



# Role of the Commander Subcommittee

## Report to the Response Systems Panel

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

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# Introduction

**Mission:** Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.

**Result:** 31 recommendations on legislation & policy, sexual assault prevention & response, military justice authorities, command climate, and commander accountability



# Objectives

- Examine the roles and effectiveness of commanders at all levels in the administration of the UCMJ and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.
- Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes, including the role of a commander under Article 60 of the UCMJ.
- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.
- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.
- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the Response Systems Panel recommends such a formal statement, the Response Systems Panel shall provide key elements or principles that should be included in the formal statement.

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# Topics Reviewed

- Commander & Convening Authority Concepts
- Legislation & Policy
- Sexual Assault Prevention
- Sexual Assault Response
- Military Justice Responsibilities
- Perspectives on Military Justice Authorities
- Command Climate for Sexual Assault Prevention
- Accountability for Sexual Assault Response

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# Methodology

## MEETINGS

- 17 public meetings, subcommittee meetings & preparatory sessions
- 240+ presenters
- 9 deliberation sessions (by conference call)

## SITE VISITS

- Fort Hood, Texas
- Joint Base San Antonio-Lackland, Texas

## PUBLIC INFORMATION

- Public comments
- Publicly available information

## REQUESTS FOR INFORMATION

- 150+ Requests for Information to DoD and Services
- Letters to 18 victim advocacy organizations

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**Recommendation 15: Congress should not further modify the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and Department of Defense policy.**

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**Finding 15-1:** Criticism of the military justice system often confuses the term “commander” with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing.

**Finding 15-2:** Pursuant to the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) amendments to the UCMJ and current practice, only a GCMCA is authorized to order trial by court-martial for any offense of rape, sexual assault, rape or sexual assault of a child, forcible sodomy, or attempts to commit these offenses. Subordinate officers, even when in positions of command, may not do so.

**Finding 15-3:** Commanders with authority to refer a sexual assault allegation for trial by court-martial will normally be removed from any personal knowledge of the accused or victim.

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**Finding 15-4:** If a convening authority has other than an official interest in a particular case, the convening authority is required to recuse himself or herself.

**Finding 19-3:** Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.

**Finding 15-5:** Under current law and practice, the authority to make disposition decisions regarding sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.

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**Finding 19-1:** The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces.

**Finding 19-2:** The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases.

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**Finding 19-4: Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.**

**Finding 19-5: None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.**

**Finding 19-6: It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.**

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**Recommendation 1: The Subcommittee recommends against any further modification to the authority vested in commanders also designated as court-martial convening authorities. Accordingly, the Subcommittee does not recommend Congress adopt the reforms in either the Sexual Assault Training Oversight and Prevention Act (STOP Act) or the Military Justice Improvement Act (MJIA).**

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**Finding 1-1:** Congress has enacted significant amendments to the Uniform Code of Military Justice (UCMJ) to enhance the response to sexual assault in the military, and the Department of Defense (DoD) implemented numerous changes to policies and programs for the same purpose. Some changes have only just been implemented and other amendments to the UCMJ have not yet been implemented, and DoD has not yet fully evaluated what impact these reforms will have on the incidence, reporting or prosecution of sexual assault in the military.

**Finding 1-2:** The MJIA includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel and yet implementing the convening authority mandate included in the MJIA will involve significant personnel and administrative costs.

**Finding 1-3:** Implementing the MJIA will require reassignment of O-6 judge advocates who meet the statutory prosecutor qualifications. The existing pool of O-6 judge advocates who meet these requirements is finite; and many of these officers routinely serve in assignments related to other important aspects of military legal practice. Therefore, implementing MJIA's mandate, absent an increase in personnel resources, may result in under-staffing of other important senior legal advisor positions.

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**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.

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**Recommendation 17: The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a GCMCA should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial.**

**Finding 17-1: Convening authorities should generally retain referral discretion and should not be bound in all circumstances by the recommendations of an Article 32 investigating officer.**

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**Recommendation 18: Congress should not adopt additional amendments to Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities.**

**Finding 18-1**: Section 1702 of the FY14 NDAA, which modifies Article 60 of the UCMJ, significantly limits the post-trial authority and discretion of convening authorities for serious sexual offenses by precluding them from disapproving findings and reducing their discretion to reduce the court-martial sentence for such offenses.

