



# The Comparative Systems Subcommittee

## Report to the Response Systems Panel

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

*Comparative Systems Subcommittee*



# Introduction

**Mission:** Compare and assess military and civilian response systems for the investigation, prosecution, and adjudication of crimes involving adult sexual assault.

**Result:** 106 Findings and 76 Recommendations.



# The Comparative Systems Subcommittee

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# Surveying Sexual Violence # 1

## Develop New DoD Crime Victimization Survey

**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.



# Surveying Sexual Violence # 2

## Use UCMJ Definitions in New Survey

**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.



# Surveying Sexual Violence # 3

## Use WGRA Only for Public Health Assessment

**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.



# Surveying Sexual Violence # 4

## Improve Survey 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.



# Surveying Sexual Violence # 5

## 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.





# Surveying Sexual Violence # 6

## 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.



# Investigations # 7

## 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.



# Investigations # 8

## 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.



# Investigations # 9-A, 9-B

## Training 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.



# Investigations # 10-A

## 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.

*\*Compare VSS Recommendation 18 (and finding).*



## VSS Recommendation # 18 Deferred Pending CSS Final Report -Study on Collateral Misconduct-

**Recommendation 18:** The Secretary of Defense direct a study of what constitutes low-level collateral misconduct in sexual assault cases and assess whether to implement a policy in which commanders will not prosecute low-level collateral misconduct.

*Deferred Pending Review of CSS R-10A, B, and C.*

\* Alternate statement by subcommittee members Anderson, Garvin and Marquardt

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***Victim Services Subcommittee***



## VSS Finding # 18 -Study on Collateral Misconduct-

**Finding 18:** Department of Defense policy states that 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.

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

***Victim Services Subcommittee***



# Investigations # 10-B

## Collateral Misconduct

**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.

*\*Compare VSS Recommendation 18 (and finding).*





# Investigations # 10-C

## Collateral Misconduct

**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.

*\*Compare VSS Recommendation 18 (and finding).*



# Investigations # 11

## 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.



# Investigations # 12

## Victim Reporting Option

**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.

*\*Compare VSS Recommendation 2a.*



## VSS Recommendation # 2a -The Right to Speak With SVC-

**Recommendation 2a:** The Secretary of Defense develop and implement policy that, when information comes to military police about an instance of sexual assault by whatever means, the first step in an investigation is to advise the victim that s/he has the right to speak with an SVC before determining whether to file a restricted or unrestricted report, or no report at all.

*Deferred Pending Review of CSS R-12.*

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

***Victim Services Subcommittee***



# Investigations # 13

## Unfounding Decision

**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.



# Investigations # 14-A

## Probable Cause Decision

**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.



# Investigations # 14-B

## Follow-Up Investigation

**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.



# Investigations # 15

## MCIO Caseloads

**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.





# Investigations # 16

## Pretext Communications Procedures

**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.



# Investigations # 17

## 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.



# Investigations # 18

## SAFE Capability

**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.



# Investigations # 19

## SAFE Requirements

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



# Investigations # 20

## Joint Working Group

**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.



# Investigations # 21

## Audit of 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.



# Training # 22-A

## Judge Advocate 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.



# Training # 22-B

## Judge Advocate Working Group

**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.





# Training # 23

## Training of Military Lawyers

**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 Judge Advocate General's (JAG) Corps of each Military Service.



# Training # 24

## Study Litigation Track for Military 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.



# Training # 25

## Training of 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.



# Training # 26

## Defense Counsel Experience

**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.



# Training # 27

## Defense Counsel Funding

**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.



# Training # 28

## 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.



# Training # 29

## Military Judge Training

**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.



# Training # 30

## Regular Evaluation of Military Counsel

**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.





# Prosecution # 31-A

## 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.



# Prosecution # 31-B

## Co-Location Models

**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.



# Prosecution # 32-A, 32-B

## 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.



# Prosecution # 32-C, 32-D

## Special Victim Capability

**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.



# Prosecution # 33

## Special Victim Prosecutors

**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.



# Prosecution # 34

## Measuring Success in Prosecutions

**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.



# Prosecution # 35

## Early Involvement of Prosecutor

**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.



# Defense # 36

## Defense Resourcing and Experience

**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.





# Defense # 37

## 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.



# Defense # 38

## Metrics for Defense Performance

**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.



# Victim Issues # 39

## Victims' Rights Compliance

**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.

*\*Compare VSS Recommendations 34, 34a, 34b (and findings).*



## VSS Recommendation # 34 - Mechanisms for Rights Notification-

**Recommendation 34:** Implement mechanisms to ensure that victims are notified of and accorded the rights provided by Article 6b, UCMJ.

