of this section.

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792

SEC. 1752. SENSE OF CONGRESS ON DISPOSITION OF CHARGES INVOLVING CERTAIN SEXUAL MISCONDUCT OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE THROUGH COURTS-MARTIAL.

(a) SENSE OF CONGRESS.—It is the sense of Congress that—

(1) any charge regarding an offense specified in subsection (b) should be disposed of by court-martial, rather than by non-judicial punishment or administrative action; and

(2) in the case of any charge regarding an offense specified in subsection (b) that is disposed of by non-judicial punishment or administrative action, rather than by court-martial, the disposition authority should include in the case file a justification for the disposition of the charge by non-judicial punishment or administrative action, rather than by court-martial.

(b) COVERED OFFENSES.—An offense specified in this subsection is any of the following offenses under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice):

(1) Rape or sexual assault under subsection (a) or (b) of section 920 of such title (article 120 of the Uniform Code of Military Justice).

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December 10, 2013 (5:04 p.m.)

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793

(2) Forcible sodomy under section 925 of such title (article 125 of the Uniform Code of Military Justice).

(3) An attempt to commit an offense specified in paragraph (1) or (2), as punishable under section 880 of such title (article 80 of the Uniform Code of Military Justice).

SEC. 1753. SENSE OF CONGRESS ON THE DISCHARGE IN LIEU OF COURT-MARTIAL OF MEMBERS OF THE ARMED FORCES WHO COMMIT SEX-RELATED OFFENSES.

It is the sense of Congress that—

(1) the Armed Forces should be exceedingly sparing in discharging in lieu of court-martial members of the Armed Forces who have committed rape, sexual assault, forcible sodomy, or attempts to commit such offenses, and should do so only when the facts of the case clearly warrant such discharge;

(2) whenever possible, the victims of offenses referred to in paragraph (1) shall be consulted prior to the determination regarding whether to discharge the members who committed such offenses;

(3) convening authorities should consider the views of victims of offenses referred to in paragraph (1) when determining whether to discharge the

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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794

1 members who committed such offenses in lieu of try-
2 ing such members by court-martial; and
3 (4) the discharge of any member who is dis-
4 charged as described in paragraph (1) should be
5 characterized as Other Than Honorable.

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December 10, 2013 (5:04 p.m.)

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

II

Calendar No. 293

113TH CONGRESS
2D SESSION

S. 1917

To provide for additional enhancements of the sexual assault prevention and response activities of the Armed Forces.

IN THE SENATE OF THE UNITED STATES

JANUARY 14, 2014

Mrs. MCCASKILL (for herself, Ms. AYOTTE, and Mrs. FISCHER) introduced the following bill; which was read the first time

JANUARY 15, 2014

Read the second time and placed on the calendar

A BILL

To provide for additional enhancements of the sexual assault prevention and response activities of the Armed Forces.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Victims Protection Act of 2014".

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

2

SEC. 2. INCLUSION OF SENIOR TRIAL COUNSEL DETERMINATIONS ON REFERRAL OF CASES TO TRIAL BY COURT-MARTIAL IN CASES REVIEWED BY SECRETARIES OF MILITARY DEPARTMENTS.

Section 1744 of the National Defense Authorization Act for Fiscal Year 2014 is amended—

(1) in subsection (c)—

(A) in the subsection heading, by inserting "OR SENIOR TRIAL COUNSEL" after "STAFF JUDGE ADVOCATE"; and

(B) by inserting "or the senior trial counsel detailed to the case" after "Military Justice),"; and

(2) in subsection (d)—

(A) in the subsection heading, by inserting "OR SENIOR TRIAL COUNSEL" after "STAFF JUDGE ADVOCATE"; and

(B) by inserting "or the senior trial counsel detailed to the case" after "Military Justice),".

SEC. 3. ADDITIONAL ENHANCEMENTS OF MILITARY DEPARTMENT ACTIONS ON SEXUAL ASSAULT PREVENTION AND RESPONSE.