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**Recommendation 16: The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate the feasibility and consequences of modifying authority for specific quasi-judicial responsibilities currently assigned to convening authorities, including discovery oversight, court-martial panel member selection, search authorization and other magistrate duties, appointment and funding of expert witnesses and expert consultants, and procurement of witnesses.**

**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.**

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**Recommendation 14: The Secretary of Defense should direct DoD SAPRO to ensure sexual assault reporting options are clarified to ensure all members of the military, including the most junior personnel, understand their options for making a restricted or unrestricted report and the channels through which they can make a report.**

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**Finding 14-1:** Sexual assault victims currently have numerous channels outside the chain of command to report incidents of sexual assault, and they are not required to report to anyone in their military unit or any member of their chain of command. These alternative reporting channels are well and broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.

**Finding 14-2:** It is not clear that a sufficient percentage of military personnel understand sexual assault reporting options. Based on recent survey results, junior enlisted personnel scored lowest in understanding the options for filing a restricted report. Nearly one-half of junior enlisted personnel surveyed believed they could make a restricted report to someone in their chain of command.

**Finding 14-3:** Under current law and practice, unrestricted reports of sexual assault must be referred to, and investigated by, military criminal investigative organizations that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.

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# Prevention

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**Recommendation 5: The Secretary of Defense should direct appropriate DoD authorities to partner with researchers to determine how best to implement promising, evidence-based alcohol mitigation strategies (e.g., those that affect pricing, outlet density, and the availability of alcohol). The Secretary of Defense should ensure DoD's strategic policies emphasize these strategies and direct the DoD Sexual Assault Prevention and Response Office (SAPRO) to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.**

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**Finding 5-1:** Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender. According to researchers, alcohol mitigation strategies that affect pricing, outlet density, and the availability of alcohol have promising potential to reduce the incidence of sexual violence.

**Finding 5-2:** The Department of Defense has not sufficiently identified specific promising alcohol mitigation strategies in its strategic documents for sexual assault prevention, thereby failing to provide local commanders with the strategic direction necessary to expect a consistent reduction in the rate of alcohol-related sexual assault across the Services. Nevertheless, some local commanders have developed innovative alcohol-mitigation programs on their own that warrant wider evaluation.

**Finding 5-3:** DoD's prevention strategies and approach require continued partnership with sexual assault prevention experts in other government agencies, non-profit organizations, and academia. Consultation with these experts is particularly necessary to enhance understanding of: male-on-male sexual violence; the impact of victimization prior to Service members' entry onto active duty; and effective community-level prevention strategies, including mitigation of alcohol consumption and youth violence.

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**Finding 5-4:** The Centers for Disease Control and Prevention (CDC) and leading private prevention organizations agree there is no silver-bullet answer to the occurrence of sexual assault. An approach to preventing sexual violence has greater potential to impact behavior to the extent it applies multiple and varied strategies at the different levels of a given environment.

**Finding 5-5:** Scientists' understanding of the various risk and protective factors for sexual violence continues to evolve, and much remains to be learned. DoD's prevention policies and requirements adopted since 2012 reflect its efforts to be informed by the best available science. While DoD's prevention approach currently reflects its consultation with the CDC and leading private organizations like the National Sexual Violence Resource Center, it is too soon to assess the effectiveness of specific prevention programs initiated in the Services.

**Finding 5-6:** According to the CDC, the only two sexual violence programs that have demonstrated evidence of effectiveness in reducing sexually violent behavior were developed and evaluated for middle and high school-aged youth. As for prevention programs that can be adapted to the military, the CDC and leading private prevention organizations identify bystander intervention and alcohol mitigation as two promising sexual violence prevention strategies that studies have demonstrated reduce risk factors and warrant further research into their impact on behavior change.

**Finding 5-7:** By spearheading additional research and implementing prevention strategies that are based on the best available science, DoD can share knowledge it gains with civilian organizations and thereby become a national leader in preventing sexual violence.

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**Recommendation 6: The Secretary of Defense and Service Secretaries should direct DoD SAPRO and the Services, respectively, to review bystander intervention programs to ensure they do not rely upon common misconceptions or overgeneralized perceptions. In particular, programs should not overemphasize serial rapists and other sexual “predators” and should instead emphasize preventive engagement, encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault.**

**Finding 6-1: According to the CDC and leading sexual assault prevention research experts and organizations, the bystander intervention programs that hold the most promise are those that encourage peer groups to guard against a spectrum of attitudes, beliefs, and behaviors that contribute to a climate in which sexual violence is more likely to occur. This spectrum starts with language and behaviors by males even in the absence of women, such as sexist comments, sexually objectifying jokes, and vulgar gestures.**

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**Recommendation 7: The Secretary of Defense should direct DoD SAPRO to establish specific training and policies addressing retaliation toward peers who intervene and/or report.**

