

Response Systems Panel
Comparative Systems Subcommittee
Minutes of January 31, 2014 Meeting

The Response Systems to Adult Sexual Assault Crimes Panel (RSP) is a federal advisory committee within the Department of Defense (DoD) operating pursuant to Section 576(a) of the National Defense Authorization Act for Fiscal Year 2013, the Federal Advisory Committee Act of 1972, the Government in Sunshine Act of 1976, and other appropriate federal regulations. The Comparative Systems Subcommittee (CSS) of the Response Systems Panel held a meeting on January 31, 2014, to review the issues identified for the subcommittee to address and determine future requirements. The meeting began at 8:25 a.m. and concluded at 2:55 p.m. The transcript of the January 31, 2014, proceedings will be appended and is incorporated herein by reference.

Participating CSS Members:

Professor Elizabeth Hillman, CSS Chair
Brigadier General (ret.) John Cooke, CSS Member (morning session only)
Colonel (ret.) Stephen Henley, CSS Member
Colonel (ret.) Larry Morris, CSS Member
Mr. Harvey Bryant, CSS Member
Ms. Rhonnie Jaus, CSS Member
Judge Barbara Jones, CSS Member (afternoon session only, by phone)

Other Participants:

Colonel Patricia Ham, RSP Staff Director
Ms. Terri Saunders, RSP Deputy Staff Director
LTC Kelly McGovern, Comparative Systems Branch Chief
Mr. Dillon Fishman, RSP Staff Attorney
Ms. Janice Chayt, RSP Staff Investigator
Mr. William Sprance, Designated Federal Official

Introductory Remarks

Mr. Sprance opened the subcommittee meeting at 8:25. Dean Hillman explained that the purpose of the meeting was to discuss the information gathered concerning the training of prosecutors and defense counsel, as well as the prosecution and defense of sexual assault cases. Subcommittee members were provided with outlines on those topics which they used to develop findings and recommendations. She explained that subcommittee members would be assigned to teams in order to provide detailed review of specific subjects. However any subcommittee member may provide comment on findings and recommendations they may have.

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Deliberations of Prosecutor and Defense Counsel Training & Experience

The subcommittee members discussed whether the systemic training provided by the military could compensate for lack of continuity and experience found in some of the large prosecution and defense offices. They discussed how one of the ways the military has tried to train prosecutors while increasing their experience level has been intern type programs, such as the Army's requirement for Special Victim Prosecutors (SVPs) to work in a civilian prosecutor's office for two weeks. Ms. Jaus noted this was a great idea, but based on her experience with an Army officer visiting the Brooklyn office, she thought the military should assign JAG officers for a longer period of time. Currently, JAGs participate in a two-week program, and she thought it should be at least four weeks, if not longer.

The members also reviewed what they learned about the civilians who are highly qualified experts (HQE); how HQEs are used in each service; and the resource and funding constraints some HQEs experienced.

The subcommittee discussed the possibility of military justice career tracks to develop the experience level of officers within the JAG Corps, noting the Navy now has a litigation track and Army awards a skill identifier for those who have attained a certain level of military justice and trial experience.

The members explored ways the military could more efficiently and effectively train JAG Officers who handle sexual assault cases. The subcommittee entertained suggestions of standardization at the DoD level, possibly consolidating the training, or designating one of the Services as the lead agent for training. The subcommittee noted the importance of sharing training ideas to create some standards and techniques while not stifling the creativity of instructors at the JAG school.

For defense counsel, the subcommittee noted that it is important, especially for sexual assault cases, that they have served at least one tour as a prosecutor prior to becoming a defense counsel. Members also suggested that if investigators worked for defense counsel, that could also help them try these cases.

COL(R) Henley recommended conducting a survey of military judges to assess the advocacy level of counsel that prosecute and defend sexual assault cases.

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Prosecuting Sexual Assault Cases:

The subcommittee compared the organizational structure in civilian jurisdictions and the military. They discussed different models and focused on the pros and cons of consolidated models that co-locate investigators and prosecutors with members of the Sexual Assault Response Team (SART) to enhance communication. The subcommittee reviewed the military's requirement to sustain a Special Victim Capability and noted that each Service has a different approach based on their size, capability and requirements. Prof Hillman stated that she is "cautiously optimistic" that the Special Victim Capability requirement will enhance the ability of the criminal justice system to provide well organized and coordinated services to the victims of sexual assault. The members agreed the implementation will require further assessment once it has been in practice for several years.

The members discussed prosecutorial discretion and agreed that it differs in the civilian and military systems. In the civilian system, the prosecutor has the ultimate authority and discretion regarding what to charge and can decide whether to decline cases. Civilian prosecutors usually coordinate with a supervisor when charging serious sexual assault cases, but it is a prosecutor's decision. In the military system, the trial counsel recommends the charges and the disposition of the case, but the final authority to refer charges rests with the commander, with advice of his or her Staff Judge Advocate.

