



Report of the Role of the Commander Subcommittee

to the Response Systems
to Adult Sexual Assault Crimes Panel

May 2014

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



**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
ROLE OF THE COMMANDER SUBCOMMITTEE
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995**

MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Report of the Role of the Commander Subcommittee

On September 23, 2013, the Secretary of Defense established this Subcommittee to support the Response Systems Panel in its duties under Section 576(d)(1) of the National Defense Authorization Act for Fiscal Year 2013. The Secretary established five objectives for the Subcommittee to address the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice). This Subcommittee has completed its review and submits to the Response Systems Panel its report with our assessment, recommendations, and findings.

Barbara Jones
Subcommittee Chair

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REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE EXECUTIVE SUMMARY

SUBCOMMITTEE MISSION STATEMENT

The Secretary of Defense established the Role of the Commander Subcommittee (Subcommittee) to report to the Response Systems to Adult Sexual Assault Crimes Panel (RSP) on the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. § 920 (Article 120 of the Uniform Code of Military Justice (UCMJ)). The Subcommittee was tasked with five objectives for analysis:

- 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.

ASSESSMENT METHODOLOGY

To consider the many perspectives on the commander's role in sexual assault prevention and response (SAPR), members of the Subcommittee participated in nineteen days of hearings involving more than 240 witnesses. The members reviewed articles and information from RSP and Subcommittee hearing participants, as well as comments and information from the public. The RSP sent requests for information and solicited inputs from

the Department of Defense (DoD), the Military Services, and victim advocacy organizations, and the members received more than 15,000 pages of information in response to these requests. Information received and considered by the Subcommittee is available on the RSP website (<http://responsesystemspanel.whs.mil/>).

CONCLUSION OF THE SUBCOMMITTEE

Based on its extensive review, the Subcommittee believes military commanders must lead the way in DoD's efforts to prevent sexual assault, establishing organizational climates that are wholly intolerant of the behaviors and beliefs that contribute to sexual assault crimes. When sexual assault does occur, military commanders must lead decisive response efforts, assuring appropriate care for victims. They must also ensure protection of the due process rights of those who are accused of sexual assault crimes, and they must take appropriate administrative and criminal action against offenders. How commanders fulfill these responsibilities reflects their leadership and effectiveness, and DoD, the Services, and senior leaders must ensure all commanders and leaders are held accountable and fairly evaluated on their execution of these critical tasks.

RECOMMENDATIONS AND FINDINGS

The Subcommittee divided its assessment into eight topics concerning the commander's role in sexual assault prevention and response: commander and convening authority concepts, legislation and policy, sexual assault prevention, sexual assault response, military justice responsibilities, perspectives on military justice authorities, command climate for sexual assault prevention and response, and accountability for sexual assault response. Based on its review of these critical topics, the Subcommittee identified 31 recommendations with findings related to the role of the commander in sexual assault prevention and response. These topics will be addressed in order:

Commander and Convening Authority Concepts:

Commanders lead military organizations and are primarily responsible for ensuring mission readiness, to include maintaining good order and discipline within military units. Historically, commanders have proved essential in leading organizational responses during periods of military cultural transition, as the Services have relied on them to set and enforce standards and effect change among subordinates under their command. All commanders have disciplinary responsibility for subordinates. However, the power to convene courts-martial for criminal offenses is established by the UCMJ, which vests convening authority in only a very limited group of senior commanders. Of the U.S. military's 15,000 commanders who lead an active duty force of more than 1.4 million, just 148 senior commanders (less than 1% of the total number of commanders) convened general courts-martial for Service members under their command in Fiscal Year 2013.

Legislation and Policy:

Congress adopted the UCMJ following World War II partially in response to concerns about the broad military justice authority held historically by U.S. military commanders. While commander control remained a central element of the UCMJ adopted by Congress, the Code also included important restrictions designed to safeguard the rights of military members and ensure fairness and justice. Congress has amended the UCMJ continuously since its adoption, adding features and requirements to the military justice system that have refined the process by which convening authorities make disposition decisions in cases. However, the authority vested in senior commanders to convene courts-martial has remained a central feature of the UCMJ. The Supreme Court has reviewed and endorsed this vesting of disposition authority in designated military commanders, noting that the disciplinary response to crimes committed by individuals subject to the

UCMJ—most notably members of the Armed Forces—directly impacts morale, discipline, and the military’s readiness to execute assigned missions.