[redacted]

•S 1917 PCS

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

[redacted]

10 (b) CONSULTATION WITH VICTIMS REGARDING
11 PREFERENCE IN PROSECUTION OF CERTAIN SEXUAL OF-
12 FENSES.—
13 (1) IN GENERAL.—The Secretaries of the mili-
14 tary departments shall each establish a process to
15 ensure consultation with the victim of a covered sex-
16 ual offense that occurs in the United States with re-
17 spect to the victim's preference as to whether the of-
18 fense should be prosecuted by court-martial or by a
19 civilian court with jurisdiction over the offense.
20 (2) WEIGHT AFFORDED PREFERENCE.—The
21 preference expressed by a victim under paragraph
22 (1) with respect to the prosecution of an offense,
23 while not binding, should be afforded great weight in
24 the determination whether to prosecute the offense
25 by court-martial or by a civilian court.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

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1 (3) NOTICE TO VICTIM OF LACK OF CIVILIAN
2 CRIMINAL PROSECUTION AFTER PREFERENCE FOR
3 SUCH PROSECUTION.—In the event a victim ex-
4 presses a preference under paragraph (1) in favor of
5 prosecution of an offence by civilian court and the
6 civilian authorities determine to decline prosecution,
7 or defer to prosecution by court-martial, the victim
8 shall be promptly notified of that determination.

•S 1917 PCS

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

[redacted]

3 (g) MODIFICATION OF MILITARY RULES OF EVI-
4 DENCE RELATING TO ADMISSIBILITY OF GENERAL MILI-
5 TARY CHARACTER TOWARD PROBABILITY OF INNO-
6 CENCE.—Not later than 180 days after the date of the
7 enactment of this Act, Rule 404(a) of the Military Rules
8 of Evidence shall be modified to clarify that the general
9 military character of an accused is not admissible for the
10 purpose of showing the probability of innocence of the ac-
11 cused, except that evidence of a trait of the military char-
12 acter of an accused may be offered in evidence by the ac-
13 cused when that trait is relevant to an element of an of-
14 fense for which the accused has been charged.

[redacted]

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

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6 **SEC. 5. COLLABORATION BETWEEN THE DEPARTMENT OF**
7 **DEFENSE AND THE DEPARTMENT OF JUS-**
8 **TICE IN EFFORTS TO PREVENT AND RE-**
9 **SPOND TO SEXUAL ASSAULT.**

10 (a) STRATEGIC FRAMEWORK ON COLLABORATION
11 REQUIRED.—Not later than 270 days after the date of
12 the enactment of this Act, the Secretary of Defense and
13 the Attorney General shall jointly develop a strategic
14 framework for ongoing collaboration between the Depart-
15 ment of Defense and the Department of Justice in their
16 efforts to prevent and respond to sexual assault. The
17 framework shall be based on and include the following:
18 (1) An assessment of the role of the Depart-
19 ment of Justice in investigations and prosecutions of
20 sexual assault cases in which the Department of De-
21 fense and the Department of Justice have concur-
22 rent jurisdiction, with the assessment to include a
23 review of and list of recommended revisions to rel-
24 evant Memoranda of Understanding and related doc-

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The Response Systems Panel has not yet considered or deliberated on the contents of this report.

10

1 uments between the Department of Justice and the
2 Department of Defense.
3 (2) An assessment of the feasibility of estab-
4 lishing the position of advisor on military sexual as-
5 saults within the Department of Justice (using exist-
6 ing Department resources and personnel) to assist in
7 the activities required under paragraph (1)and pro-
8 vide to the Department of Defense investigative and
9 other assistance in sexual assault cases occurring on
10 domestic and overseas military installations over
11 which the Department of Defense has primary juris-
12 diction, with the assessment to address the feasi-
13 bility of maintaining representatives or designees of
14 the advisor at military installations for the purpose
15 of reviewing cases of sexual assault and providing
16 assistance with the investigation and prosecution of
17 sexual assaults.
18 (3) An assessment of the number of unsolved
19 sexual assault cases that have occurred on military
20 installations, and a plan, with appropriate bench-
21 marks, to review those cases using currently avail-
22 able civilian and military law enforcement resources,
23 such as new technology and forensics information.

•S 1917 PCS

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

11

1 (4) A strategy to leverage efforts by the De-
2 partment of Defense and the Department of Jus-
3 tice—
4 (A) to improve the quality of investiga-
5 tions, prosecutions, specialized training, services
6 to victims, awareness, and prevention regarding
7 sexual assault; and
8 (B) to address social conditions that relate
9 to sexual assault.
10 (5) Mechanisms to promote information sharing
11 and best practices between the Department of De-
12 fense and the Department of Justice on prevention
13 and response to sexual assault, including victim as-
14 sistance through the Violence against Women Act
15 and Office for Victims of Crime programs of the De-
16 partment of Justice.
17 (b) REPORT.—The Secretary of Defense and the At-
18 torney General shall jointly submit to the appropriate
19 committees of Congress a report on the framework re-
20 quired by subsection (a). The report shall—
21 (1) describe the manner in which the Depart-
22 ment of Defense and Department of Justice will col-
23 laborate on an ongoing basis under the framework;
24 (2) explain obstacles to implementing the
25 framework; and

