



# Comparative Systems Subcommittee

## Interim Assessment to the Response Systems to Adult Sexual Assault Crimes Panel



# Comparative Systems Subcommittee (CSS)

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# Introduction

**Mission:** Assess and compare military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses with nine specific objectives.

**Result:** 77 Recommendations on Surveys and Data Analysis, Investigations, Prosecution, Defense and Adjudication of Adult Sexual Assault



# Objectives and Scope

1. 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.
2. Compare military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes.
3. 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.



# Objectives and Scope

4. 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.
5. 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.
6. Identify best practices from civilian jurisdictions that may be incorporated into any phase of the military system.



# Objectives and Scope

7. 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.
8. 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.



# Objectives and Scope

9. 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.

The Subcommittee shall develop conclusions and recommendations on the above matters and report them to the Response Systems Panel.



# Methodology

## Meetings

- 30 RSP & CSS meetings & preparatory sessions
- Over 380 presenters including military criminal investigative organizations, civilian police, military and civilian prosecutors and defense attorneys, commanders, medical professionals, statisticians, military and civilian forensic examiners, survivors, victim advocate organizations, other public interest groups, and United States senators
- Multiple, progressive deliberation sessions



# Methodology

## Site visits to federal, state, and military locations

- Defense Forensic Science Center (GA)
- Georgia Bureau of Investigations Laboratory (GA)
- Dawson Place (WA)
- Philadelphia Sexual Assault Response Center (PA)
- Fort Hood (TX)
- Joint Base San Antonio (TX)
- Joint Base Lewis-McChord (WA)
- Naval Station Norfolk (VA)
- Naval Base Kitsap (WA)
- Marine Corps Base Quantico (VA)



# Methodology

- **Research**
  - Submitted more than 150 RFIs to SECDEF & Service Secretaries
  - Requested input from 18 victim advocacy organizations
  - Solicited & received public comments
  - Visited sites for non-attribution comments
  - Transcribed RSP & CSS meetings and deliberation sessions verbatim



# Methodology

- Analysis and document review
  - Reviewed government & non-governmental organization reports and policy memoranda
  - Reviewed transcripts of hearing testimony
  - Assessed statistical data and available research into military and civilian (state and federal) response systems



# Findings and Recommendations

## Findings and Recommendations:

- Surveys (Recs 1-6)
- Investigations (Recs 7-22)
- Training (Recs 23-31)
- Prosecution and Defense (Recs 32-54)
- Sentencing and Clemency (Recs 55-60)
- Proposed Legislation (throughout)



# Themes of Comparison

1. Collecting crime victimization data to complement workplace assessments increases the value of comparative analysis.
2. Training & collaborating with civilian experts & other Service branches helps to leverage experience.
3. Balancing an emphasis on prosecution with resources for defense counsel protects the rights of the accused & the legitimacy of military justice.



# Themes of Comparison

4. Ensuring investigators and prosecutors comply with victims' rights requirements and victims are treated with dignity and respect through the justice process.
5. Standardizing terms and reporting improves the accuracy of cross-service comparisons.
6. Granting military judges authority closer to that of civilian judges enhances fairness, rationality, and confidence.



# Surveys: Recommendation #1

## Crime Victimization Survey for DoD

SECDEF direct the development of a military crime victimization survey in conjunction with Bureau of Justice Statistics (BJS)

- Will enable military/civilian comparisons
- Current surveys are not equivalent or comparable
- Crime victimization surveys must be distinguished from public health surveys



# Surveys: Recommendation #2

## Defining Terms in Surveys

SECDEF direct that military crime victimization surveys use the Uniform Code of Military Justice (UCMJ) definitions of sexual assault offenses in order to:

- Ensure the capture of precise, comparable data
- Track law enforcement and prosecution definitions
- Enable better assessment of unreported sexual assaults
- Evaluate the relative success of sexual assault prevention and response programs



# Surveys: Recommendation #3

## Using WGRA for its Intended Purpose

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

The WGRA is not a reliable source of crime victimization data because:

- its design follows public health rather than crime victimization survey practices
- its definitions do not match the definitions of military crimes



# Surveys: Recommendation #4

## Response Rates

The SECDEF seek to improve survey response rates to enhance accuracy of data.