- **Bystander intervention programs for service members should include training that emphasizes the importance of guarding against such retaliation.**
- **DoD and Service policies and requirements should ensure protection from retaliation against not just victims, but also the peers who speak out and step up on their behalf.**
- **Commanders must encourage members to actively challenge attitudes and beliefs that lead to offenses and interrupt and/or report them when they occur.**



**Recommendation 8: The Secretary of Defense should direct DoD SAPRO to evaluate development of risk-management programs directed toward populations with particular risk and protective factors that are associated with prior victimization. In particular, DoD SAPRO should partner with researchers to determine to what extent prior sexual victimization increases Service members' risk for sexual assault in the military in order to develop effective programs to protect against re-victimization.**

**Finding 8-1: Research underscores the importance in developing programs to identify Service members who are victimized prior to entering the military and strengthen their ability to deal with the consequences of prior victimization, including increased risk for future victimization.**

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**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 resolution, and access to witnesses or evidence.**

**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.**

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**Recommendation 10: The Secretary of Defense should direct DoD SAPRO and the Services to enhance their efforts to prevent and respond to male-on-male sexual assault.**

- Prevention efforts should ensure commanders directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it.
- Prevention efforts should also ensure Service members understand that sexually demeaning or humiliating behaviors that may have been minimized as hazing or labeled as “horseplay” in the past constitute punishable offenses that should not be tolerated.
- DoD SAPRO should seek expert assistance to understand the risk and protective factors that are unique to male-on-male sexual assault in the military and should develop targeted prevention programs for male-on-male sexual assault offenses.

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**Recommendation 11: The Service Secretaries should direct further development of local coordination requirements both on and off the installation, and expand requirements for installation commanders to liaison with victim support agencies.**

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**Recommendation 12: The Service Secretaries should ensure commanders focus on effective prevention strategies. Commanders must demonstrate leadership of DoD's prevention approach and its principles, and they must ensure members of their command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.**

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**Recommendation 13: Given existing training and curriculum mandates, the Department of Defense should not promulgate an additional formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response.**

Finding 13-1: As described in Enclosure 10 of DoD Instruction 6495.02, DoD has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on SAPR principles, reporting options and resources for help, SAPR program and command personnel roles and responsibilities, prevention strategies and behaviors, and sexual assault report document retention requirements.

Finding 13-2: DoD SAPRO established core SAPR training competencies with tailored instruction requirements for the following situations: accessions training, annual refresher training, pre- and post-deployment training, professional military education, pre-command and senior enlisted leader training, sexual assault response coordinator (SARC) and victim advocate (VA) training, and chaplain training.

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# Climate & Accountability

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**Recommendation 20: DoD and the Services must identify and utilize means in addition to surveys to assess and measure institutional and organizational climate for sexual assault prevention and response.**

**Finding 20-1**: Although surveys may provide helpful insight into positive and negative climate factors within an organization, surveys alone do not provide a comprehensive assessment of the climate in an organization.

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**Recommendation 21**: In addition to personnel surveys, DoD, the Services, and commanders should identify and utilize other resources to obtain information and feedback on the effectiveness of SAPR programs and local command climate.

**Finding 21-1**: Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations.

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**Recommendation 22: The Secretary of Defense and Service Secretaries should ensure commanders are trained in methods for monitoring a unit's SAPR climate, and they should ensure commanders are accountable for monitoring their command's SAPR climate outside of the conduct of periodic surveys.**

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**Recommendation 23: The Secretary of Defense and Service Secretaries should ensure commanders are required to develop action plans following completion of command climate surveys that outline steps the command will take to validate or expand upon survey information and steps the command will take to respond to issues identified through the climate assessment process.**

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**Recommendation 24: The Secretary of Defense should direct periodic and regular evaluations of DoD SAPR programs and performance, to be conducted by independent organizations, which would serve to validate or disprove DoD's own internal assessments and would provide useful feedback to the Department and enhance public confidence in SAPR programs and initiatives.**

**Finding 24-1**: Evaluations conducted by independent organizations of institutional and installation command climate are essential to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness.

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**Recommendation 25: DoD SAPRO and the Defense Equal Opportunity Management Institute (DEOMI) should ensure survey assessments and other methods for assessing command climate accurately assess and evaluate the effectiveness of subordinate organizational leaders and supervisors in addition to commanders.**

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**Finding 25-1:** Commanders are ultimately accountable for their unit's performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including all subordinate personnel exercising leadership or supervisory authority.