**Recommendation 34a:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to ensure that military investigators, prosecutors and other DoD military and civilian employees engaged in the detection, investigation, or prosecution of crime notify and accord victims the rights specified in Article 6b, UCMJ.

**Recommendation 34b:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe mechanisms that make military courts responsible for ensuring compliance with the rights afforded to crime victims in court proceedings under Article 6b, UCMJ.

*Deferred Pending Review of CSS R-39.*



## VSS Findings # 34 - Mechanisms for Rights Notification-

**Finding 34-1:** The FY14 NDAA amended Article 6 of the Uniform Code of Military Justice to extend to military crime victims many of the rights conferred to crime victims under the CVRA. These rights were incorporated into the UCMJ as Article 6b.

**Finding 34-2:** The CVRA requires prosecutors and investigators to use their “best efforts” to see that crime victims are notified of, and accorded, the rights under the CVRA. It further places responsibility on the court to ensure that crime victims are afforded the rights guaranteed in court proceedings under the CVRA.

**Finding 34-3:** The FY14 NDAA did not place a similar requirement on military investigators, prosecutors or military courts to ensure that crime victims in military proceedings have been afforded the rights specified in Article 6b, UCMJ.

**Finding 34-4:** Rather, the legislation requires the Secretary of Defense to “recommend changes to the Manual for Courts-Martial to the President and to prescribe appropriate regulations” to implement mechanisms for ensuring that victims are notified of and accorded the rights specified in Article 6b, UCMJ.



# Defense # 40

## Measuring the Performance of 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.



# Victim Issues # 41

## Jurisdiction of Cases

**Recommendation 41**: Congress should not enact Section 3(b) of the Victims Protection Act of 2014 (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.

*\*Compare VSS Recommendation 29.*



## VSS Recommendation # 29 -Congress Defer Adopting 2014 VPA-

**Recommendation 29:** Congress defer adopting Section 3(b) of the Victims Protection Act of 2014 until Congress obtains further evidence and information about the potential impact of such legislation on victims and the military justice system.

*Deferred Pending Review of CSS R-41.*





## VSS Findings # 29 -Congress Defer Adopting 2014 VPA-

**Finding 29-1:** Legislation currently pending in Congress would add to SVC requirements. Under the Victims Protection Act of 2014, which passed the Senate on March 10, 2014, and is pending in the House of Representatives, SVC would be required to advise victims of sexual assault on the advantages and disadvantages of prosecution by courts-martial versus in a civilian jurisdiction.

**Finding 29-2:** The pending legislation also requires the establishment of a process for victims of sexual assaults that occur in the United States to be consulted regarding his or her preference on prosecution by courts-martial or a civilian forum.

**Finding 29-3:** While not binding, the victims' preference must be given "great weight" in determining the prosecution forum. Prior to enacting this legislation, Congress did not receive extensive evidence on the potential impacts such legislation would have on victims and the military justice system.



# The Law # 42

## Considering Article 120

**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.



# Judge's Role # 43-A

## 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 pre-trial 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.

*\*Compare ROC Recommendation 16 (and finding).*



## ROC Recommendation # 16 (Pending Review)

Recommendation 16: It is the sense of the Panel that military judges should be involved in the military justice process at an earlier stage in order to protect the rights of victims and the accused. The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate the feasibility and consequences of doing so.

Covers CSS Recommendations A-E. Bring in all findings.

Finding 16-1: Further study is appropriate to fully assess what positive and negative impacts would result from changing some pretrial or trial responsibilities of convening authorities.

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



# Judge's Role # 43-B

## Military Judge's Role

**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.



# Defense Requests # 43-C

## Witness, Expert, Evidence & Other Assistance

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.