- The 2012 WGRA response rate was 24%
- Surveys at service academies achieve approximately 70% response rates
- Response rates under 80 % require non-response bias analysis



# Surveys: Recommendation #5

## DoD Release WGRA Raw Data

SECDEF direct the release of raw survey data to independent professionals and publish its non-response bias analysis so that

- Independent study can inform DoD's responses to sexual assault
- Targeted prevention efforts can be developed
- Environmental factors such as time in service, location, training, and deployment status can be identified as markers for increased risk



# Surveys: Recommendation #6

## Advisory Panel for Next Survey

SECDEF direct the creation of an advisory panel to consult with RAND as it develops the next iteration of the DoD's WGRA/public health survey

- Members should include experts from BJS, Committee on National Statistics (CNSTAT), and other specialists in surveying sexual violence
- Will ensure effective survey design, which is critical to data collection and response



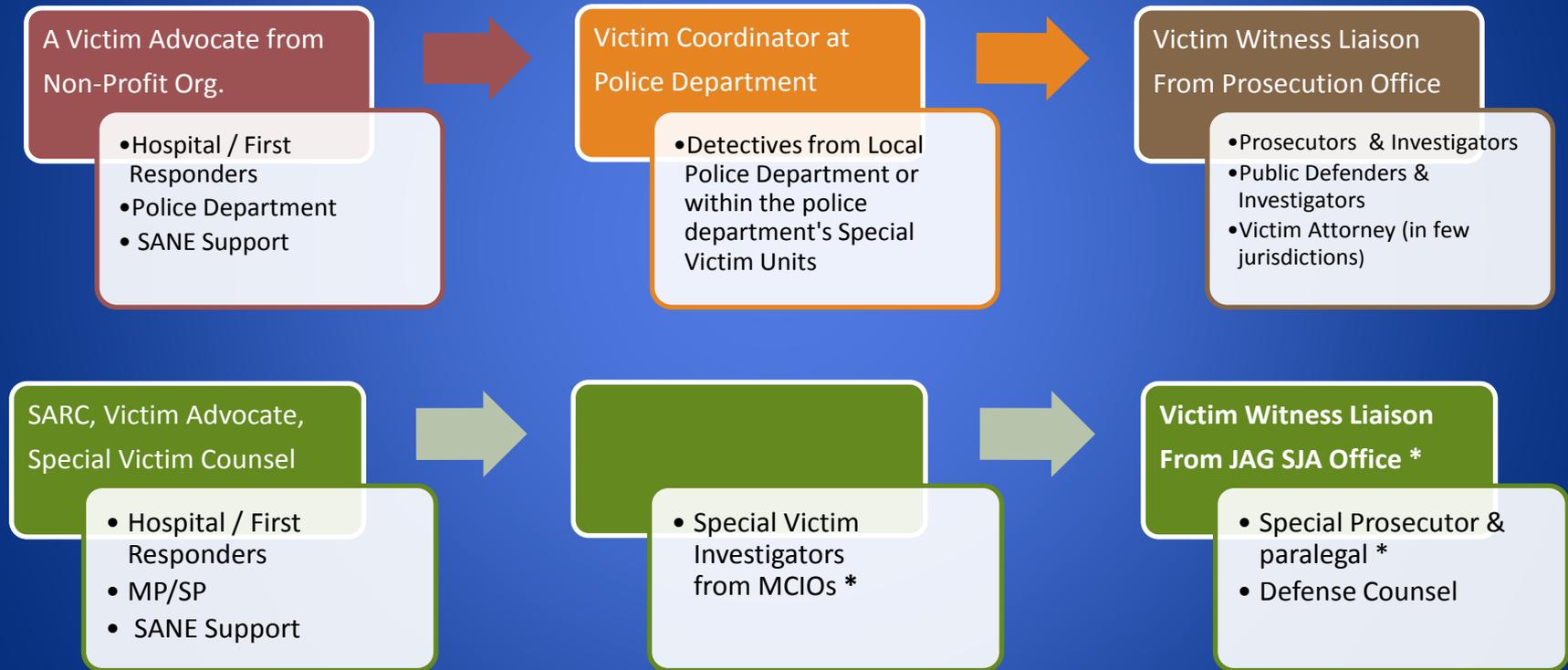
# Terminology

- Military Criminal Investigative Organization (MCIO)
- Special Victim Capability (SVC)
- Special Victim Unit (SVU)
- Special Victim Investigator (SVI)
- Special Victim Prosecutor (SVP)
- Sexual Assault Nurse Examiner (SANE)
- Sexual Assault Forensic Examination (SAFE)
- Sexual Assault Response Coordinator (SARC)
- Victim Advocate (VA)
- Victim Witness Liaison (VWL)
- Special Victim Counsel (SVC)



# Special Victim Capability

## Civilian & Military Multidisciplinary Approach





# Investigations Recommendation #7

## Specially Trained Agents

SECDEF should direct that non-SVU agents coordinate with SVU agents in all sexual assault investigations

- Many, but not all, civilian agencies have separate sexual assault units and investigators
- Military also uses special investigators for sexual assaults, but not all offices have them due to size, case load, installation population



# Investigations Recommendation #8

## Selection of SVU Investigators

SECDEF direct the careful selection and training of supervisory agents and investigators for SVUs, utilizing civilian agents as supervisors whenever possible

- Ensure those selected have competence and commitment to investigate sexual assaults
- Civilian supervisory agents good for continuity
- Reassign those who experience “burn out”



# Investigations Recommendation #9

## Investigator Training

Congress appropriate centralized funds for MCIOs to provide advanced training on advanced sexual assault investigations and eliminate bias

- Military investigator training is more robust than civilian counterparts
