

CSS ISSUES FOR DISCUSSION

MISSION: 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)).

OBJECTIVES:

- Compare military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes.
- Compare and assess the sexual assault training of law enforcement personnel, to include first responders, police, and special investigators and the protocols.
- Compare and assess the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual 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.
- Examine advisory sentencing guidelines and mandatory minimums used in civilian courts in adult sexual cases to assess whether it would be advisable to promulgate sentencing guidelines for use in courts-martial. Assess the possible collateral consequences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates) and address whether sentencing guidelines or mandatory minimums should be established by Congress with legislation or by the President through Executive Order. Also, assess clemency opportunities as tasked in FY14 NDAA.
- Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.
- Assess current and pending legislation that pertain to the investigation, prosecution, and/or defense of a sexual assault case in the military.

CSS LIST OF ISSUES

I. Compare military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes.

A. Investigation Issues

- i. Organizational structure and location of office (specialized career track or general investigative work; separate or co-located with prosecutor, victim advocates, rape crisis center personnel and/or victim services' agencies)
- ii. Who investigates sexual assaults
 1. Limited Role of first responders
 2. Experience level required
 - a. SVU Team Chief
 - b. SVU Team member
 - c. Lead agent
 3. Training for sexual assault investigators
 - a. SVU Team Chief
 - b. SVU agents
 - c. Lead agent
 - d. Training required for all agents
 - e. Training required for all law enforcement personnel
 4. Case load
- iii. Investigators' role and authority
 1. Investigator's role and relationship to: prosecutor, defense counsel, victim, victim advocate, victim's attorney, and in the military, the commander and medical community/health professionals (common practice & best practice). Examine level of interaction and the points during the process the investigator communicates with each of these stakeholders.
 2. Authority of investigators to make a charging decision
 3. Level of discretion
 - a. Authority to dispose of a case initially
 - b. Authority of investigators/investigative agencies to decline cases after initial investigation
 4. Authority of investigators to unfound cases
 - a. Unfounding versus false report
 - b. Making the unfounding decision
 5. Case determination
 6. Authority of investigators to close cases
 7. Role of investigator at trial – does investigator sit at the prosecution or defense table, or is the investigator sequestered as a witness?
- iv. Tracking
 1. Tracking Serial Offenders [**Needed Modification to Terms of Reference from FY 14 NDAA**]
 - a. *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.

- b. How do civilian jurisdictions track alleged offenders when anonymous reports are made to police? Is there any effort to track alleged offenders when no report is made to civilian police authorities and instead, victims choose report to a civilian victim advocate or rape crisis center who has no reporting requirement?
2. Investigator of old cases
 - a. Incidents that are reported that occurred months or years prior
 - b. Incidents that occurred prior to military service
 - c. Desires of the victim
- v. Evidence
 1. Pretext phone calls
 - a. Existing policy
 - b. Consent
 - c. Recording
 2. Pretext text messaging
 3. Polygraph use (for accused)
 4. Interview techniques
 - a. Accused
 - b. Victim
 - c. Video recording
 - d. FETI/Cognitive/other methods
 5. Forensic evidence
 - a. Collection
 - b. Which exams to request
 - c. Lab processing time
 - d. Lab capabilities
 6. Obtaining other collaborative information
 7. Existing policy
- vi. Allowing time for agents/officers to implement existing programs
- vii. Length of investigations
- viii. Collateral misconduct issues
 1. Investigators' approach
 2. Requirement to advise victims of their rights
 3. Obtaining immunity for victims
- ix. Anonymous reporting
 1. Law enforcement being notified
 2. Law enforcement notifying others
 3. Preservation of evidence
 4. Notification of destruction of evidence
- x. Availability of investigators on deployment/at sea
- xi. Culture change issues
 1. Credibility of victim
 2. Rape myths
 3. Trauma

- xii. Reports
 - 1. Report procedures
 - 2. Report writing – language & word choice
- xiii. Oversight of Investigations
 - 1. Audits of case files / Military IG inspection of cases
 - 2. Metrics to measure success of investigations
- xiv. Remedial procedures for mistakes
- xv. SANE/SAMFE
 - 1. Roles
 - 2. Availability/location of examiners (including on deployment)
 - 3. Training/Certification
 - 4. Interaction with and relationship to SVUs
- xvi. Requirement to notify victim of Victim rights