# Subpoena Power # 43-D

## Defense Subpoenas

**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.



# Article 32 Hearing # 43-E

## Article 32

**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.





# Article 32 Hearing # 43-F

## Article 32

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.



# Referral Decision # 44-A

## Review of Referral Decision

**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.



# Referral Decision # 44-B

## Review of Referral Decision

**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.

*\*Compare ROC Recommendation 2 (and finding).*



## ROC Recommendation # 2 (Pending Review)

Recommendation 2: Congress should not adopt Section 2 of the Victims Protection Act of 2014 (VPA). The decision whether to refer a case to courts-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate.

Finding 2-1: Section 2 of the VPA would mandate Secretarial review of cases involving sex-related offenses when the senior trial counsel detailed to a case recommends that charges be referred to trial and the convening authority, upon the advice of his or her staff judge advocate, decides not to refer charges. Most “senior trial counsel” assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. This provision inappropriately elevates the assessments of generally more junior judge advocates and would likely prove to be unproductive, disruptive, and unnecessary to ensuring the fair disposition of cases.

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



# Written Declination # 45

## Prosecution Declination Formatting

**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.



# Plea Negotiations # 46

## Plea Bargaining

**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.



# Panel Selection # 47-A

## 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.

*\*Compare ROC Recommendation 9 (and finding).*



# ROC Recommendation # 9

Recommendation 9: The Secretary of Defense and Service Secretaries should ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure SAPR training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and **disposition**, and access to witnesses or evidence.

*Accepted with modifications on 5/6/14*

Finding 9-1: In addition to supporting victims of sexual assault, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.

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





# Panel Selection # 47-B

## Voir Dire

**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.



# Character Evidence # 48

## Eliminating “Good Soldier Defense”

**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.



# Calculating Prosecution and Conviction Rates # 49 (1 of 3)

## Standardizing Definitions

**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.



# Calculating Prosecution and Conviction Rates # 49 (2 of 3)

## Standardizing Definitions

**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.



# Calculating Prosecution and Conviction Rates # 49 (3 of 3)

## Recommended Methodology



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

Comparative Systems Subcommittee



# “Substantiated” Cases # 50

## Unfounded vs. Substantiated

**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.



# Comparing Prosecution and Conviction Rates # 51

## Comparing

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



# Sentencing # 52

## Sentencing Data Organization/Availability

**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.





# Sentencing # 53

## Sentencing Data Organization/Availability

**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.



# Sentencing # 54

## Sentencing Authority

**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.

*\*Compare VSS Recommendation 37 (and findings).*



## VSS Recommendation # 37 -Victim Unsworn Statement During Sentencing

**Amended Recommendation 37:** The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to provide victims the right to make an unsworn victim impact statement, not subject to cross examination during the presentencing proceeding, with the following safeguards:

- The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;
- If there is “new matter” that could affect the sentence brought up in the victim’s unsworn statement, sentencing could ~~should~~ be delayed so the defense can respond; and
- The unsworn statement should be in writing, available to the defense counsel before sentencing, subject to the same objections available to the government regarding the accused’s unsworn statement.



## VSS Findings # 37 -Victim Unsworn Statement During Sentencing-

**Finding 37-1**: The CVRA includes the opportunity for a victim to be reasonably heard at sentencing by allowing him or her to make a statement that is neither under oath nor subject to cross-examination.

**Finding 37-2**: Under military rules, a sexual assault victim may present evidence of financial, social, psychological, and medical impact of an offense the accused committed.

**Finding 37-3**: Unless there is an agreement from the defense, however, the victim must testify under oath, and is subject to cross-examination.



# Sentencing # 55

## Sentencing Guidelines

**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.



# Sentencing # 56

## Sentencing Guidelines (Further Study)

**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.



# Sentencing # 57

## Mandatory Minimum Sentences

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



# Sentencing # 58

## Clemency

**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.





# Proposed Addl Recommendation

The Secretary of Defense make publicly available, in easily accessible formats, on a regular basis, information, already gathered, regarding military response systems to sexual assault, including, for example, statistics on incidents, prosecutions, convictions, acquittals, and sentences.