•S 1917 PCS

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Legislation

1 (3) identify changes in laws necessary to
2 achieve the purpose of this section.
3 (c) APPROPRIATE COMMITTEES OF CONGRESS DE-
4 FINED.—In this section, the term "appropriate commit-
5 tees of Congress" means—
6 (1) the Committee on Armed Services and the
7 Committee on the Judiciary of the Senate; and
8 (2) the Committee on Armed Services and the
9 Committee on the Judiciary of the House of Rep-
10 resentatives.

[redacted]

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

I

113TH CONGRESS
2D SESSION

H. R. 4485

To provide for additional enhancements to the sexual assault prevention and response activities of the Armed Forces.

IN THE HOUSE OF REPRESENTATIVES

APRIL 10, 2014

Mr. TURNER (for himself and Ms. TSONGAS) introduced the following bill; which was referred to the Committee on Armed Services, and in addition to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To provide for additional enhancements to the sexual assault prevention and response activities of the Armed Forces.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Furthering Accountability and Individual Rights within the Military Act of 2014" or the "Fair Military Act".

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

3

SEC. 4. MODIFICATION OF MILITARY RULES OF EVIDENCE RELATING TO ADMISSIBILITY OF GENERAL MILITARY CHARACTER TOWARD PROBABILITY OF INNOCENCE.

(a) MODIFICATION REQUIRED.—Not later than 180 days after the date of the enactment of this Act, Rule 404(a) of the Military Rules of Evidence shall be modified to clarify that, except as provided by subsection (b), the general military character of an accused is not admissible for the purpose of showing the probability of innocence of the accused.

(b) EXCEPTION.—Evidence of a trait of the military character of an accused may be offered in evidence by the accused when that trait is relevant to an element of an offense for which the accused has been charged.

[redacted]

•HR 4485 IH

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Appendix G:
ATTORNEY TRAINING

PROSECUTION TRAINING

Additional Training Courses Offered by Army TCAP in 2013[1]

Intermediate Trial Advocacy Course

Judge Advocates with approximately 1-3 years of experience out of the Judge Advocate Officer Basic Course (JAOBC) are usually assigned to serve as trial counsel or defense counsel. Within the first three months in that assignment, the attorney will attend this course, which builds on the military justice block from JAOBC. This course is offered twice a year and presents intensive intermediate trial skills instruction and practical exercises and workshops covering issues regarding courts-martial from case analysis through presentencing argument. The following areas are addressed: trial procedure; trial advocacy techniques; professional responsibility; and topical aspects of current military law, with particular emphasis on the military rules of evidence. The factual scenario that forms the basis of all instruction is a sexual assault scenario.

Regional Conferences

TCAP conducted seven three-day Regional Conferences. All of TCAP's regional conferences are focused on sexual assault and special victim. The instructors include uniformed/TCAP personnel, TCAP HQEs, and prominent civilian experts in the area of sexual assault and special victim prosecutions. These three-day training events include instruction concerning the prosecution of special victim cases (i.e., sexual assault cases, domestic violence, child pornography, and the sexual and physical abuse of children). They also include instruction concerning new developments in criminal law, advocacy classes, developing strong sentencing cases, impact of diminished responsibility, and roundtable discussions among participants. TCAP solicits subject areas and areas of focused instruction from the various Chiefs of Military Justice for the installations covered by the Regional Conferences.

Outreach Program Training

TCAP conducted approximately 21 of these 2.5-day training events. The instructors include both uniformed TCAP personnel and TCAP HQEs. This program concentrates on basic military justice practice and procedures with a focus on sexual assault prosecutions and walking new/relatively new counsel through the courts-martial process from initial allegation through sentencing. The outreach program includes up to eight hours of sexual assault specific training, advocacy training and specific/focused training as requested by the Chiefs of Military Justice focusing on issues encountered at participating installations. Additionally, TCAP personnel conduct

1 Information from Services' Responses to RSP Request for Information 1d (Nov. 1, 2013).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

roundtable case discussions with trial counsel and Chiefs of Military Justice, and daily individual case reviews when not engaged in formal instruction.