B. Prosecution Issues

- i. Organizational structure and location of office (specialized career track or general practice; separate or co-located with investigators, victim advocates, victim witness liaisons)
 1. Military: Special Victim Capability
 - a. Large & small bases prosecutors' "capability" to handle penetrative & non-penetrative sexual assault cases
 - b. TC's involvement with VWL, paralegal, and special investigator
 - c. Measures of effectiveness
 2. Civilian: Special Victim Units within Prosecutor's office or general practice
 3. Best practice
- ii. Prosecutors
 1. Experience required for lead prosecutors
 2. Training required for lead prosecutors
 - a. Funding for training
 - b. Agreements/programs for training in civilian jurisdictions
 3. Career progression
 4. Case load
- iii. Prosecutor's Role and Authority
 1. Point of involvement in the case
 2. Initial and on-going interaction with first responders, investigators, victim advocates & agencies, victim attorneys, defense counsel
 3. Supervision of prosecutors
 4. Prosecutor discretion to take or decline taking a case from investigative phase
 5. Charging
 - a. Authority – drafting and/or charging
 - b. Protocol to review charging decisions
 - c. Criteria used
 6. Guilty plea authority – handling of plea negotiations and supervision requirements in sexual assault cases
 7. Declination procedures at various stages, such as preferral/charged, referred, preliminary hearing/GJ/Art. 32
 8. Use of alternative dispositions
- iv. Experts
 1. Obtaining/funding
 2. HQEs – types of experts used in sexual assault cases and frequency of the use of those experts at trial
- v. Other Best practices
- vi. Victim (as witness) issues
 1. Collateral misconduct
 - a. Alcohol
 - b. Adultery/fraternization
 2. Alcohol/drug use
 3. Delayed/inconsistent reports or statements
 4. Credibility
 5. Mental health issues
 6. Availability
 7. Consent

8. Recantation (true/false) and how to handle non-cooperation
9. Rank disparity
10. Expedited transfer – how to prosecute case when victim is in another location
11. Best methods to retain victim cooperation throughout process
12. Any special procedures or considerations for prosecutors when dealing with male victims?
- vii. Comparable populations
 1. College students – handling intoxication cases involving acquaintances
 2. Urban areas near bars
- viii. Victim Rights Issues
 1. How do prosecutors ensure they meet their requirement to notify victim of Victim rights
 2. What does a prosecutor do when a victim rights' issue arises or realizes a right may have been violated?
 3. What extent do prosecutors take victim's opinion into account throughout the judicial process
 - a. Pre-trial (charging decision, preferral & referral)
 - b. Declination or closing of case
 - c. Plea negotiations
 - d. At trial
 - e. Sentencing
 - f. Post-trial
- ix. Discovery
 1. Openness of discovery & related issues in sexual assault cases
 - a. Timing
 - b. Disclosure requirements
 - c. Witness availability
 - d. Use of expert consultants
 2. Prosecutor's role and opinions regarding Grand jury, preliminary hearing or Art. 32 proceedings
- x. Evidentiary issues
 1. Technology/specialization
 - a. Cell phones
 - b. Computers
 - c. Video evidence
 - d. Pretext phone calls
 - e. DNA/forensics
 - f. Psychology/psychiatry
 - g. Cross-racial issues
 2. Good Soldier defense/ accused's character evidence
 3. Impact of Rape Shield Law on prosecutor's case and related MRE's
 4. Handling victim's collateral misconduct at the time of incident or counterintuitive behavior subsequent to the incident (which could be punishable by UCMJ)
- xi. Administrative separations
 1. As an alternate disposition to a trial
 2. In cases where the accused was convicted, but retained at trial
- xii. Best practices
- xiii. Metrics of success

C. Defense Issues

- i. Organizational structure for public defenders and military defense counsel – specialized or general practice?
 - ii. Who can defend
 1. Experience requirements
 2. Career progression
 - a. Promotion issues
 - b. Retention of attorneys
 - c. Pay disparity between prosecutors and public defenders
 - d. Burnout
 3. Training defending sexual assault cases
 4. Case load
 - iii. Are there investigators assigned or available for defense counsel to use in sexual assault cases?
 1. What is the background of civilian investigators for public defenders
 2. What training have they received
 3. How is it funded
 4. In the military, can an investigator be requested? If so, how often do investigators assist defense counsel in sexual assault cases.
 - iv. Witnesses
 1. Requests
 2. Subpoenas
 - v. Funding & other resource issues – who pays and what are the limits
 1. Training
 2. Experts
 3. Travel expenses
 4. Resources for accused/suspects
 - vi. Access to Experts
 1. Process of obtaining
 2. HQEs
 3. Funding
 - vii. Discovery
 1. Timing
 2. Process/rules, disclosure requirements
 3. Witness availability
 4. Oversight
 5. Use of expert consultants
 - viii. Victim issues
 1. Relationship with Victim, victim counsel and victim advocates
 2. Concerns with victim rights versus accused's rights
- ### **D. Evidentiary issues**
- i. Impact of rape shield law and related rules of evidence in sexual assault cases
 - ii. Specific issues for cases involving alcohol and acquaintances
 - iii. Technology/specialization
 1. Cell phones
 2. Computers
 3. Video evidence
 4. Pretext phone calls
 5. DNA/forensics
 6. Psychology/psychiatry