**Finding 25-2:** Because officers and noncommissioned officers who are subordinate to the commander will inevitably have the most contact with sexual assault victims in their units, unit climate assessments and response measures must be sufficiently comprehensive to include leaders and supervisors at every level.

**Finding 25-3:** Commanders at all levels must be attuned to the critical role played by subordinate officers, noncommissioned officers and civilian supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

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**Recommendation 26: DoD and the Services must be alert to the risk of survey fatigue, and DoD SAPRO and DEOMI should monitor and assess what impact increased survey requirements have on survey response rates and survey results.**

**Finding 26-1: The dramatic increase and large volume of surveys administered by DEOMI last year creates risk of survey fatigue. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide thoughtful input.**

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**Recommendation 27: DoD and the Services should consider opportunities and methods for effectively factoring accountability metrics into commander performance assessments, including climate survey results, indiscipline trends, sexual assault statistics, and equal opportunity data.**

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**Finding 27-1:** Results-based assessment provides both positive and negative reinforcement and highlights the importance of a healthy command climate.

**Finding 27-2:** Although statutory provisions require assessment of a commander's success or failure in responding to incidents of sexual assault, there are no provisions that mandate assessment or evaluation of a commander's success or failure in sexual assault prevention.

**Finding 27-3:** All Services have policies and methods for evaluating commanders on their ability to foster a positive command climate, but definitions and evaluation mechanisms vary across the Services.

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**Recommendation 28: The Service Secretaries should ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys.**

**Finding 28-1: Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance.**

**Finding 28-2: Mandated reporting of command climate surveys to the next higher level of command has the potential to improve command visibility of climate issues of subordinate commanders. Meaningful review by senior commanders increases opportunities for early intervention and can improve command response to survey feedback. However, commanders and leaders must recognize that surveys may or may not reflect long-term trends, and they provide only one measure of a unit's actual command climate and the commander's contribution to that climate.**

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**Recommendation 3: Congress should not adopt Section 3(d) of the Victims Protection Act of 2014. Alternatively, the Secretary of Defense should direct the formulation of a review process to be applied following each reported instance of sexual assault to determine the non-criminal factors surrounding the event. Such reviews should address what measures ought to be taken to lessen the likelihood of recurrence (e.g.; physical security, lighting, access to alcohol, off-limits establishments, etc.)**

Finding 3-1: Evaluating a unit's culture or climate may be helpful or may provide relevant information in some criminal investigations, but it is not clear how organizational climate assessments would be effective following each report of a sexual offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements for personnel and the possibility of survey fatigue may also reduce the accuracy of feedback and the effectiveness of assessments.

Finding 3-2: DoD has not formalized a standard process to review reported incidents of sexual assault to determine what additional actions might be taken in the future to prevent the occurrence of such an incident. Some organizations and commands within DoD have developed review processes that warrant evaluation by DoD.

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**Recommendation 29: To hold commanders accountable, DoD SAPRO and the Service Secretaries must ensure SAPR programs and initiatives are clearly defined and establish objective standards when possible.**

**Finding 29-1: The Navy's accountability effort, which provides specific direction and command-tailored direction on SAPR and other command climate initiatives, offers an encouraging model for ensuring compliance and fostering program success.**

**Finding 29-2: Detailed standards and expectations provide commanders clear guidance on supporting SAPR programs.**

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**Recommendation 30: The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers, noncommissioned officers, and civilian supervisors.**

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Finding 30-1: Service policies on SAPR expectations for subordinate accountability vary.

Finding 30-2: If performance evaluation assessment increases attention to and support of SAPR programs, differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel.

Finding 30-3: Subordinate leaders in a unit play a significant role in the success or failure of SAPR efforts, and accountability should extend beyond commanders to junior officers, noncommissioned officers, and civilian supervisors.

Finding 30-4: SAPR program effectiveness will be limited without the full investment of subordinate leaders.

Finding 30-5: Section 3(c) of the Victims Protection Act of 2014 would extend evaluation requirements to all Service members.

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**Recommendation 31**: The Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to perform the quasi-judicial authority and functions assigned to them under the UCMJ.

**Finding 31-1**: Legal training provided to senior commanders through resident and on-site Service JAG School hosted courses varies significantly among the Services. For example, the Army and Navy JAG Schools provide senior commanders with mandatory resident or on-site courses on legal issues. Formal Air Force legal training is less robust and is incorporated into group and wing commander courses hosted by Air University.

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**Recommendation 4: The Secretary of Defense should establish an advisory panel, comprised of persons external to the Department of Defense, to offer to the Secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD's sexual assault prevention and response programs and policies.**

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**Questions?**

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