Essential Strategies for Sexual Assault Prosecution (ESSAP) Course

TCAP conducted four of these three-day training events. Taught in conjunction with the New Prosecutor's Course (NPC), the subject matter is sexual assault crimes and crimes against special victims. The training is modeled after sexual assault institutes throughout the country, which train prosecutors to successfully prosecute sex and other special victim crimes. The ESSAP is an Army led training event, designed to provide trial counsel of all experience levels with an offender focused approach to prosecuting sexual assault cases. The course covers: developing offender-focused themes/theories by understanding the offender's pathology; non-intuitive responses by rape victims; using experts to explain victim behavior; health, medical, and forensic issues observed in sexual assault cases including how to understand and effectively present medical evidence; and presenting a sentencing case.

Complex Litigation Course

TCAP conducted one three-day course on complex litigation. The Complex Litigation course focuses on the very difficult aspects and challenges of litigating high profile cases, such as voir dire, discovery, use of expert testimony, and sentencing. Taught by TCAP personnel, HQEs, and experts from the field, the course provides relevant and timely training for advanced litigation.

National Center for Missing and Exploited Children (NCMEC) Course

TCAP sponsored two of these training events. The NCMEC Course is a four-and-one-half-day seminar to familiarize prosecutors with computer-facilitated crimes committed against children and the ever-evolving legal and technical issues surrounding those investigations. The course walks prosecutors through an online child exploitation case by first familiarizing prosecutors with how perpetrators use the computer and internet to locate children to exploit and disseminate child pornography. Day two focuses on the computer technologies used by the sexual predator to commit crimes against children, the use of experts to explain the technology involved, and search and seizure issues when dealing with digital media. Day three focuses on the trial strategies of an online child exploitation case, from charging to plea negotiations to sentencing. Day four includes instruction modules on the use of medical evidence in child exploitation cases, to include discussions of child psychosexual and physical development, and concerns regarding long term complications of sexual exploitation. The final half day of instruction is geared to issues specifically raised in military prosecutions of child exploitation cases, including charging decisions and sentencing considerations.

Sexual Assault Trial Advocacy Course (SATAC)

TCAP conducted one SATAC, which included both trial counsel and defense counsel. The SATAC is a two-week trial advocacy course focusing on the fundamentals of trial advocacy in the context of litigating special victim cases. The course includes lectures, break-outs, and numerous advocacy exercises, culminating in a full-day trial for each participant. The course is a follow on to The Judge Advocate General's Legal Center and School's (TJAGLCS) one-week long Intermediate Trial Advocacy Course.

Introduction to Forensic Evidence Course

TCAP offered this five-day training event twice. This course is held at the Defense Forensic Science Center (formerly United States Army Criminal Investigation Laboratory (USACIL)), Fort Gillem, Georgia using USACIL instructors. During the investigation of many sexual assault cases, local investigators from the

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Army's Criminal Investigation Division (CID) send various pieces of evidence to the lab for examination. This collected and examined evidence can be used to identify (or exclude) perpetrators and to corroborate the victim's account of events. This course introduces the students to the laboratory analysis involved in sexual assault cases, to include: the examination of DNA evidence; the examination of trace evidence such as fibers; serology; the examination of digital evidence; testing for drugs such as date rape drugs; and a review and use of the criminal records database. The various laboratory experts conduct classes on their areas of expertise and demonstrate how examinations are conducted. It also includes instruction on firearms and ballistics evidence, and an expanded block on discovery issues and obligations.

Sexual Assault Expert Symposium

TCAP offered this three-day training event once. The expert symposium introduces participants to the scientific disciplines they will encounter while litigating special victim cases. Classes are taught by some of the leading experts in their fields. The experts include: a Forensic Pathologist; a Forensic Psychologist; a Forensic Psychiatrist; a Sexual Assault Forensic Examiner/Sexual Assault Nurse Examiner; a Forensic Toxicologist; a Forensic Child Interviewer; a Forensic Computer Examiner; a Fingerprint Examiner; a Trace Evidence Examiner; and a DNA and Serology Examiner.

Special Victim Prosecutor (SVP) Conference

TCAP conducted an SVP conference, which brought all SVPs assigned throughout the world to one location to discuss trends and issues in the investigation and disposition of special victim cases. The conference is a three-day event where TCAP personnel, as well as military and civilian HQEs, provide relevant and timely military justice training, both substantive and advocacy, to the attendees. Additionally, substantive legal issues regarding defense experts, administrative issues, the need for automation and the need for personnel support, are discussed and courses of action developed to attempt to enhance the prosecution of cases and minimize the distractions caused by the administrative demands placed on each SVP.