- 7. Cross-racial issues
- iv. Polygraph of accused
- v. Good Soldier defense/ accused's character evidence
- vi. Handling victim's collateral misconduct at the time of incident or counterintuitive behavior subsequent to the incident (which could be punishable by UCMJ)
- E. Adjudication Issues
 - i. Sexual Assault laws
 - 1. Interpretation of Article 120
 - 2. Choice of statute
 - ii. Discovery – openness of discovery and related issues in sexual assault cases
 - 1. Timing
 - 2. Disclosure requirements
 - 3. Witness availability
 - 4. Use of expert consultants
 - iii. Pre-trial proceedings
 - 1. Grand jury and preliminary hearings
 - 2. Article 32 oversight
 - iv. Negotiation procedures – formal/informal and plea agreement considerations
 - v. Defenses available
 - vi. Punishment & Sentencing
 - vii. Administrative separations
 - 1. As an alternate disposition to a trial
 - 2. In cases where the accused was convicted, but retained at trial
 - viii. Collateral conviction consequences to accused
 - ix. Clemency opportunities [**Needed Modification to Terms of Reference from FY 14 NDAA**]
 - 1. As part of the comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes, as required by subsection 18 (d)(1)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013, 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.
 - a. Explain military appellate system and when there are Clemency opportunities, to include FY14 NDAA provision regarding Art. 60 and Board of Corrections (boards of equity for each service)
 - b. Parole
 - c. Number of cases that are entitled to an appeal
 - d. Note: this task for CSS is to analyze the opportunities from defense perspective rather than role of the commander perspective
 - 2. Typical Clemency opportunities in civilian jurisdictions
 - x. Perception of police, govt. investigators, prosecutors, and victim services personnel
 - xi. Defense Counsel Best Practices

F. Other Procedural Issues that apply to both the prosecution and defense of sexual assault cases

- i. Panel selection
 1. Who is eligible to sit on a jury/panel – civilian versus military systems
 2. Selection of pool of members – questionnaires used by military
 3. Panel selection process by judge, prosecution and defense counsel
- ii. Rules, Privileges, and Defenses – military rules compared to civilian jurisdictions
 1. Scope of discovery in military versus civilian jurisdictions and the general interpretation of what constitutes Jenks Act and *Brady* material
 2. Impact of Art. 32 hearings in sexual assault cases (including victim's testimony subject to cross examination) compared to Grand Juries
 3. MRE 412 Rape Shield Law (pre-trial motions, Art. 32 hearings, courts martial) compared to federal and state rape shield laws
 4. Evidence of other acts by accused: Interplay of Military Rules of Evidence (MRE)
 - a. MRE 404(b) uncharged misconduct
 - b. MRE 413, evidence of accused's committing previous sexual assault
 - c. MRE 414, admissibility of similar crimes in child molestation cases
 5. Privileges and protecting information during trial
 - a. MRE 501, construing privileges narrowly
 - b. MRE 502, Attorney-client privilege (prosecutors & defenders views on new victim counsel/*Brady* issues) and how this is handled in civilian jurisdictions with victim attorneys
 - c. MRE 503, Clergy privilege compared to civilian jurisdiction rules
 - d. MRE 504, Spousal privilege compared to civilian jurisdictions and the role it plays in domestic violence cases that contain a sexual assault offense
 - e. MRE 513, Psychotherapist-patient privilege compared to civilian jurisdictions' privileges for mental health professionals and records
 - f. MRE 514, Victim-advocate privilege compared to civilian jurisdiction privileges
 - g. MRE 414, admissibility of similar crimes in child molestation cases
 6. Good Soldier Defense compared to defendant's ability to provide evidence of his good character and/or truthfulness in civilian sexual assault cases (specifically review its application in the military at the time of charging decisions and RCM 306, RCM 404, RCM 405(a))
 7. Analyze the historical basis and policy reasons for each of the above issues and the applicable MRE's/RCMs and civilian privileges

