RESPONSE SYSTEMS EFFECTIVENESS

A PRACTITIONER'S PERSPECTIVE

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Viewing the mandate of the panel, I see five practical areas for discussion which can be identified as Investigation, Forwarding, Trial, Sentencing, and Clemency. I have spent my professional life as a practitioner, defending service members accused of committing offenses. I have not been a policy developer, so I will address these topics from the practitioner perspective, generically using "sexual assault" as the phrase for all potential offenses under Article 120, Uniform Code of Military Justice (UCMJ). I have not been involved in studies or research papers, so my observations are personal or partially anecdotal, to the extent that I have discussed these topics with others in the trial arena, either as advocates or judges. The opinions expressed, however, are mine alone.

I need to be 100 percent clear. I know that there are criminal sexual assaults occurring in the military, whether more or less frequently than in any other cognizable population I do not know. However, it is patently obvious to anyone who has been involved with the military justice system to any degree, that there are also false reports of sexual assault, either in whole or in part, occurring in the military. To deny this is to ignore centuries of human experience.

It is axiomatic that a system of justice must be able to distinguish between accurate reports of crime and false reports of crime. Investigation and (if warranted by the exercise of wise prosecutorial discretion) trial are the time tested methods for this determination. No step in this process, nor any individual involved in the process, can presume the truth or falsehood of the allegation.

Investigation

1. Training should improve any aspect of human endeavor, and investigation is no exception. Training law enforcement investigators to approach a reported sexual offense differently than a reported car accident is clearly to be encouraged. However, I fear that the public debate has lost sight of (or does not believe the value of) William Blackstone's observation that it is better for ten guilty men to go free than for an innocent one to be convicted. In the current hyper-ventilating climate, no one wants to be responsible for saying that no crime was committed when an adult female in the military makes an allegation of sexual assault. This attitude begins with the investigation.

2. Identifying specially trained investigators as "Special Victim" Investigators shifts the thrust of the investigation from determining whether a crime has been committed, to how to handle and protect the "special victim", even before any unbiased and open-minded determination of victim status has been made. Providing a purported sexual assault victim with "Special Victim" Counsel during the investigative phase (whether one legally trained or possessing other qualifications), perpetuates this belief, *ab initio*, that an offense occurred. Everyone involved in investigating a report of sexual assault must be free of pre-conceived notions that an offense did or did not occur. Appropriate titles for investigators, counsel and liaison personnel will assist in this regard.

3. Involving an attorney early in the investigation should be the norm. I do not find it to be so. Many law enforcement agencies see themselves as independent of the local legal office and many young Trial Counsel do not know enough to be truly helpful or provide sensible guidance. Requiring that a "Senior" or "Circuit" or "Special" prosecutor with training and experience in sexual assault cases become involved from the early stages of a sexual assault investigation should benefit all parties.

4. I have read comments concerning obtaining more cooperation from the accused during the investigation. This usually means obtaining a statement from him. Even with the protection of the Fifth and Sixth Amendments, the military justice system has seen the need to provide a greater degree of protection due, in large part, to the authoritarian, hierarchical nature of the military. [See, e.g. United States v Duga, 10 MJ 206 (C.M.A. 1981), United States v Moore, 32 MJ 105 (C.M.A. 1991)]. Despite these protections, law enforcement officials frequently obtain statements from accused individuals, usually by suggesting that "the command" needs to hear the accused's perspective. This plays on the suspect's belief that "the command" has the power to affect his life, a perspective that has been drilled into him since Boot Camp. The command knows him; these cops don't. The command will do right by him; the cops only want a person to charge. I have seldom found it to be helpful to the defense for the accused to make a statement during the initial interrogation since it usually devolves into a "he said, she said" scenario that the command will not dispose of other than by trial anyway. By then, minor inconsistencies or inaccuracies are frequently found in the written version signed by the accused which are not helpful to his credibility, or which are additionally charged as a False Official Statement in violation of Article 107, UCMJ.

5. If the true intent of law enforcement is to get the statement of an accused for the purpose of informing the command and assisting the command in the resolution of the allegation, a modification of Military Rule of Evidence (MRE) 410(a)(4) could serve that end while protecting the Constitutional and UCMJ rights of the accused.