Congress recently adopted significant amendments that target the processing of courts-martial for sexual assault crimes, including limiting courts-martial jurisdiction for the most serious allegations to only general courts-martial and requiring Service Secretary review of cases where a convening authority disagrees with his or her staff judge advocate’s recommendation to refer a charge to trial. In addition, the Secretary of Defense implemented numerous policy changes to SAPR guidelines and programs. Some changes have only recently been implemented and other amendments to the UCMJ are pending implementation. As a result, DoD has not yet fully evaluated what impact these reforms will have on the incidence, reporting, or prosecution of sexual assault in the military.

Congress also recently considered other legislative proposals that address the prosecution of sex assault crimes in the military. Two proposals, the Sexual Assault Training Oversight and Prevention Act (the STOP ACT) and the Military Justice Improvement Act (MJIA), would further amend the UCMJ and transfer the convening authority vested in senior military commanders to legal officials outside the chain of command. A third proposal, the Victims Protection Act of 2014 (VPA), would impose alternative mandates in addition to those previously adopted by Congress. The Subcommittee does not recommend amending the UCMJ to divest military commanders of their authority to convene courts-martial to try allegations of sexual assault, and therefore does not recommend Congress adopt the reforms in either the STOP Act or MJIA. The Subcommittee also recommends Congress not adopt Section 2 or Section 3(d) of the VPA, because the members do not believe either section will be productive in improving sexual assault response or reducing the incidence of sexual assault in the military.

The Subcommittee believes the Secretary of Defense should establish an advisory panel to offer to the Secretary and other senior leaders in DoD independent assessment and feedback on the effectiveness of DoD SAPR programs and policies. This advisory group, which should be comprised of persons external to the Department of Defense, would aid the Department in evaluating and monitoring SAPR progress and would provide useful information to the public on DoD SAPR programs and initiatives.

Sexual Assault Prevention:

Sexual assault crimes pose a significant risk to the military’s readiness and effectiveness. Preventing sexual assault crimes and stopping the attitudes and behaviors that contribute to such crimes is a primary responsibility for all leaders in DoD. DoD’s work with leading national experts and resources for sexual assault prevention strategies is encouraging, but more must be done.

DoD must employ effective and comprehensive prevention policies, informed by the best available science and targeted toward strategies that have the greatest potential to impact behavior and reduce risk factors for sexual assault. Alcohol abuse is a major contributing factor in a significant number of sexual assaults. DoD must do more to identify promising alcohol mitigation strategies and must provide greater strategic direction to commanders to reduce alcohol-related sexual assault across the Services. DoD must also continue to develop effective bystander intervention training for personnel that increases Service member vigilance toward the attitudes and behaviors that increase the potential for sexual assault. Leaders must ensure those who report sexual assault or intervene on behalf of others are supported and not subject to retaliation for their willingness to step forward. DoD must do more to address male-on-male sexual assault. Commanders must directly acknowledge the potential for male-on-male sexual assault in their commands and strive to mitigate the stigma associated with it.

In executing robust prevention programs, commanders must ensure they also fulfill their obligation to anyone within their command who may be accused of a sexual assault crime, ensuring training and initiatives emphasize the due process rights- most significantly respect for the presumption of innocence - of a Service member who is accused of a crime and the necessity for fair resolution of individual cases.

Sexual Assault Response:

In spite of prevention efforts, crimes of sexual violence in DoD remain an important concern, just as they are throughout society. Most sexual assault crimes are not reported to authorities or law enforcement, and DoD has directed substantial effort toward increasing sexual assault reporting. DoD adopted an option for restricted reporting in 2005, which allowed victims of sexual assault crimes to elect to confidentially report and receive support without triggering an investigation. DoD also established reporting channels outside of law enforcement or the chain of command where Service members can report when they are victims of sexual assault, and military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies. Reporting channels are broadly publicized throughout the military, but it is not clear from Service member feedback and junior enlisted personnel, in particular, that a sufficient percentage of military personnel adequately understand their options for reporting sexual assault. Most concerning is that nearly one half of junior enlisted personnel surveyed this year mistakenly believe they can make a restricted report to someone in their chain of command.