- Ensure continued training on potential biases and inaccurate perceptions of victim behavior
- Avoid language in reports that inaccurately or inappropriately implies victim consent



# Investigations Recommendation #10

## Policies and Procedures - Patrol Officer Response

SECDEF direct that the role of military police continue to be: protecting the crime scene, ensuring safety and well-being of victims, and reporting to MCIO

- Civilian patrol officers have discretion regarding handling sexual assaults
- Military police (MP) have no discretion and must immediately refer report of sexual assault to MCIO
- Ensures specialized processing from the outset



# Investigations Recommendation #11

## Increased Caseload

SECDEF direct that Marine Corps CID, military police, or Security Forces investigators be authorized to assist in investigations of minor incidents under SVU oversight

- Increased reporting and requirement for MCIOs to investigate all offenses under Article 120 means increased caseload
- Marine CID and Military/Security Forces Investigators underutilized
- Permits supervision and better resource allocation



# Investigations Recommendation #12

## “Pretext” Phone Calls and Text Messages

SECDEF establish a standardized procedure to streamline and expedite MCIOs’ use of this investigative technique in accordance with the law

- Victim calls suspect to elicit valuable evidence
- Civilian agencies report that calls are valuable tool often used with quick approval as state law permits
- Services use various approval procedures, sometimes cumbersome and time-consuming



# Investigations Recommendation #13

## Victim Collateral Misconduct

SECDEF standardize the policy regarding rights advisement during interviews of victims of sexual assault when they disclose minor misconduct

- Civilian systems do not generally advise of rights, nor prosecute, upon such disclosure
- Potential prosecution for collateral misconduct is a significant barrier to reporting for military victims
- Current policy affords convening authority discretion
- Practices vary as to whether victim is advised of rights as suspect under Article 31(b) of the UCMJ during an interview



# Investigations Recommendation #13

## Victim Collateral Misconduct

SECDEF establish a procedure that grants immunity for victims who disclose minor collateral misconduct, promulgate a list of qualifying offenses, and consider recommending amendment to Art 31(b) or other legislation

- Remedies confusion regarding authority to grant immunity
- Protects rights of victims and encourages reporting
- Standardizes practice across the services to increase fairness
- Difficult to reconcile existing Art 31(b) with current practice