DEFENSE COUNSEL TRAINING

Army

In Fiscal Year 2013, the Defense Counsel Assistance Program (DCAP) conducted or sponsored the following courses:

DC 101

DCAP s conducted this training at Fort Leavenworth in October 2012, Wiesbaden, Germany in August 2013, Fort Bragg in August 2013, Fort Lewis in September 2013, and Fort Hood in September 2013. DCAP also conducted DC 101 in February 2013 at Fort Belvoir. This three-day course combines law and trial advocacy focused on preparing newly assigned defense counsel to represent their clients at courts-martial. Two DCAP personnel (often including Trial Defense Service (TDS) HQEs) serve as instructors of this course. Areas of instruction include: initial client interview; major client decisions; discovery; Article 32 investigations; all stages of the court-martial process; roundtable discussion of active cases, and professional responsibility.

Annual Training

DCAP, on behalf of Trial Defense Service (TDS), conducted annual training for all counsel assigned to TDS. DCAP conducted training in Germany in November 2012 for counsel stationed in Europe and the Central

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Command Area of Responsibility. DCAP conducted training in December 2012 for all TDS counsel east of the Mississippi River and Pacific Rim. DCAP conduct training in January 2013 for all counsel west of the Mississippi River. Instructors include members of DCAP (including both HQEs) and TDS counsel. These conferences typically include a heavy focus on sexual assault or special victims crimes. Topics covered at these three day events include themes and strategies in sexual assault cases, MRE 412, case updates, and professional responsibility.

Regional Training

The Army's Regional Defense Counsel (RDC) host annual regional training events. In 2012, DCAP coordinated with RDCs to train all TDS counsel east of the Mississippi River in March and all defense counsel west of the Mississippi River in April. These events provide three days of instruction to all defense counsel in their particular region(s). DCAP (to include both HQEs) provides most of the instruction at these events based on the RDC's training plan. Traditional topics include professional responsibility, new developments, evidentiary issues, trial advocacy, and post-trial matters. Sexual assault and special victim issues are always included, and previous regional conferences focused almost exclusively on sexual assault cases.

DC 201

DCAP conducted this training for the East Coast in February 2013 and the West Coast in April 2013. This three-day course combined law and trial advocacy focused on preparing more experienced defense counsel on more complicated areas of the law. Two DCAP personnel (often including TDS HQEs) served as instructors for this course. Areas of instruction covered advanced topics of criminal law, including: character evidence, MRE 404(b), 412, 413, 414, remote testimony, confrontation, privileges and immunities. Training on sexual assault issues and special victim issues was included.

Intermediate Trial Advocacy Course (ITAC)

The Judge Advocate General's Legal Center and School (TJAGLCS) hosted three of these events in September, November, and February. TDS typically sends eight officers to each event.

Advanced Communications and Advocacy

DCAP participated in these joint training events hosted by TCAP/DCAP. Instruction was provided by civilian experts, along with TCAP and DCAP personnel. The focus is exclusively on courtroom advocacy and consists of lecture, group discussion, and practical exercise. There are typically four of these events scheduled annually.

Sexual Assault Training Advocacy Course (SATAC)

DCAP and TCAP jointly hosted this course. This course utilizes a sexual assault fact pattern to train more advanced counsel on effective advocacy in all phases of the trial process. Instructors include DCAP and TCAP personnel, as well as outside instructors, selected for their expertise in advocacy and sexual assault cases. Instruction format included lecture, small group discussion, one on one mentoring, and practical exercises.

Sexual Assault Expert Symposium

DCAP and TCAP jointly hosted this course in the late spring. This week-long training consisted of lectures given by experts commonly encountered by advocates in a typical sexual assault case. There were also break-out sessions for prosecutors and defense counsel to address their specific areas of concern with the experts.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

U.S. Army Trial Defense Service (TDS) Leadership Training

TDS held this three day training event in August 2013 for RDCs and Senior Defense Counsel from both active and reserve components. The instruction typically covers various leadership duties and substantive law updates that can be shared with their counsel. DCAP (including both HQEs) presented a series of classes on legal issues that included some sexual assault and special victim emphasis (e.g., MRE 412).

