

**COMPARATIVE SYSTEMS SUBCOMMITTEE
ISSUE ASSESSMENT- SENTENCING/CLEMENCY**

SUBCOMMITTEE MISSION STATEMENT:

Assess and compare military and civilian systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

SUBCOMMITTEE OBJECTIVES AND SCOPE:

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

Examine advisory sentencing guidelines and mandatory minimums used in civilian courts in adult sexual cases to assess whether it would be advisable to promulgate sentencing guidelines for use in courts-martial. Such assessment should include a study of the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy, and the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates).

Assess the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

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

ISSUES:

Should the military establish sentencing guidelines to improve its response to sexual assault?

Should the military establish mandatory minimum sentences to improve its response to sexual assault?

Should the military change clemency (for example, reserve it until the end of the military appeals process) to improve its response to sexual assault?

REPORT OUTLINE:

I. Methodology and Overview of Subcommittee Analysis

- a. Meetings/discussions held
- b. Presenters heard
 1. 11 Feb. 2014 Meeting
 - COL(R) Fran Gilligan
 - Rusty Burress
 - Meredith Farrar-Owens
 - Mark Bergstrom

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- Molly Gill
- Annette Burrhus-Clay

c. Materials reviewed

1. RFIs potentially relevant:

- 30 (military crime data)
- 39 (“waterfall slides”)
- 41b (conviction rates)
- 41f (RILT)
- 41g (administrative discharge in lieu of court-martial)
- 41h (guilty pleas versus trials)
- 110 (impact of guidelines or mandatory minimum sentences)
- 111 (offense types for proposed changes to Article 60)
- 113 (administrative separation for non-punitive discharge cases)
- 114 (policy for members convicted of sexual assault in civilian court)
- 115 (offender registration)

d. Installations visited

II. Assessment of Sentencing Guidelines in Civilian Jurisdictions

a. Civilian Jurisdictions—Federal

1. Purposes of sentencing
2. Judicial training
 - a. Theories of sentencing
 - b. Experts (e.g., risk assessments, etc.)
3. U.S. Probation
4. Presentence Report

b. Civilian Jurisdictions—States

1. Guidelines jurisdictions
 - a. Sentencing commissions or bodies
 - b. Collection of statistics

III. Mandatory Minimum Sentences

- a. Theory behind mandatory minimums
- b. Pros/Cons: Are they effective or do practitioners draft charges around MM’s?
- c. Current use of MM’s in the UCMJ
 1. Art. 106 – Spying with MM of death
 2. Art. 118 – Premeditated murder & felony murder have MM of life
- d. What are Federal MM for sexual assault offenses
- e. What are State MM for sexual assault offenses (provide sampling)
- f. What is the Maximum Punishment for sexual assault offenses in the military

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IV. Assessment of Sentencing in the Military

1. Who imposes the sentence – judge or jury?
 - i. What information does the sentencing authority have when making the sentencing decision?
 - ii. What is the timeframe for imposing the sentence after verdict rendered?
2. Is there a problem with the military’s current sentencing scheme for sexual assaults?
 - i. Is there a large disparity in sexual assault case sentences?
 - ii. If so, is that disparity among all cases, judge alone cases, or panel cases?
3. What offenses should be included “as sexual assault and related offenses” if sentencing guidelines and/or mandatory minimums are imposed?
4. Are there Statistics to establish average sentences for sexual assault offenses in military versus comparable crimes in civilian jurisdictions – is this comparable data?
5. Identify comparable statistics from civilian jurisdictions
 - i. Which points to compare (e.g., recidivism, rehabilitation, victim satisfaction)
6. Feasibility of using sentencing guidelines or mandatory minimums for Art. 120 and related sexual assault offenses
 - i. Logistical requirements / resources to establish and implement the change
 - ii. Training for expertise in this area
7. Analyze the collateral impact, pros/cons of sentencing guidelines, mandatory minimums. Is there evidence that either would:
 - i. Increase/decrease the number of guilty pleas
 - ii. Increase/decrease victim confidence & reporting
 - iii. Increase/decrease the number of guilty pleas - Change the ratio of the number of guilty pleas vs. contested cases
 - iv. Effect plea negotiations, if so, how
 - v. Increase/decrease conviction rates
 - vi. Deter perpetrators from committing sexual assaults
 - vii. Be effective in promoting uniformity in sentences
8. What is the perspective of practitioners:
 - i. Civilian Prosecutors
 - ii. Defense counsel
 - iii. Military members

V. Civilian Clemency Opportunities

1. Federal: <http://www.justice.gov/pardon/statistics.htm>
 - i. Authority: U.S. Const., Art. II, Sec. 2; authority of the President as Chief Executive; and 28 U.S.C. §§ 509, 510.

VI. Military Clemency Opportunities

- a. Brief explanation of clemency & the military appellate system
- b. Clemency through the Convening Authority (include discussion of recent changes in FY14 NDAA regarding Art. 60)
- c. Clemency through Service Secretaries and the Clemency & Parole Boards – change unexecuted portion of sentence.

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- d. Clemency through the Service Secretaries and the Records Correction Boards – cannot change conviction, but can change records to effectuate change on executed portion of sentence.
- e. Note any significant differences among the Services
- f. Assess:
 - 1. The appropriateness of clemency proceedings in the military system
 - 2. Whether clemency in the military justice system could be reserved until the end of the military appeals process (Note: this should be analyzed from the government’s prosecution & defendant’s perspective, not as an issue related to the role of the commander)

VII. Best Practices

VIII. Findings Based on Above Evidence

IX. Recommendation(s)

- A. Whether it would be advisable to promulgate sentencing guidelines for use in courts-martial
- B. Whether it would be advisable to adopt mandatory minimum sentences for military sexual assault and related offenses
- C. What are the collateral consequences of such mandatory minimum sentences
- D. If mandatory minimum sentences are adopted, should Congress establish such mandatory minimums itself or should the President do so?