When a Service member makes an unrestricted report of sexual assault, the allegation must be investigated by an independent military criminal investigation organization (MCIO). By law, commanders must immediately forward all allegations to investigators, and they have no authority or control over the conduct of investigations. Once an MCIO completes its investigation, the case is returned to the appropriate commander for action. DoD policy establishes the minimum level of commander who may make decisions about the disposition of an allegation of sexual assault. The first special court-martial convening authority in the grade of O-6 or above in the chain of command of the accused serves as the “initial disposition authority” for any sexual assault allegation. DoD policy further requires the initial disposition authority to consult with a judge advocate before determining appropriate disposition.

Military Justice Responsibilities:

Once an allegation of sexual assault has been investigated, the initial disposition authority may determine a court-martial is warranted. Recent amendments to the UCMJ, which take effect this year, restrict jurisdiction for all serious sexual assault offenses to general courts-martial, which limits convening authority for these offenses to only the small number of senior commanding officers (almost all general or flag officers) who serve as general courts-martial convening authorities (GCMCAs). To initiate a court-martial, charges must be preferred and then reviewed by an investigating officer as part of a pretrial investigation under Article 32 of the UCMJ. Once the pretrial investigation is complete, the investigation report and recommendation of the investigating officer are provided to the initial disposition authority (or whichever convening authority directed the Article 32 investigation). When warranted, the case is then forwarded to the GCMCA for consideration, who must receive written advice from his or her staff judge advocate (SJA) before referring a charge to trial by general court-martial. The GCMCA, upon receiving advice from his or her SJA, makes an independent decision whether to refer the case to court-martial.

A recent congressional amendment requires higher-level review any time a sex-related charge is not referred for trial. If an SJA and a convening authority agree that a charge should not be referred for trial, the case must be reviewed by the next superior commander who is a GCMCA. If an SJA recommends referral to trial and the GCMCA decides not to refer the charge, the case must be forwarded to the Service Secretary for review.

In addition to referral authority, the UCMJ also vests other pretrial and trial responsibilities in convening authorities. The convening authority selects and details—in accordance with statutory qualification criteria—personnel who serve as panel members, or jurors, on a case. The convening authority also has authority to enter into a pretrial agreement, or plea bargain, with an accused. Other authorities vested by the UCMJ in convening authorities include discovery oversight, search authorization and other magistrate duties, appointment and funding of expert witnesses and expert consultants, and procurement of witnesses. Once a trial is complete, the convening authority must act on the findings and sentence adjudged by the court-martial. Recent statutory changes to Article 60 of the UCMJ significantly restrict the discretion of convening authorities to disapprove a guilty finding or reduce the sentence for a sexual assault charge.

Perspectives on Military Justice Responsibilities:

The Subcommittee heard substantial testimony and received extensive information about commander responsibilities in the criminal disposition of sexual assault allegations. The Subcommittee considered numerous proposals and supporting materials advocating for removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Proponents for change articulated a number of reasons why the UCMJ's current disposition authority framework discourages sexual assault victims and reporting of sexual assault crimes. The Subcommittee also heard from many who believe convening authority is a vital tool for commanders and that changing the UCMJ's convening authority framework would be counter-productive to military effectiveness and sexual assault response.

Based on its review, the Subcommittee believes Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses. Evidence considered by the Subcommittee 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 conviction rates in these cases. 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. Further, civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.

The Subcommittee also believes 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 changes to DoD policy. According to these recent changes, the authority to make disposition decisions regarding sexual assault allegations is sufficiently limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution. Additionally, Congress should not further amend 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. However, the Subcommittee believes additional consideration and study is warranted to evaluate the feasibility and consequences of modifying other pretrial and trial responsibilities currently assigned under the UCMJ to convening authorities. The Subcommittee heard recommendations for and against changes to these authorities, and we believe further study is appropriate to fully assess what positive and negative impacts would result.