6. There should be a requirement for videotaping all law enforcement involvement with the accused from the moment law enforcement impinges on his free mobility, whether that is officially characterized as an arrest, an apprehension, a detention or otherwise. This suggestion goes beyond videotaping only interrogations since the standard "rapport-building" sessions conducted by law enforcement agents with the accused before they commence formal questioning can also be coercive. Videotaping should serve to eliminate many defense arguments concerning the nature of the interaction as an arguable basis for suppression of any statements obtained.

7. However, for a truly impartial investigation, the same requirement should obtain for the reporting complainant. The government should support this suggestion since it would create indisputable evidence of a Prior Consistent Statement [MRE 801(d)(1)(B)]. It could also, as a discoverable prior statement of the alleged victim, be shown to the accused by defense counsel with any ancillary benefit an impersonal "confrontation" could have in the decision of the accused as to the ultimate direction of the case.

8. While there are certainly cases where the reassignment of the accuser or the accused during the investigation could be appropriate, requiring the reassignment of an accuser during the investigation stage can be precisely what the accuser was seeking by making the allegation for reasons having nothing to do with the purported sexual assault. A similar requirement concerning reassignment of the accused could be the other side of the coin for the accuser, removing him/her from her/his presence, and could also easily be interpreted as a presumption of guilt by those in the unit who know of the transfer. Less draconian measures are available to the command to ensure that the accused and the accuser, if in the same unit, do not interact with each other. See Rule for Courts-Martial (RCM) 304.

9. During the investigation stage, law enforcement officials should automatically and immediately obtain the local personnel records of both the accused and the accuser. This is all the more important where the accuser is rapidly moved to another unit, as the local records often are then destroyed. On numerous occasions, I have been told by neutral, senior individuals of negative counseling statements, often involving issues which are of a potentially moral turpitude nature, and which have been issued to the accused, the accuser, or both, or by the accused to the accuser, but which are nowhere to be found by the time the defense is able to begin its own investigation.

10. It is normal to run a background check on the accused. It should also be normal to do one on the accuser if an impartial investigation is the goal. Whether the results of that check should be released to the defense without more is a second question. A procedure paralleling the request for mental health records (MRE 513) could be promulgated to address this legitimate privacy interest of the accuser. However, the credibility of the accuser is a valid area of inquiry for the accused, as is the credibility of any other witness. The law enforcement report could merely state that a check was done with either negative or positive results. If positive, the defense is on notice to invoke the procedures in place to obtain the results. Even then, merely obtaining the results does not mean that those results are material, relevant or admissible, only discoverable, possibly under a protective order.

11. The last step in the investigative stage is obtaining an "opine" from a JAG, usually the Trial Counsel who will be responsible for bring the case to trial if that is the decision made. However, there seems to be no formal procedure for obtaining an "opine" so that, in my experience, law enforcement agents "shop" various JAGs for a "favorable" opine, usually that an offense exists. After all, law enforcement agencies want to investigate crimes, not non-crimes.

12. Obtaining a legal opinion at the conclusion of the investigation was to whether an offense exists is an excellent idea. However, shopping for a second or even a third opinion if the first ones do not suit the investigator's thoughts about the case should be prohibited. Who should provide the opine is, of course, another question, but that is one for policy makers. If a counsel has been part of the investigation (as suggested in paragraph 3, above), I would detail a different counsel as a check on the investigation.

The "opining" attorney should have recent, sufficient, hands-on military justice experience to be able to evaluate the case fully, fairly and completely. (S)he should also be willing and able to make an independent call and stick with it.

Forwarding

1. This is the politically most explosive area under discussion. The forwarding of charges in the military I see as the functional equivalent of "prosecutorial discretion" in the civilian sector. It is divided into two steps: preferral and referral. (RCM 307 and Chapter IV of the RCM, generally). The UCMJ directs the command to exercise the decisive role at the referral-to-trial phase, with the legally trained JAG Corps acting as advisors only. (RCM 403, 404, 407). The public "debate" I am hearing makes me fear that an effort is being made to subvert the Presumption of Innocence in the military into a Presumption of Guilt. The mere fact that an allegation is made causes many to accept it as true, and those commanders who do not fall into that politically-correct sugar trap find that their careers are side-tracked, if not over. In a misguided effort to deny commanders the authority to decide whether to prosecute a case of alleged sexual assault, legislators are talking about removing authority over sexual offenses from commanders, and placing it at a higher level, possibly to Flag officer level. That means into the hands of the officers whose future careers rely on the "good graces" of those very legislators to approve their career appointments. Civilian control of the military is good; legislative control of the military judicial function based, in whole or in part, upon "politically-correct" forwarding decisions would not be.