# Investigations Recommendation #14

## Sequestration and Furlough of Lab Examiners

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

- Military forensic examiners were furloughed last summer as result of “sequestration,” delaying evidence examination and investigations in sexual assault and other cases



# Investigations Recommendation #15

## Identifying Repeat Offenders

SECDEF establish a policy to collect information about alleged offenders who are identified by victims in restricted reports

- SARC should enter information on restricted and unrestricted sexual assault reports into DoD database (DSAIDs) so it is available if the alleged offender is identified in another reported sexual assault
- Currently, if a victim makes a restricted report SARC does not enter data on reported offender, if known, and no information is provided to MCIO



# Investigations Recommendation #16

## Restricted Reporting

SECDEF direct a change in the restricted reporting policy to allow a victim to speak with an investigating agent without triggering an investigation if he or she chooses

- Currently, if a victim makes a restricted report, he or she cannot speak to a law enforcement agent and no investigation is permitted
- Change would allow victim to speak to investigator with a Victim Advocate or Special Victim Counsel present
- Law enforcement would not be able to initiate an investigation unless the victim converted the report to unrestricted
- Limited law enforcement contact may increase victim confidence, victim's willingness to convert to an unrestricted report, and criminal intelligence data collected



# Investigations Recommendation #17

## Audits

**SECDEF direct an external audit of DoD sexual assault investigations by a qualified outside entity**

- DoD Inspector General audits sexual assault investigations and measures investigations against checklists of required actions
- Non-DoD entities are currently not involved
- Some civilian police agencies use external audits to increase transparency and confidence in law enforcement response to sexual assault



# Investigations Recommendation #18

## Case Coordination

SECDEF direct MCIOs to standardize and coordinate with trial counsel to ensure all appropriate investigation occurs before MCIO provides reports to commander

- Service procedures vary re case coordination
- Army requires coordination for probable cause determination
- Opine should be limited to ensuring the investigation has been exhausted and the case is ready for a disposition decision



# Investigations Recommendation #19

## Determining Allegations are Unfounded

The SECDEF direct that the Uniform Crime Reporting (UCR) standard for “unfounding” be adopted across the Services and DoD

- Unfounded should mean only false or baseless
- Services now use different definitions, or no definition, of unfounded

MCIOs, in coordination with trial counsel, should make the decision to unfound

- Currently, commanders or trial counsel and MCIOs make this decision, with no standard practice across the DoD



# Investigations Recommendation #20

## Sexual Assault Nurse Examiners

SECDEF direct Surgeons General to review FY14 NDAA requirement for SANE at all military treatment facilities with a 24/7 emergency room and provide recommendation on the best way to deliver SANE services effectively

- Not all military hospitals have in-house SANE
- Victims may have to travel to civilian facility
- Some civilian SANEs are located in community centers of excellence and handle all exams in the area
- Military installations may not have sufficient caseloads to maintain expertise



# Investigations Recommendation #21

## Hair Samples for SAFE

SECDEF direct that military SAFE kits eliminate requirement to collect plucked hair samples

- Plucked samples are not necessary as they have little if any probative value
- Many civilian agencies no longer collect plucked hairs as part of SAFE kit
- Limits invasiveness for victim



# Investigations Recommendation #22

## Collaboration on SAFE Training

SECDEF direct working group to coordinate efforts and leverage expertise to create course for military and DoD practitioners

- Consider using Joint Medical Education and Training Center, portable forensic training, and joint refresher courses
- DOJ national guidelines are basis for military and civilian SAFE training
- Services instituted different programs to implement the national guidelines



# Training Prosecutors and Defense Recommendation #23

## Joint Training Working Group

Establish criminal law Joint Training Working Group to assess, oversee, and optimize sharing of best practices, resources, and expertise in SA cases

- Produce report to TJAGs annually next five years
- Strive to eliminate redundancy, consider consolidated training, and monitor training and experience
- Currently all Services send members to other Services' training courses
- Review SVP, Navy's MJLCT, HQE, TCAP/DCAP