Command Climate for Sexual Assault Prevention and Response:

The Subcommittee heard contrasting perspectives about what role commanders should have in military justice processing for sexual assault crimes, but there is near universal agreement that military commanders and their

subordinate leaders are essential to establishing and maintaining an organizational climate that mitigates the risk of sexual assault crimes and responds appropriately to incidents when they occur. DoD, the Services, and individual commanders must proactively monitor organizational climate for sexual assault prevention and response and respond swiftly to correct indications of unacceptable behaviors or attitudes. DoD has developed climate survey tools that may provide helpful insight into positive and negative climate factors within an organization, and the Services have established aggressive mandates that require commanders and their supervising commanders to utilize surveys and review survey results. While these surveys appear helpful, DoD and the Services should ensure commanders are trained broadly in unit SAPR climate monitoring methods, and commanders must use other means of assessment to validate or expand upon climate survey results.

Institutionally, DoD should also expand its assessment of SAPR programs and management through direct periodic and regular evaluations of DoD SAPR programs and performance, to be conducted by independent organizations. The DoD Sexual Assault Prevention and Response Office serves as the Department's single point of accountability and oversight for developing and implementing SAPR programs and initiatives, and it is also responsible for assessing and monitoring the effectiveness of these efforts. External, independent evaluations would serve to validate or disprove DoD's own internal assessments and would provide credible, unbiased measurement of SAPR initiatives, programs, and effectiveness, which would enhance public confidence in SAPR programs and initiatives.

Accountability for Sexual Assault Response:

To ensure SAPR program effectiveness, commanders and leaders must be held accountable and fairly evaluated on how they execute these critical duties. All officers preparing to assume command should be sufficiently trained and prepared to execute their SAPR responsibilities and the quasi-judicial authorities assigned to them under the UCMJ. Once trained, the Secretaries of the Military Departments should ensure commanders are evaluated according to clearly defined and established standards for SAPR leadership and performance, and assessment of commander performance must incorporate more than results from command climate surveys. Chaplains, social services providers, military judges, inspectors general, and officers and enlisted personnel participating in professional military education courses may be underutilized resources for obtaining accurate, specific, and unvarnished information about institutional and local climate. Victim satisfaction interviews may provide direct insight into climate factors and feedback on installation services and organizational support.

In addition to commanders, other subordinate leaders, including officers, enlisted leaders, and civilian supervisors, play a significant role in the success or failure of SAPR efforts. SAPR programs cannot be effective without the full investment of these subordinate leaders, but Service policies on SAPR expectations and assessment vary. If performance evaluation assessment increases attention to and support of SAPR programs, these differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel. The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers and noncommissioned officers.

CONCLUSION

The Subcommittee believes its recommendations and findings will strengthen DoD, Service, installation, and individual unit sexual assault prevention and response efforts. Further, the Subcommittee believes it is important to recognize that senior commander convening authority roles under the UCMJ are well founded and appropriate, and recent legislative and policy changes have clarified and improved the reporting, investigation, and military justice response to sexual assault allegations. Finally, DoD must ensure robust, continuous, and comprehensive climate assessment in military organizations and ensure consistent accountability expectations for sexual assault prevention and response among commanders and leaders.

ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

LEGISLATION AND POLICY AFFECTING THE ROLE OF COMMANDERS IN SEXUAL ASSAULT PREVENTION AND RESPONSE

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).

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.

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.

ROLE OF THE COMMANDER SUBCOMMITTEE

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.

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.

COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

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.

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.

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.

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.

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.

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.

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.

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.

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.

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.

COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

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.

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.

COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

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.

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.

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 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.

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.

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.

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 UMCJ, 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.

PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

Recommendation 19: Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses.

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.

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 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.

ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

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.

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.

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.

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.

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.

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.

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.

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.

COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

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.

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.

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.

ROLE OF THE COMMANDER SUBCOMMITTEE

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.

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.

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.

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.

I. OVERVIEW OF SUBCOMMITTEE ASSESSMENT

The Role of the Commander Subcommittee (Subcommittee) of the Response Systems to Adult Sexual Assault Crimes Panel (RSP) conducted an extensive review of the role of the commander in the prevention and response to sexual assault crimes. The issue of sexual assault in the U.S. military has been the subject of significant public, legislative, and administrative scrutiny. A focus point in current discussion on this subject is the role of commanders under the Uniform Code of Military Justice (UCMJ), and more specifically on the authority assigned to designated senior commanders to convene courts-martial and refer criminal offenses for trial. This Subcommittee has completed its review of the role of commanders in sexual assault prevention and response. The following report provides our assessment and our recommendations and findings based on this review.