The subcommittee found the evidence used in both civilian and military cases is similar. DoD uses one Sexual Assault Forensic Examination kit with separate collection instructions for use with a victim or a suspect. Pretext calls are used in civilian cases, but approval requirements vary within the Services. The use of forensic psychiatrists or psychologists is common by the prosecution to explain to the jury the victim's counterintuitive behavior and trauma, and the defense will request similar experts. Experts are very expensive and both the military and civilian courts may require the parties to use a less expensive substitute if the government is paying for the expert.

Defending Sexual Assault Cases:

One of the recurring complaints the members have heard from military defense counsel has been the inability of the defense to obtain experts and resources during the pretrial phase of a sexual assault case. The members discussed the requirement that military defense counsel submit such requests through the trial counsel and the staff judge advocate, for convening authority approval. This process requires the defense counsel to reveal their strategy to the government and the military defense counsel stated that their requests are often denied, requiring them to wait until after referral of the charges so they can raise the issue with the military judge.

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The civilian members of the subcommittee explained that public defenders go through the judge for expert requests. In New York the requests can be ex parte; however, in Virginia they are not. The members agreed that having the defense counsel submit a request to a judge is better than requiring them to go through the trial counsel.

The members discussed possible changes to the military justice system to involve the judge earlier in a case to provide an opportunity for defense counsel to address expert requests and other pre-trial discovery issues.

Overriding Issues Involving the Victim and Accused

The subcommittee discussed the concerns surrounding the handling of victims' collateral misconduct. In the military, information on minor collateral misconduct is turned over to the command for disciplinary action, which typically occurs after the sexual assault case is resolved. Members discussed that the specter of disciplinary action is likely a reason that victims do not report. Some civilian jurisdictions typically would not charge a victim for minor misconduct related to the offense. The information would be brought out at trial, but not prosecuted. Mr. Bryant pointed out that a major distinction between the systems is that civilians do not face comparable consequences for minor misconduct such as underage drinking. The subcommittee talked about alternatives such as establishing policies with immunity, but noted it would be difficult to appropriately capture the minor offenses because in the military they may be seen as a major offense. Some of the Service regulations note that the Commander will withhold adverse action until the conclusion of the case. This topic goes to the issue of fairness in the system and a commander's concern for good order and discipline.

The members talked about the military's policy of offering victims expedited transfers, if requested. This makes the victim less available for the investigation and prosecution, since a transfer can be to another unit or another base. If the victim does not want to transfer, the commander can consider transferring the accused. In civilian communities the victim may need to be relocated to protect them from harassment from the accused's friends.

The last topic for deliberation was the "good soldier defense." Two of the members noted this is a court created name tag with a negative connotation, since the military rules of evidence concerning character evidence are not unique to the military. The members found that civilian and military defendants can only introduce character evidence when it is relevant. They reviewed the current version of a bill sponsored by Senator Claire McCaskill, which proposes to remove the Good Soldier Defense from the merits phase except in military-type offenses. The members concluded the rules of evidence would still apply. The members agreed with testimony that they heard which

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indicated that relying on the good soldier defense is not an effective tool. The members also discussed the related concern that in the military, a service member in dress uniform wearing numerous decorations would predispose the jury to believe the accused was not capable of a sexual assault. One member suggested changing the uniform for a court-martial so the accused wears the camouflage uniform until sentencing to avoid that problem, though most members disagreed that this was a workable solution.

Mr. Sprance closed the subcommittee meeting at 2:50 PM.

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



Elizabeth Hillman
Chairperson for the Comparative Systems Subcommittee,
Response Systems to Adult Sexual Assault Crimes Panel

Attachments:

- Agenda
- Completed Agendas
- Future Agendas
- 6 Aug 13 brief by JCS-SAS to RSP
- CSS Team Assignments
- Email to Subcommittee members
- JSC SAS Report Appendices
- RSP RFIs dated 25 Oct 13
- Schenck, L., *Informing the Debate About Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, Draft 1-15-2014, pending publication.
- Schenck, L., *Sex Offenses Under Military Law: Will the Recent Changes in the Uniform Code of Military Justice (UCMJ) Re-traumatize Sexual Assault Survivors in the Courtroom?*, Draft 12-30-2013, pending publication.
- White House Council on Women and Girls, Rape and Sexual Assault, *A renewed call to action*, January 2014
- Victim Protection Act of 2014
- GAO Report: *Oversight and Better Collaboration Needed for Sexual Assault Investigations and Adjudications*, dated June 2011.

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- DoD Report to the HASC and SASC: *Establishment of Special Victim Capabilities with the Military Departments to Respond to Certain Special Victim Offenses*, dated Dec. 12, 2013.
- DODD 6495.01, Sexual Assault Prevention and Response (SAPR) Program
- DODI 6495.02, Sexual Assault Prevention and Response (SAPR) Program procedures
- COL Mulligan's statement on implementation of Special Victim Capability, and explanation of waterfall slides