# Training Prosecutors and Defense Recommendation #24

## Overall Assessment of Prosecutor and Defense Counsel Training and Experience

SECDEF direct that funding for training of judge advocates be sustained or increased to maintain the expertise necessary to litigate SA cases

- No uniform national or state training or experience standards for sexual assault prosecutors or defense counsel exist
- Most civilian training is supervised, on-the-job training
- Civilian sexual assault prosecutors usually have at least 3 years experience, although this is not uniform
- All Services have specially trained SA prosecutors & trained defense counsel



# Training Prosecutors Recommendation #25

## Specialized Training of Military Trial Counsel

Study Navy's Military Justice Litigation Career Track as a model to enhance litigation expertise; Sustain and broaden emphasis on sharing JAG resources, experience, and expertise

- Military trial counsel receive extensive, standardized training but may have fewer years of prosecutorial experience than some of their civilian counterparts in large jurisdictions
- Services informally share resources, personnel, and lessons learned



# Training Defense Counsel Recommendation #26

## Training of Military Defense Counsel

Sustain current training programs to ensure defense counsel are competent, prepared, and equipped to defend sexual assault cases

- Military defense counsel in all Services receive specialized training in handling sexual assault cases



# Training Defense Counsel Recommendation #27

## Defense Counsel Experience

Permit only experienced attorneys to serve as defense counsel and establish a requirement that their assignments be for a minimum of two years to develop expertise litigating complex sexual assault cases

- Trial experience difficult to develop because assignments may be as short as 12-18 months with relatively few courts-martial
- Not all counsel assigned to the defense have previous experience as a trial counsel



# Training Defense Counsel Recommendation #28

## Funding Defense Counsel Training

Review the funding of defense counsel training to ensure opportunities are on par with those of trial counsel

- Some defense counsel reported their training opportunities were insufficient and unequal to those of trial counsel



# Training Best Practices Recommendation #29

## Civilian Role in Military Counsel Training

Continue to fund and expand programs that provide permanent civilian presence in military counsel's training structure for trial and defense counsel

- Experienced civilian advocates play an important role in training military trial and defense counsel in the Army, Navy and Marine Corps and ensure continuity and baseline experience and an added perspective



# Training Best Practices Recommendation #30

## Regular Evaluation of Military Counsel Advocacy

TJAGs consider implementing a system like the Navy's quarterly judicial evaluations of military counsel's advocacy skills

- Navy military judges prepare quarterly evaluations of counsel advocacy performance which are used to target training plans



# Training of Military Judges Recommendation #31

## Training of Military Judges

Continue to fund sufficient training opportunities for judges and consider more joint and consolidated programs

- Military judges participate in joint training
- Recommendations for enhanced role of military judges may necessitate increased funding for training of judges



# Multidisciplinary Facilities Recommendation #32

## Co-location Models

Co-locate investigator and prosecutor offices where caseloads justify consolidation and resources are available

- Organizational structures of civilian and military prosecutors offices vary
- No single model is optimal
- Consolidated facilities can improve communications and help minimize additional victim trauma



# Co-location Models Recommendation #32

## Multidisciplinary Co-location Models

Dawson Place,  
Everett, WA  
and JBLM

- Victim Advocate
- SANE/SAFE Support
- Special Victim Counsel (military)
- Investigator
- Prosecutor
- Victim Witness Liaison

Philadelphia, PA &  
Austin, TX.

- SANE/SAFE Support
- Investigator
- Victim Coordinator
- Prosecutor

Arlington, VA & Ft.  
Hood, TX.