2. If, after reasoned debate, a political decision is made to limit command discretion in the prosecution of sexual assault cases, that discretion should be vested in officers with legal training, not lifted to a higher level of command over which the legislature has the ultimate power of career life or death.

3. One perspective that I, with my European-based practice, think has received too little attention in the discussion surrounding prosecutorial discretion is that of concurrent jurisdiction. While it may be "practical" within the 50 states to suggest limiting or removing judicial authority from military commanders (and, thus, from the military as a whole) since there is always a State or Federal prosecutor with concurrent jurisdiction, that is not true outside of the United States. Status of Forces Agreements (SOFA) in the various countries where US Forces are stationed control who is to be responsible for reported offenses by service members (a bone of contention in Iraq and Afghanistan, for example). Although anything but an expert in this field, I believe that each individual SOFA in Europe is different. Some countries routinely release jurisdiction for alleged offenses committed on their soil (outside of military bases) to American forces, others do not. If one discusses limiting, by law, what authority a commander has to deal with alleged criminal conduct within his command, one must be cognizant that, in some circumstances, this could result in no jurisdiction over the alleged offense at all, or in having American service members tried according to the laws of the country in which (s)he happens to be stationed.

4. In a text book scenario, once the investigation is complete, the report is forwarded to the chain of command of the subject for a determination what to do. In any large investigation, the command and the local JAG office have been following the investigation or have been involved in it. The command with JAG advice then decides what is possible from a legal point of view and what is desirable from a command point of view. In theory, the command has a multitude of options in any given case. In practice, some decisions are routinely removed from lower level commanders for a variety of reasons.

5. In the Army (and I believe in the other services), it is common, if not a given, for division commanders or their equivalents in the other services (the General Court Martial Convening Authority (GCMCA), normally Flag officers) to withhold jurisdiction over any allegation involving commissioned or warrant officers of any rank or senior non-commissioned officers, as a matter of discipline. The GCMCA can prefer court-martial charges him/herself, take other action at his/her level, or send the matter back down the chain of command with an indication that (s)he does not want to handle it at his/her level. These decisions are usually made for valid, military discipline reasons, colored by the nature of the "offender's" career.

6. Factoring the suspect's career performance into the process at this stage is only fair. If there is evidence which may be admissible at trial under MRE 404(b) or 413, why not permit good character evidence to be likewise admitted in fairness to both sides, and why not consider the possible impact good or bad character evidence could have at trial on the decision how to proceed? Even if no "bad" character evidence is to be offered, "good" character evidence is expressly permitted for all offenses tried in accordance with the UCMJ. RCM 404. Whether good character evidence has an impact at all or what degree of impact it has is for the panel, as trier of fact, to determine.

7. The GCMCA receives legal advice from his Staff Judge Advocate, who, in turn, is usually briefed by his Chief of Military Justice and the various trial counsel involved in the case, to include Special Victim Prosecutors. At present, the command of the accused also provides input in the nature of recommendations as to level of disposition and a characterization of the accused's service to date. Nowhere is there a provision for anyone to speak on behalf of the accused. MRE 410, referred to under paragraph 4 of Investigation, is the only way for an accused to interact with those who decide his fate before a decision is made.

8. It would not be treading new ground conceptually to impose a requirement that any allegation involving Article 120, UCMJ, be sent to the GCMCA for a decision after the investigation is complete. This would mean, however, that a decision not to follow the case could not be made below the GCMCA level. Every investigation into an allegation of sexual misconduct in violation of Article 120, UCMJ, will wind up on the GCMCA's already crowded desk. The down-side to such a requirement could result in fewer informed recommendations being seen by the ultimate decider. That said, my own experience over the past several years has been that the buck has been passed up at almost every level, not always for legally logical reasons. Also, since Rule for Courts-Martial 405 requires an Article 32 hearing before any charge may be referred to General Court Martial, if the GCMCA decides that a General Court Martial is appropriate, someone will have to order an Article 32 hearing.