Federal law requires commanding officers to demonstrate exemplary conduct, including vigilant inspection of the conduct of those placed under their command and promotion and safeguarding of the welfare of the officers and enlisted persons under their command.¹ At the heart of every military commander's duty is the responsibility to ensure mission readiness, which includes maintaining good order and discipline within the command. For centuries, U.S. military commanders have held the authority to impose discipline as well as direct trials for criminal allegations. The UCMJ, the U.S. military's criminal code, vests the authority to establish and convene courts-martial in select, senior commanding officers.

Some individuals and groups, however, contend that commanders should not have authority over military justice matters and should be relieved of their authority to convene courts-martial for sexual assault offenses. Accordingly, they propose amending the UCMJ to shift convening authority for courts-martial from commanders to military prosecutors who are independent of the military command in which the alleged misconduct occurs. Others contend senior military commanders are essential to resolving the pernicious issues of sexual assault in military organizations. They assert that divesting senior commanders of convening authority will dilute their capacity to lead and impair their ability to maintain good order and discipline, thereby damaging the efficiency and effectiveness of the Armed Forces.

In the past three years, Congress has significantly amended the UCMJ and enacted substantial mandates on the Department of Defense (DoD) to address the issue of sexual assault in the military. Additionally, DoD has implemented many changes to its processes and systems for preventing, assessing, and responding to sexual assault. Sexual assault reports, including reports of assaults that occurred before the person entered the military, significantly increased during Fiscal Year 2013, possibly suggesting that some sexual assault victims may have increased confidence that the military will respond sympathetically and effectively to them.

1 See 10 U.S.C. § 3583 (requiring exemplary conduct for Army commanding officers); 10 U.S.C. § 5947 (requiring exemplary conduct for commanding officers in the Navy and Marine Corps); 10 U.S.C. § 8583 (requiring exemplary conduct for Air Force officers).

Based on its extensive review, the Subcommittee believes military commanders must lead the way in DoD's efforts to prevent sexual assault, establishing organizational climates that are wholly intolerant of the behaviors and beliefs that contribute to sexual assault crimes. When sexual assault does occur, military commanders must lead decisive response efforts, assuring appropriate care for victims. They must also ensure protection of the due process rights of those who are accused of sexual assault crimes, and they must take appropriate administrative and criminal action against offenders. How commanders fulfill these responsibilities reflects their leadership and effectiveness, and DoD, the Services, and senior leaders must ensure all commanders and leaders are held accountable and fairly evaluated on their execution of these critical tasks.

A. RESPONSIBILITY OF THE SUBCOMMITTEE

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 directed the Secretary of Defense to establish the RSP “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.”² In order to assist the RSP in accomplishing, in twelve months, the many areas Congress directed it to assess, the RSP Chair requested that the Secretary of Defense establish three subcommittees—Role of the Commander, Comparative Systems, and Victim Services.

On September 23, 2013, the Secretary of Defense established the RSP subcommittees and appointed nine members to the Role of the Commander Subcommittee, including four members of the RSP. The Secretary of Defense established three objectives for the Role of the Commander Subcommittee focused on assessment of “the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.” The National Defense Authorization Act for Fiscal Year 2014 added two requirements for RSP study that were assigned to the Role of the Commander Subcommittee.³ In total, the Subcommittee was tasked with five objectives for analysis:

- 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, 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.

2 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632 (2013).

3 National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(a)(1)(A), 127 Stat. 672 (2013).

I. OVERVIEW OF SUBCOMMITTEE ASSESSMENT

- 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.

B. METHODOLOGY OF SUBCOMMITTEE REVIEW

Since June 2013, RSP and Subcommittee members have held and attended nineteen days of hearings—including public meetings, subcommittee meetings, preparatory sessions, and site visits—with more than 240 different presenters. Presenters included surviving sexual assault victims; current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims' counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocates General from each of the Services; current and former military justice officials and experts from Allied nations; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners and emergency physicians; first responders; chaplains; and currently serving United States Senators.