APPENDIX: NAVY MILITARY JUSTICE LITIGATION CAREER TRACK (MJLCT) DETAILS[2]

In 2007, to improve the overall quality of Navy court-martial litigation, the Navy JAG Corps established the MJLCT. The MJLCT is a career track for judge advocates with demonstrated military justice knowledge and advocacy skills. The track combines courtroom experience, training, and education with mentoring from senior litigators who help judge advocates develop the skills needed to become preeminent trial lawyers. Military Justice Litigation Qualified (MJLQ) officers are detailed to lead trial and defense departments at each of nine Regional Legal Service Offices (RLSOs) and four Defense Services Organizations (DSOs), which provide Navy prosecutors and defense counsel, respectively.

At the close of FY13, there were 65 Navy MJLCT officers, with 45 filling the 53 MJLCT-designated billets. Additional MJLCT officers are at the Office of Military Commissions, on aircraft carriers, at the Naval Justice School, in VLC positions, and at post-graduate school to obtain Masters of Laws (LL.M.) degrees in trial advocacy. The promotion rate for MJLCT officers is monitored, and the in-zone MJLCT officers were selected for promotion by the FY14 promotion selection boards at a rate comparable to, or better than, the overall in-zone selection rate.

SPECIALIST I MJLQ is the entry point for the MJLCT. A judge advocate may be qualified as SPECIALIST I after demonstrating military justice litigation proficiency and MJLCT potential. Candidates are normally eligible for SPECIALIST I after their fourth year of active duty. After SPECIALIST I qualification, a judge advocate may qualify as SPECIALIST II by obtaining sufficient military justice litigation experience and professional development as a naval officer. Candidates will normally be eligible for SPECIALIST II after their tenth year of active duty. Following SPECIALIST II, a judge advocate may qualify as EXPERT after obtaining significant military justice litigation experience and demonstrating leadership of junior judge advocates. EXPERT is ordinarily reserved for judge advocates who have reached the senior-most MJLCT positions. Candidates will normally be eligible for EXPERT after their sixteenth year of active duty.

SPECIALIST II and EXPERT MJLQ are community-management tools to guide the assignment, training, and professional development needs of MJLQ judge advocates. Navy JAG senior leaders seek to provide all MJLQ judge advocates with training and duty assignment opportunities that facilitate their professional development. Military justice litigation proficiency includes quantitative and qualitative criminal courtroom litigation experience and demonstrated proficiency in military justice procedure. As judge advocates seek MJLCT advancement, they are required to demonstrate increased courtroom experience, continued growth in litigation leadership, and familiarity with the Navy's broader mission. MJLQ judge advocates are encouraged to explore the wide variety of naval experiences that contribute to the development of a broad understanding of the duties of judge advocates, and to seek out detailing to non-litigation billets even after MJLQ. Accordingly,

2 Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2012 to September 30, 2013, at 77-79.

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applicants for EXPERT MJLQ should generally have served at least two years in a non-litigation billet prior to their application for qualification.

Table of Information Gathered from Civilian Prosecution Offices[3]

Office	Organization/Size	Experience Required to Prosecute Sex Crimes	Prosecutor Training Program	Remarks
Alaska Attorney General's Office[4]	Several districts; Anchorage has Special Assault Unit (SAU) with five prosecutors	No minimum.	Start misdemeanors, go to general felonies, then SAU. No set criteria to enter SAU.	
Maricopa County (AZ) Attorney's Office[5]	Divisions, then Bureaus. Sex Crimes Bureau has 19 attorneys.	Varies. Range from 3-17 years. No minimum. Budget cuts/ lower salaries have increased turnover and decreased experience.	4 week training for new prosecutors. In-house and statewide training before assigned to specialty bureaus. Spend 9-12 months on misdemeanors, then trial bureau, then specialty such as sex crimes.	"Prosecutors need to learn up front that there [are] as many different responses to the trauma of a sexual assault as there are victims. The one person who presents with a stereotypical stress-related trauma may not be the same as the next person, who is rather stoic.."[6]

3 Unless otherwise indicated, the source for this information is Joint Service Committee Sexual Assault Subcommittee (JSC-SAS) Report (Sept. 2013) appendices.

4 Joint Service Committee Sexual Assault Subcommittee *(JSC-SAS)* Report on Civilian Sexual Assault Prosecution, Appendix C *(Sept. 2013) [hereinafter JSC-SAS Report].*

5 JSC-SAS Report, Appendix D.

6 *See Transcript of RSP Public Meeting* 481 (December 12, 2013) (testimony of Bill Montgomery, Maricopa County Attorney).