9. Before an Article 32 hearing is convened, charges are preferred and the defense finally gets to see what the investigation has uncovered (or not) and can begin to prepare to defend the accused. This would normally include an interview with the accuser. Oddly enough, there is no requirement for a uniformed accuser to agree to be interviewed by the defense. This should change. At the same time, no defense counsel should oppose having a Victim Witness Liaison or some other "helper" for the accuser sitting in the interview for the comfort and well-being of the accuser. I draw the line, however, at allowing a member of the prosecution team sitting in on my interview or interviewing the "helper" about my interview unless the same courtesy is extended to the defense each and every time the accuser meets with the prosecution. Even if this were required post-preferral, a good prosecutor will have met with the accuser at least once before preferral, so that the defense would even here be in an unequal position.

10. At present, no one has to listen to the conclusions or recommendations of the Article 32 officer since they are not binding on anyone. I support the idea of a qualified military judge as the 32 officer for cases involving allegations of sexual assault. A Judge could resolve a current Gordian Knot at Article 32 hearings, how to handle evidence under MRE 412 which currently applies at Article 32 hearings. [RCM 405(i)]. The problem is that there is no mechanism to import the requirements of Rule 412 into Article 32 proceedings. [See MRE 412(c)]. Having a qualified military judge presiding would resolve that issue. A judge could also resolve similar evidentiary issues for the Article 32 concerning mental health records under MRE 513 and background checks (see paragraph 10, Investigations). These decisions, however, should not be binding at trial presided over by a different military judge.

11. However, if a military judge were to preside over sexual assault allegations, his/her conclusions and recommendations in accordance with RCM 405(i) should be binding. Since the Article 32 officer uses a different standard of proof in the conclusions [whether reasonable grounds exist to believe the accused committed the offense, RCM 405(j)(2)(H), as opposed to beyond a reasonable doubt], his/her conclusions would not be the equivalent of a conviction. However, if the government knows that its failure to show that reasonable grounds exist to proceed will mean the end of the case, the government might put more effort into the Article 32 hearing, produce more evidence, tie up more loose ends, all of which, coupled with any analysis provided by the Investigating Officer, would give both sides a better way of assessing their relative case strengths and could lead to more negotiated conclusions. It would also serve to assist the GCMCA in the tough decision whether to refer a case to trial or accept an alternate resolution without exposing him/her to unnecessary, and usually uninformed, criticism by the "If she says it, it must be true" crowd.

Trial

1. The phrase, attributed to Graf von Moltke, the Elder, that no battle plan survives first contact with the enemy, applies to trials by courts-martial. This means a counsel, experienced in trial work, who is able to react convincingly and accurately to the sudden, surprising developments which occur in every trial, will have an advantage that has

nothing to do with the merits of his/her case. The military appellate courts are cognizant and concerned about an "uneven playing field". (See, e.g., United States v Warner, 62 MJ 114 (2005) and United States v Lee, 64 MJ 213 (2006), concerning requests for government-funded expert witnesses for the defense).

2. Requiring certain qualifications for counsel is nothing new, as a reflection about capital qualified counsel shows. The various services have reacted to the complaints that not enough sexual assault convictions were being obtained by assigning more-highly qualified prosecutors to sexual assault cases. (Why an expressed goal in a fair system should be more convictions escapes my defense counsel perspective.) I am unaware of any parallel effort to provide more-highly qualified defense counsel for the accused and his defense. This, too, creates an uneven playing field, although one much more difficult to quantify than that involving experts. (See Warner and Lee, supra). Having a complex, difficult, emotional case tried by experienced, competent counsel for both sides should be the goal, not a unilateral quality-enhancement for one side only.

3. A real concern, not only with sexual assault cases, but with the military justice system as a whole, is that the panel (jury) convened to hear the case is appointed by the same Convening Authority who orders the trial. RCM 502. That these individuals are all within the same chain of command as the Convening Authority is a function of the hierarchical nature of command and control. If the authority to refer a sexual assault case to trial is withdrawn from the GCMCA because it is feared that (s)he will not act impartially in that kind of case, the same logic should apply to any panel members (s)he appoints. The policy questions then become, in sexual assault cases, who appoints panel members and using what criteria? If a decision is made to change the authority to select of panel members for sexual assault cases, does that not also imply a need to change it for all cases?