- Investigator
- Prosecutor
- Victim Witness Liaison

Marine Base Quantico

- SARC
- Victim Advocate
- Special Victim Counsel



# SVP Program Recommendation #33

## Specially Trained Prosecutors

Continue to fully implement specially trained prosecutors (SVP) program as best suits each Service, but standardize the duty title among the Services

- Do not require SVPs to try every Art. 120 case
- Revise definition of “covered offenses” in DTM 14-003 to align with UCMJ because generic terms inappropriately include or exclude conduct



# Prosecuting SA Cases Recommendation #34

## Resourcing Prosecutors

Continue to assess and provide adequate resources to meet need for well-trained prosecutors in the Special Victim Capability

- Services may need additional SVPs to meet demand if there is a continuing trend in increased reporting
- Military Services fully fund special prosecutors' case preparation requirements



# Prosecuting SA Cases Recommendation #35

## Measuring SVP Success

Assess the Special Victim Capability annually and continue to develop metrics for SVPs, adding the victim “drop out” rate as a measurement of effectiveness

- DoD established a list of SVP evaluation criteria
- Since Army established SVP program, only 6% of sexual assault victims were unable to continue to cooperate in investigation or prosecution which reflects SVP a contributing factor to the low “drop out” rate



# Prosecuting SA Cases Recommendation #36

## Prosecutors' Initial Involvement

Maintain the 24-48 hour standard for the investigator and SVP coordination, and add a requirement for SVP to contact victim ASAP

- Early prosecutor involvement leads to greater likelihood victim will cooperate in the case
- SVPs follow civilian jurisdictions' best practice to respond quickly, but there is no established requirement



# Defending SA Cases Recommendation #37

## Military Trial Defense Structure and Budget

Ensure military defense counsel are adequately resourced with funds and personnel and leverage experience in Reserve component

- Military trial defense essential to the legitimacy and fairness of the justice system
- Unlike public defender offices, military defense organizations do not maintain their own budget
- Neither military defense counsel nor civilian public defenders specialize in sexual assault



# Defending SA Cases Recommendation #38

## Defense Investigators

SECDEF direct Services to provide independent, deployable defense investigators to increase efficiency, effectiveness and ensure the fair administration of justice

- Many civilian public defender offices have investigators on staff
- Military defense counsel rely solely on MCIOs
- Military defense need independent investigators to zealously represent clients, for all cases



# Defending SA Cases Recommendation #39

## Measuring Effectiveness of Defense Counsel

SECDEF direct Services to assess military defense counsel's performance in sexual assault cases and identify areas that need improvement

- No established metrics to measure military defense counsel's performance



# Victims' Rights in SA Cases Recommendation #40

## Trial Counsel Role in Victims' Rights

Ensure trial counsel comply with their obligations to afford victims their rights

- In some civilian jurisdictions, judge asks prosecutor if he/she conferred with victim and to present victim's opinions to the court
- In cases tried by courts-martial, require judge to inquire on the record whether TC complied with statutory and policy requirements



# Victim's Counsel Impact Recommendation #41

## Assess Interaction of SVC, Trial and Defense Counsel

Obtain feedback from SJAs, prosecutors, defense counsel and investigators to assess satisfaction with the Special Victim Counsel

- Personnel reported positive working relationships
- Military counsel foresee potential issues such as privilege, confidentiality, or delays, when the government's and victims' interests do not align



# Victim's Rights and Special Victim Counsel Recommendation # 42

## Victim Protection Act, Section 3(b)

Congress should not enact section 3(b), which suggests that victims have a choice of military or civilian prosecution

- Decision to prosecute routinely negotiated between civilian and military prosecutors
- No evidence of any problem between civilian and military authorities
- VPA would provide victim opportunity to voice preference



# Sexual Assault Statute Recommendation # 43

## Article 120

Judicial Proceedings Panel should study the wisdom of further changes to the UCMJ's sexual assault statute to narrow or separate offenses now included

- Civilian jurisdictions generally refer to “sexual assault” as felony level crimes such as rape
- Civilian misdemeanors generally require contact + intent to satisfy sexual desire
- Article 120 spans an extremely broad range of conduct, from touching without intent for sexual gratification to rape
- Numerous recent changes give us pause



# Charging Decision

## Finding # 44

### Charging Discretion: No recommendation for change

- Both civilian and military prosecutors have broad discretion in drafting charges



# Disposition Decision

## Finding # 44

### Disposition: No recommendation for change

- Civilian and military prosecutors face same initial case disposition decisions
  - Request further investigation
  - Commence Prosecution
  - Decline prosecution (alternate disposition possible)
- In military, several adverse actions exist if insufficient evidence for court-martial on sexual assault
  - Nonjudicial punishment
  - Separation
  - Letters of reprimand