- II. 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.**
- A. Base training level for military defense counsel
 - B. Base training level for military trial counsel
 - C. Required experience for military defense and trial counsel
 - D. Additional/specialized training for military defense and trial counsel
 - E. Base training level for civilian defense counsel
 - F. Base training level for civilian prosecutors
 - G. Required experience for civilian defense counsel/prosecutors
 - H. Additional/specialized training for civilian prosecutors/defense counsel
 - I. Funding for attending training programs and schools
 - J. OJT with civilian agencies
 - K. Attend investigative training courses
 - L. Training on the role and relationship to establish with victim witness liaisons, victim advocates and victim service agencies, victim attorneys

III. 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.

- A. Can conviction rates be compared?
 - i. Sources of statistical information
 - 1. UCR as a guide or not
 - 2. Cf. testimony/resources from Spohn, Addington, Lynch, Schenck
 - 3. National Science Foundation
 - 4. CDC
 - 5. BJS
 - 6. DOD & Services – do they track the same information?
 - ii. Challenges & Issues arise due to the differences in systems
 - 1. Differences from start to finish – investigator discretion, ways to receive report & responsibility to act on reports, prosecutor’s role, discovery, forms of preliminary hearings/GJ/Art. 32, to alternate disposition options (Art. 15, administrative separation, rank reduction, etc)
 - 2. Sentencing comparison issues – prison term length, monetary penalties, probation, parole, sentencing by judge or jury/panel
- B. Identify conviction rates by relevant offenses (with above disclaimers)
 - i. Identify comparable federal conviction rates
 - ii. Identify comparable state civilian conviction rates
 - iii. Identify comparable services’ conviction rates
 - iv. What percentage of contested trials resulted in conviction to a charged sexual assault offense, a lesser included offense, hung jury/mistrial, or acquittal?
- C. Other statistical issues
 - i. Raw number data compiling the number of sexual assault complaints, arrests, investigations, cases closed by investigators, cases referred to prosecution offices, cases closed by prosecutors, number of guilty pleas vs. contested trials, alternative dispositions, treatment options
 - ii. Clearance rates – number of cases disposed of by police as unfounded/unsubstantiated
 - iii. Number of cases declined by civilian authorities and prosecuted by military (waterfall slides)
 - iv. Other military justice statistics provided in RFI’s & DOD SAPRO reports
 - v. Surveys to measure victim satisfaction
 - 1. WGRA Survey Issues
 - 2. Command climate surveys
 - 3. DOD IG victim experience surveys
 - 4. Civilian surveys of victims by victim services & rate of return

IV. 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.

- A. Who imposes the sentence – judge or jury?
 - i. What information does the sentencing authority have when making the sentencing decision?
 - ii. What is the timeframe for imposing the sentence after verdict rendered?
- B. Statistics to establish average sentences for sexual assault offenses in military versus comparable crimes in civilian jurisdictions – is this comparable data?
- C. Determine which civilian jurisdictions to compare (e.g., federal, state, both)
- D. Identify types of existing sentencing guidelines in use
- E. Identify comparable statistics from civilian jurisdictions
 - i. Which points to compare (e.g., recidivism, rehabilitation, victim satisfaction)
- F. Mandatory minimum punishment considerations

- G. Feasibility of using sentencing guidelines or mandatory minimums for Art. 120 offenses
 - i. Logistical requirements / resources to establish and implement the change
 - ii. Training for expertise in this area
- H. Analyze the collateral impact, pros/cons of sentencing guidelines, mandatory minimums. Is there evidence that either would:
 - i. Increase/decrease the number of guilty pleas
 - ii. Increase/decrease victim confidence & reporting
 - iii. Increase/decrease the number of guilty pleas - Change the ratio of the number of guilty pleas vs. contested cases
 - iv. Effect plea negotiations, if so, how
 - v. Increase/decrease conviction rates
 - vi. Deter perpetrators from committing sexual assaults
 - vii. Be effective in promoting uniformity in sentences
- I. What is the perspective of practitioners:
 - i. Civilian Prosectors
 - ii. Defense counsel
 - iii. Military members

- V. Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.**
 - A. Risk assessments
 - B. Victim's decision regarding initiating an investigation
 - C. Organizational structure that seems most effective – multidisciplinary approaches, consolidated facilities versus independent investigators/health providers

- VI. Assess the strengths and weaknesses of current and proposed legislative initiatives, not including those addressing the role of the commander in the system or victim services initiatives, to modify the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.**
 - A. Timing of discovery/trigger
 - B. Changing the definition of rape and sexual assault
 - C. Obtaining information for law enforcement purposes from restricted cases
 - D. Art. 60 - Clemency