4. Such a change might not appear to be bad from a judicial/legal perspective, as it would provide a more neutral panel, almost akin to a change of venue. It could, however, have a significant impact on military discipline and command authority. For example, assuming that commanders continue to have the authority to offer Non-Judicial Punishment for perceived offenses (Article 15, UCMJ), a service member could demand trial by court-martial totally outside of his command. If (s)he is acquitted at trial, this could be seen as undermining the authority of the command as a whole.

5. The actual nuts and bolts of trying a case, i.e., motions practice, voir dire, objections, instructions, do not appear to be in need of significant modification in general or in sexual assault cases in particular, and, where the need arises, the two levels of military appellate courts, with the possibility of review by the United States Supreme Court (Article 67a, UCMJ), seem able to address issues as they arise.

6. A Finding of Guilty in a court-martial tried before members occurs if at least two-thirds of the panel votes for a Finding of Guilty (unless a death penalty is mandatory). RCM 921(c)(2). The members vote only once on each offense, meaning that an acquittal results if fewer than two-thirds vote for a Finding of Guilty. RCM 921(c)(3). By contrast, a sentence in excess of confinement for more than 10 years (including life, and life

without parole) can only be adjudged if at least three-fourths of the panel votes for that sentence. RCM 1006(d)(4). I propose that for a Finding of Guilty for an offense where confinement for life (with or without parole) or in access of 10 years can be adjudged, a three-fourths vote be required for conviction. This parallelism should provide greater protection to an accused from emotionally charged Findings of Guilty while giving a great degree of confidence in those Findings. This would affect the more severe offenses under Article 120.

Sentencing

1. I oppose mandatory sentences, minimum or maximum. I believe firmly that no two cases or fact patterns are alike, no two accuseds are alike, no two victims are alike, and also that no two people on the panel would or should view any of these as being alike. For the same reason, I also oppose mandatory exclusion from the service for conviction of any offense. Mandatory sentences require one to ignore these obvious differences, attempting, like Procrustes, to make everything fit one size.

2. My opposition does not apply to greater potential maximum punishments as I believe the absence of a "floor" still permits non-Procrustean sentences. They also permit society to express a greater degree of disgust for some crimes as opposed to others.

3. I support the concept that higher sentences should require greater concurrence amongst the panel as mentioned in paragraph 6,Trial. How many votes are to be required for what level of punishment is a policy decision as is the issue of how many increments are to be created, two-thirds, three-fourths, eighty percent, ninety percent, etc. The higher the requirement, the more likely that unanimity will be the result since, in my experience, most military panels have less than ten members. A greater degree of concurrence in a sentence would also make it more difficult to justify a reduction in that sentence as a matter of Clemency as discussed in paragraph 4, Clemency, below.

4. Greater aberrations in sentences could be reduced by transferring sentencing authority in a sexual assault case to the military judge even if the accused has elected to be tried by a panel. Whether this option should be made mandatory or left to the discretion of the accused is a second question. I support leaving the decision to the accused. However, the accused should be required to state that choice before trial commences on the merits (allowing him to see the panel during voir dire), since it requires a different degree of attention to the trial by the military judge than if (s)he knows (s)he may not be making any decisions. The accused should make the decision whether or not to inform the panel of that decision, as he now can do with a partial plea. I think it improves the panel's attention if they believe they may be involved in the sentencing, that is, they think they will have to deal with the consequences of the decisions they make.

Clemency

1. Mistakes happen at trial. Some are not caught until after trial. In the military, where trials occur much more quickly than in the civilian sector, potential "new

evidence" being discovered shortly after the trial is not rare. I personally can recall at least four such cases in which I have been involved in one way or another. In each case, the Convening Authority's power after trial to either direct a post-trial hearing or take his own corrective action saved time, effort and expense to provide the government and the accused with a rapid, fair resolution of the matter. In one case, the Convening Authority, at the advice of the Staff Judge Advocate, without a new hearing, disapproved a Finding of Guilty and reduced the sentence accordingly.

2. I am also aware of other cases where a misapplication of the law at trial has been brought to the attention of the Convening Authority post-trial, allowing him to disapprove Findings and modify the sentence, again in the interests of justice and judicial economy.