# Judge's Role Recommendation # 45

## Comparing Civilian and Military Judges' Role

Congress should increase authority of military judge

- In civilian jurisdictions, magistrate judges become involved early (indictment/arrest)
- In existing system, military judges do not become involved until referral
- Earlier judge involvement will improve process



# Judge's Role Recommendation # 45

## Witness, Expert, Evidence & Other Assistance

Military judges should rule on defense requests for witnesses, experts, and other pretrial matters

- Current practice requires defense counsel to go through trial counsel/convening authority
- Defense counsel required to disclose information
- Military judges already rule on these matters when defense counsel challenge gov't denials
- Would enhance fairness in light of Art 32 changes



# Judge's Role Recommendation # 45

## Subpoena Power

**Military judges should issue subpoenas on behalf of defense counsel**

- Currently trial counsel have subpoena power with minimal oversight
- Defense counsel have to go through trial counsel for subpoenas
- Some civilian public defenders have subpoena power



# Judge's Role Recommendation # 45

## Article 32

### Military judge should preside over preliminary hearing

- Changes in Article 32 have made military pretrial process more like civilian processes
- Judge's ruling of no probable cause should be binding, so that if no probable cause, case cannot proceed unless and until more evidence is brought forward
- Civilian approaches to victim pretrial testimony vary
- JPP should assess use of depositions in light of Article 32 changes, and whether changes are merited



# Referral Recommendation # 46

## Referral & Section 2 of VPA

Congress repeal FY14 NDAA § 1744 because it creates undue pressure for referral/prosecution

Congress should not enact § 2 of VPA

- Elevating review creates a one-way ratchet toward more prosecutions, even if referral to trial does not serve interests of victims or justice
- Elevating review places Service Secretaries in position of exercising prosecutorial discretion without training or experience



# Referral Recommendation # 47

## Written Declination Procedures

If § 1744 is not repealed, Secretary of Defense direct a standard format be developed for declining prosecution (e.g., DOJ's) to preserve possibility of future action

- Currently, § 1744(e)(6) requires elevated review, memorandum for declination
- Civilian offices vary in declination practices, but no analogous lengthy justification is required
- No standard declination procedure exists in DoD



# Plea Negotiations Recommendation # 48

## Plea Bargaining

### Plea bargaining deserves further attention

- In civilian jurisdictions, most plea agreements involve a known sentence or range of punishments
- In courts-martial, plea agreements place only a ceiling, not a floor, on the sentence
- Convicted service members can “beat the deal” at sentencing, potentially decreasing victim confidence, especially if those victims consulted with prosecutors on the pre-trial agreement
- Most military sexual assault cases go to trial, so the impact of a change might be limited



# Panel Selection Recommendation # 49

## Voir Dire

Judge advocates should review sexual assault prevention training materials to ensure prospective members do not receive inaccurate training

- Military judges should continue to control voir dire to ensure a fair and impartial panel
- Site visits and testimony revealed difficulty in finding prospective panel members not influenced by training



# Character Evidence Recommendation # 50

## Eliminating “Good Soldier Defense”

Enacting VPA Section 3(g) to limit certain evidence may increase victim confidence

- The “Good Soldier Defense” undermines victim confidence
- Character evidence will still be admitted if a proper foundation is established, limits the impact of § 3(g)
- Military rules on character evidence parallel civilian rules
- Further changes regarding character evidence are unwarranted



# Prosecution and Conviction Rates Recommendation # 51

## Data Currently Collected

The SECDEF implement a standard method for calculating prosecution and conviction rates

- Once standardized, direct an independent civilian expert to study prosecutorial decision making in the military
- Services currently use different definitions and methods, which make meaningful comparison difficult or impossible