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

San Diego County District Attorney's Office[7]	Sex Crimes and Human Trafficking Division[8] consists of 11 attorneys.	Start in a misdemeanor unit; minimum 4 years experience before assigned sex crimes cases.	Every other year, 3-day formal in-house training. Also train other members of SART and attend trainings as time/budget permit.	Office part of Sexual Assault Response Team (SART), which includes military investigators, prosecutors, medical personnel, and victim support personnel
Kent County, Delaware Prosecutor's Office[9]	16 prosecutors total. 2 attorneys in Sex Crimes Unit. Rotate every 3-4 years.	Juvenile bench trials for 2 years, then misdemeanor jury trials, then general felony unit before Sex Crimes Unit.	Lead prosecutor attends trainings if time allows; preferred training for young prosecutors is to be in court.	
United States Attorney's Office, District of Columbia (Superior Court Division)[10]	Sex Offense and Domestic Violence Section prosecutes all misdemeanors and felonies involving sexual abuse.	No minimum, but several years of experience required to interview for sex crimes positions.	Ongoing in-house training and outside conferences. DOJ National Advocacy Center offers variety of courses. Supervisors conduct pre-trial conference before felony trials, observe them, and give feedback/training after.[11]	Recent/recommended training topics: FETI interviewing; sexual assault nurse training; DNA and digital evidence; secondary trauma; sex offender registration; crime victims' rights laws.[12]
Athens-Clarke County (GA) District Attorney's Office[13]	3 special victims prosecutors are lead counsel on all crimes against female, elderly, child victims, and all serious violent felonies	Assigned to courts with experienced supervisory attorney and two line prosecutors. Supervisor is also special victims prosecutor.		

7 JSC-SAS Report, Appendix E.

8 *See San Diego County District Attorney's Office, at* http://www.sdcda.org/office/criminal-divisions.html.

9 JSC-SAS Report, Appendix F.

10 JSC-SAS Report, Appendix G.

11 See *Transcript of RSP Public Meeting* 469 (December 12, 2013) (testimony of Kelly Higashi, AUSA, District of Columbia).

12 *Id.* at 465-68.

13 JSC-SAS Report, Appendix H.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Baltimore State Attorney's Office[14]	Special Victims Unit devoted to prosecution of cases involving sex crimes domestic violence and child abuse. Also prosecutes sex-related misd.	3-5 years of experience prosecuting misdemeanors and general felonies (such as drug, property, and gun crimes) before specialty units, including SVU		
Kent County Prosecutor's Office (Grand Rapids, MI)[15]	17 felony prosecutors, 4-5 misdemeanor prosecutors.	Experience level about 9-10 years.	Typically attend prosecutor trainings in San Diego, CA or Huntsville, AL	
Bronx District Attorney's Office[16]	Child Abuse/Sex Crimes Bureau (CAS) prosecutes all sexual assault cases involving both child and adult victims. 24 attorneys assigned.	Normally hired as Misdemeanor ADAs; 5-6 years of experience to do sex crimes.	Attend a series of varied training sessions; New York Prosecutors Training Institute (NYPTI) conducts specialized training. NYPD also has trainings that ADAs sometimes attend.	
Brooklyn County District Attorney's Office[17]	Separate unit for sex crimes prosecution (includes crimes against children). 30 attorneys assigned.	1-1.5 years' experience doing sex-related misdemeanors (such as prostitution or "touching" cases) followed by one year at the Grand Jury.		

14 JSC-SAS Report, Appendix I.

15 JSC-SAS Report, Appendix J.

16 JSC-SAS Report, Appendix K-1.

17 JSC-SAS Report, Appendix K-2.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

New York County District Attorney's Office[18]	No unit; chief and two deputies supervise pool of experienced attorneys who report to them for these cases	Four years of experience, and interest in sexual assault cases, plus interview screening.	Ongoing substantive training: laws, rules Continue to train most senior people. Bring in outside speakers.[19]	
Multnomah County District Attorney's Office (OR)[20]	3 large divisions, each divided into smaller specialty units. Specialty unit prosecutes adult sex crimes and other felony assaults	New prosecutors in misdemeanor units for 3-4 years, then Felony Trial Division 2-6 years (property or drug crimes). Then eligible for person crime units.		
Yamhill County District Attorney's Office (OR)[21]	No special unit for adult sex crimes. 10 prosecutors in office, including the DA. Two attorneys handle all adult felony cases.	New attorneys do misdemeanors before felonies. No minimum time requirement for assignment to sex crimes cases; based on supervisor discretion.	New prosecutors attend a basic prosecution course, and then attend training sponsored by DOJ. Also attend annual OR District Attorney's Conference, and other specialized training as time and funding permit.	