In addition, the Subcommittee considered information submitted by the public and publicly available information and documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. The RSP sent specific requests for information (RFIs) to DoD and each of the Services. The RFIs focused on the role of the commander, comparing military and civilian investigative and prosecution systems, and victim services. To date, DoD and the Services have submitted more than 620 pages of narrative responses and more than 15,000 pages of information in response to these requests.

The RSP also sent letters to eighteen victim advocacy organizations around the country soliciting input from those organizations to assist the Panel in its review. Advocacy organizations providing information to the RSP have included those working specifically in military sexual assault, including: Protect Our Defenders; Service Women's Action Network; Rape, Abuse, and Incest National Network; the National Organization for Victim Assistance; and the National Alliance to End Sexual Violence.

Information received and considered by the Subcommittee is available on the RSP website (<http://responsesystemspanel.whs.mil/>). The Subcommittee wishes to express its gratitude to all the presenters and to those who provided information and other assistance to it.

II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

A. COMMANDER AUTHORITY AND RESPONSIBILITY

The term “commander” has a unique and specific meaning within the military. It indicates a position of seniority, authority, and responsibility. The Rules for Courts-Martial distinguish “commander” from “convening authority,” and the two roles, while overlapping, are not interchangeable.⁴ Military officers at all ranks and experience levels may serve in command positions. Commanders serve as part of the “chain of command,” which is the succession of commanders from superior to subordinate through which command authority is exercised.⁵

The commander is the head of a military organization and is primarily responsible for ensuring mission readiness, to include maintaining good order and discipline within the unit. The importance of the commander’s disciplinary responsibility is reflected in the preamble to the Manual for Courts-Martial: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁶

The commander also plays a key role in times of cultural change in the Armed Forces. Historically, commanders have proved essential in leading the organizational response during periods of military cultural transition, especially since enactment of the UCMJ. Beginning with racial integration and continuing toward greater inclusion of women and, most recently, the repeal of “Don’t Ask, Don’t Tell,”⁷ the Services have relied on commanders to set and enforce standards and effect change among subordinates under their command.⁸

A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command in achieving change in the attitudes and behaviors of

4 See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(5) and R.C.M. 103(6) (2012) [hereinafter MCM].

5 While often used as an all-encompassing term for military superiors, the term “chain of command” refers only to the distinct organizational chain of commanders. Supervisory or “technical chains” are not part of a Service member’s chain of command, and they lack the responsibility and authority unique to military commanders and chains of command.

6 *Id.* at pt. I, ¶ 3.

7 10 U.S.C. § 654 (repealed Dec. 22, 2010).

8 *Transcript of Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* [hereinafter *Transcript of SASC Hearing*] 12 (June 4, 2013) (testimony of General Raymond T. Odierno, Chief of Staff, U.S. Army); *Transcript of Response Systems Panel [hereinafter RSP] Public Meeting 214* (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army) (“Past progress and institutional change, whether racial or gender integration, or, more recently, Don’t Ask, Don’t Tell, have been successful because of the focus and authority of commanders, not because of lawyers. And so it should be in addressing sexual assault.”).

Service members.⁹ Senator Carl Levin, Chair of the Senate Armed Services Committee, observed that the chain of command has been “[t]he key to cultural change in the military.”¹⁰ Stated directly, commanders—the leaders of military organizations—set and enforce standards and have the requisite station to drive cultural change in the military.¹¹

B. DISTINCTION BETWEEN COMMANDERS AND CONVENING AUTHORITIES

While all commanders have disciplinary responsibility for subordinates, the authority vested by the UCMJ to convene courts-martial is legally distinct from command authority. The authority to convene general, special, and summary courts-martial¹² is purely statutory in nature, and is established by Articles 22, 23, and 24 of the UCMJ, respectively.¹³ Under these articles, convening authority is a specific statutory authority that attaches to individual officers serving in certain positions and designations.

With limited and rarely invoked statutory exceptions,¹⁴ convening authorities must be commanders. However, not all commanders are convening authorities. An officer in command does not become a convening authority until he or she is selected for a specific command or level of command meeting the statutory requirement. Stated simply, nearly all convening authorities are commanders, but few commanders have authority to convene special courts-martial, and fewer still possess the authority to convene general courts-martial.