3. In light of the above, I am opposed to any reduction of the clement and post-trial authority of the Convening Authority. Assuming there is no modification in the power of the GCMCA to refer a case to trial (see paragraphs 1 and 2, Forwarding), one must recall that the Convening Authority originally ordered the trial based upon the investigation and evidence (s)he had before him/her at the time. Regardless of the issue of "new evidence", after trial, the Convening Authority would also become aware of evidence which was not admissible at trial, either for valid legal reasons or because of a misapplication of the law by the military judge, which, in either event, could cause him/her to question morally the correctness of the verdict. If, after thorough discussion with his/her legal advisor, the Convening Authority is convinced that a miscarriage of justice has occurred, why should (s)he not have the authority to rectify the error that has occurred on his/her watch?

4. Nothing speaks against requiring the Convening Authority set forth the reasons and rationale for any clement decision. One could require that any decision affecting the Findings be reviewed by the next higher command, or some other entity, before the decision becomes final. In the alternative, a Rule could be promulgated that such a decision must be forwarded to the service Court of Criminal Appeals for expedited review to ensure that the Convening Authority acted within the confines of his authority before action is taken, similar to the provisions of Article 62, UCMJ. Any change in this regard should be made to apply to any offense, not solely one involving sexual assault.

Having addressed the five areas I mentioned at the outset, I wish to mention a few other points which appear to be within the realm of the panel's mandate.

Victims' Rights/SARC's

1. As mentioned in paragraph 2, Investigation, any "rights" afforded a "victim" can only come into effect when that status has been confirmed by a conviction. Once that has occurred, nothing speaks against protecting the victim from future criminal action by the convicted perpetrator. Normally, the perpetrator will not be in the immediate vicinity of the victim, so protective orders and similar actions should not be required. If, however, physical interaction could occur, protection must be provided to the victim.

2. Should the victim feel that remaining in the same unit would be detrimental, (s)he should have the right to request reassignment to another unit where his/her skills could be used by the service (which is still employing the victim). If mental health counseling or treatment is deemed necessary, it should, of course, be provided.

3. Any witness should be free from harassment by the accused or anyone else. In the military, protective orders or no contact orders are frequently issued pre-trial in an effort to separate the accused from potential witnesses or witnesses amongst themselves. RCM 304. If these orders are violated, pretrial confinement may be ordered, as the violator will have shown the likelihood of committing further crimes by the violation of valid orders. RCM 305(d)(3).

4. Assigning to a complaining witness a "Witness Liaison" to act as a secretarial interface with the various requirements on the time of a complaining witness (interviews with attorneys or law enforcement personnel, medical or mental health appointments, etc.) may alleviate some of the natural stress accompanied by being involved with the criminal justice system. If such a program is to be implemented, I would encourage it be offered to all witnesses, not just those making a complaint of sexual assault.

5. Sexual Assault Response Coordinators (SARC) could fulfill the "secretarial interface" role mentioned in the paragraph above without degrading any other function assigned to them. This would mean that no special Witness Liaison position need be created. The organizational level at which SARCs are to stationed is a man-power issue for policy determination. Clearly, the more SARCs available at any given installation, the lighter the work-load on any one person.

6. That said, however, I find the situation at Ramstein Air Base, Germany, for example, to be over-the-top. To my knowledge, there are approximately 11,000 service members stationed at Ramstein. There are currently four, full-time SARCs who are supported by approximately 70 volunteers, all of whom have some type of "certification" to assist in SARC type matters. In calendar 2012, a total of 29 alleged sexual incidents were reported at Ramstein. Seven alleged victims for each SARC does not seem to be too excessive, until one reflects that this number is over the course of twelve months. More than two volunteers for each alleged victim in the same time period I think is overkill. Match this helper-helpee ratio against zero "helpers" of any kind for the alleged perpetrator (until a single defense counsel is appointed after charges are preferred), and I see an imbalance that does not square with our rightly revered symbol of Blind Justice holding evenly weighted scales.

7. This over-reaction, apparently for the sake of appearing to "do something", does absolutely nothing to prevent sexual assaults in the military. Nor does it assist in the investigation or adjudication of the allegation. If having this many supporters enables the victim to recover from the trauma shown to have been caused (by the conviction), then it may be of some help in determining an appropriate sentence. Until that point, though, it only reinforces the disparity between the alleged victim and the loneliest person in the military, the alleged perpetrator of a sexual assault.