18 JSC-SAS Report, Appendix K-3.

19 *See Transcript of RSP Public Meeting* 432 (December 12, 2013) (testimony of Martha Bashford, New York County District Attorney's Office).

20 JSC-SAS Report, Appendix L.

21 JSC-SAS Report, Appendix L.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Philadelphia District Attorney's Office[22]	Family Violence and Sexual Assault Section includes 18 prosecutors; 4 are new-hires handling misdemeanor DV and preliminary hearings. Other14 handle more serious adult/child cases.	9-12 months on misdemeanors, followed by stint in Juvenile Court Unit (may include sex cases for bench trials). 8-9 years before becoming a supervisor	Most hired directly out of law school. 2 wk. orientation plus observation of trials and hearings before handling cases. Prosecutors Assoc. training on criminal code; mentoring and guidance from supervisors and more experienced prosecutors. Many in-house trainings.	
Austin (TX) District Attorney's Office[23]	No separate unit or division for sex offenses. Prosecutors in Trial Division assigned by court and supervised by a Trial Court Chief	Prosecutors assigned to sex offense cases must at least have experience prosecuting misdemeanor cases.	The Trial Court Chief supervises, mentors, and trains prosecutors working in the division.	
Arlington County (VA) Commonwealth Attorney's Office[24]	15 prosecutors in office. All assigned all types criminal cases, but primarily three prosecute sexual assault cases.	One very experienced, second is fairly experienced, third relatively new attorney.		

22 JSC-SAS Report, Appendix M.

23 JSC-SAS Report, Appendix N.

24 JSC-SAS Report, Appendix O.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Snohomish County Prosecutor's Office (WA)[25]	Criminal Division divided into specialized units. Special Assault Unit (SAU) is composed of 7 deputy prosecutors (including the lead prosecutor).	Typically 4-6 years of experience before considered for SAU. Misdemeanors for 2-3 years, then felonies such as drugs, then SAU or other specialty unit.	No formal training program; new prosecutors observe trials, attend state trainings and law enforcement trainings on sexual assault. Some at little or no cost. May also attend other national training seminars if funding is available	Expected to rotate assignments throughout their career. May spend 2-3 years in SAU before rotating to another unit, but will likely return to the SAU later.

25 JSC-SAS Report, Appendix P.

The Response Systems Panel has not yet considered or deliberated on the contents of this report.

Table of Information Gathered from Civilian Defender Offices

Name	Type of Organization	Structure	Experience	Training	Remarks
Alaska Public Defender Agency[26]	Quasi-independent agency within the Department of Administration; 13 Public Defender offices in the state.	Anchorage Office has 23 attorneys; 5 handle misd. and 18 handle felonies. 6 are qualified and trained to handle sex cases.	Senior attorneys handle most serious sex offense cases. Large and dispersed area, system of travel and coordination is required to gain experience	New lawyers second-chair felony cases. Supervisors evaluate them. Two-week intensive training on trial practice for new attorneys. Also a defense conference that provides on-going training.	Due to budget issues, both training events were cancelled in 2013.
Bronx Defenders[27]	Public defense and advocacy firm: criminal defense attorneys, advocates, civil attorneys, immigration attorneys, social workers, investigators	120 attorneys, divided up and assigned to different mixed trial teams	Defense counsel from the Bronx Defenders never sit at trial alone, and despite the attorney's experience level, will always have a co-counsel.	One trial team is used for the first year public defenders for training	

26 JSC-SAS Report, Appendix C.

27 JSC-SAS Report, Appendix K-1.

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Multnomah County Metropolitan Public Defender Services[28]	Private, nonprofit corporation originally established by the Multnomah County Bar Association. 63 attorneys; largest public defender organization in Oregon.	Services are provided via a contract with Multnomah County (Metropolitan also has a contract with neighboring Washington County).	Typically little prior experience, handle misdemeanor cases, progress to felony drug or property crime cases for about a year. New attorneys second-chair major cases. Assigned to cases based on their experience levels.	Oregon Criminal Defense Lawyers Association provides CLE training for defense attorneys, which attorneys from the Metropolitan Public Defense Association attend. They also will attend a defense college in Macon, GA.	Problem retaining experienced attorneys, because the salaries are less than equivalent prosecutors earn

28 JSC-SAS Report, Appendix L.

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