# Prosecution and Conviction Rates Recommendation # 51

## Recommended Methodology



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



# Prosecution and Conviction Rates Recommendation # 52

## Unfounded vs. Unsubstantiated

Congress should amend legislation in FY 11, 12, & 13 NDAA so that Services must provide the number of “unfounded” cases—those deemed false/baseless—rather than “unsubstantiated” cases in their reports

- Reporting requirements for various authorities vary widely
- FY 11 NDAA requires synopsis of “substantiated cases”
- Use of “unfounded” with a specified definition will enhance accuracy



# Prosecution and Conviction Rates Recommendation # 53

## Comparing Military and Civilian

Neither Congress nor the SECDEF should measure success solely by comparing civilian and military prosecution rates

- In civilian jurisdictions, police disposition options and discretion vary but routinely include non-prosecution
- In the military, specific alternate dispositions are available that are not applicable to civilians
- Definitions of criminal conduct not the same in military and civilian criminal codes
- UCR's broadening of definition in Jan. 2013 brings civilian collection closer to what military tracks



# Sentencing Recommendation # 54

## Sentencing Data

SECDEF direct that the Services provide sentencing data for all rape and sexual assault offenses (and other offenses) in a searchable DoD database

- Sentencing data is not easily accessible and is internally maintained/reported by Services
- Modify Services' existing software programs to include sentencing information as needed.



# Sentencing Recommendation # 55

## Sentencing Data Availability

Services should release sentencing outcomes monthly to increase transparency and promote public confidence

- Public has an interest in military's sexual assault case outcomes
- Navy began publishing all GCM/SPCM results in Navy Times monthly in 2013



# Sentencing Recommendation # 56

## Sentencing Authority

Congress amend the UCMJ, and the President the Manual for Courts-Martial, to make military judges the sole authority in sentencing to improve reliability and proportionality in absence of sentencing guidelines.

- Federal system and 44 states use judges to impose sentences in all noncapital cases
- Military has retained sentencing option by panel members
- Judge-alone sentencing is already available at the accused's request at court-martial



# Sentencing Recommendation # 57

## Sentencing Guidelines

Rather than adopting sentencing guidelines, further study of sentencing, and assessment of the impact of the enhanced role of military judge, should be pursued

- Sentencing guidelines are currently used in federal system, DC, and 20 states
- Sentencing guidelines can be complex and may require a substantial support infrastructure
- Not enough evidence of disparity, nor sufficient data available to study, for CSS to assess current patterns



# Sentencing Recommendation # 58

## Mandatory Minimum Sentences

Recommend not enacting further mandatory minimums at this time and asking the Judicial Proceedings Panel to review further

- Remain controversial because some believe they can suppress reporting while others seek enhanced punishments as deterrent and source of victim confidence
- Apply in very few circumstances at courts-martial, and previous studies have suggested further review of the mandatory life sentence for premeditated murder



# Sentencing Recommendation # 59

## Clemency

Recommend allowing convening authorities to grant clemency for forfeiture protection for dependents of convicted service members

- Civilian clemency rules for Governors' and President's pardon/commutation power do not parallel the military clemency rules
- Impacts of recent Article 60 changes on clemency are not yet clear
- Changes may limit appellate review for certain service members



# Sentencing Recommendation # 60

## Unitary Sentencing

Recommend eliminating unitary sentencing and requiring specific sentences be adjudged for each offense to improve transparency and accountability

- Civilian sentencing specifies sentences for each offense as well as whether those sentences will run concurrently or consecutively
- Military sentencing, by contrast, uses an aggregate sentence in which a single sentence is adjudicated even for multiple convictions



# Summary

- **Goal:** Compare many civilian systems to the military justice system, which itself has multiple branches, regulations, policies, courts, and schools.
- **Scope:** Surveys, investigations, training, prosecution, defense, sentencing, clemency, and proposed legislation.
- **Results:**
  - Better crime victimization data, standard terms, and rational reporting requirements will enable comparative analysis.
  - Training and collaboration are critical to success.
  - Must balance resources for defense counsel and avoid incentives to prosecute at all costs.
  - Granting military judges more authority can improve fairness, efficiency, and confidence.



# QUESTIONS?

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

***Comparative Systems Subcommittee***