Officers serving in positions with special courts-martial convening authority (SPCMCA) or general courts-martial convening authority (GCMCA) are senior officers with many years of service and experience. A senior officer assuming a command position with convening authority also receives military justice training in pre-command courses, as well as specific legal training conducted by judge advocate instructors.¹⁵ In addition to

9 *Transcript of RSP Role of the Commander [hereinafter RoC] Subcommittee Meeting* 40 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy) (noting that he had “witnessed the chain of command’s ability to effect change in the military culture on racial discrimination”); *accord id.* at 299-301 (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps); see also *Transcript of RSP RoC Subcommittee Meeting* 115-17 (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director for Military Equal Opportunity, Department of Defense [hereinafter DoD] Office of Diversity Management and Equal Opportunity) (describing significance of military leaders in achieving cultural and climate change in race relations).

10 *Transcript of SASC Hearing 4* (June 4, 2013).

11 See, e.g., *Transcript of RSP Public Meeting* 213 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, U.S. Army) (“It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders, not lawyers.”).

12 Article 16 of the UCMJ classifies three kinds of courts-martial. General courts-martial are the highest level of military courts-martial. They consist of a military judge and at least five panel members, and they may adjudge any punishment authorized by law, up to and including death, life imprisonment, and a dishonorable discharge or dismissal. Special courts-martial are used to resolve offenses that are not so severe as to warrant a general court-martial, and they consist of a military judge and at least three panel members. Special courts-martial may adjudge punishment up to a bad conduct discharge and confinement for up to one year, among other punishment limits. Summary courts-martial are the lowest level of courts-martial, and they are ordinarily used to dispose of relatively minor offenses. Service members may decline to be tried by summary courts-martial, which consist only of one officer who may adjudge limited punishments.

13 10 U.S.C. §§ 822-824 (UCMJ arts. 22-24).

14 The only convening authorities who are not military commanders are the President, the Secretary of Defense, and Service Secretaries. See 10 U.S.C. § 822(a)(1, 2, 4) (UCMJ art. 22(a)(1, 2, 4)).

15 Army commanders selected for SPCMCA positions attend Senior Officer Legal Orientation; selected Air Force commanders receive legal training at the Wing Commanders Course; selected Navy executive officers, commanders, and officers in charge, as well as Marine Corps commanders, attend the Senior Officer Course. See DoD and Services’ Responses to Request for Information 1c (Nov. 21, 2013).

II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

military justice training, each Service allocates judge advocate support to senior commanders with convening authority.

An officer will not typically serve in a command position with SPCMCA until he or she is promoted to the grade of O-6 (i.e., colonel or Navy/Coast Guard captain). Officers serving as SPCMCA generally have at least 20 years of service and have been selected for this level of command through a rigorous and highly competitive process. An officer's leadership ability, career service record, and previous performance in lower levels of command are important factors in selection for senior command positions.

Officers serving as GCMCA have even longer records of service, with distinguished performance and substantial command experience. In general, an officer serving as a GCMCA has "had 25 years of experience in a quasi-judicial role, either reviewing misconduct and referring it to the commander who has the authority or [taking] corrective actions on his own with the powers that he or she has."¹⁶ GCMCA are normally two-star general or flag officers and higher.

The following chart illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCA and even smaller number of GCMCA:¹⁷

	Active Duty Personnel	Commanders	SPCMCA	SPCMCA who convened 1 or more court-martial in FY13	GCMCA	GCMCA who convened 1 or more court-martial in FY13
Army	521,685	7,000 (approx.)	424	Not tracked	85	70
Navy	323,930	1,422	1,080	94	200	17
Marine Corps	192,350	2,182	451	106	50	29
Air Force	330,172	3,943	97	70	58	23
Coast Guard	40,665	677	350	12	18	9

C. LEGISLATIVE ORIGIN OF COMMANDER AUTHORITY UNDER THE UCMJ

The authority to convene and manage courts-martial has been vested in U.S. military commanders since the colonial period.¹⁸ Indeed, until after World War II, commanders enjoyed "virtually unfettered" discretion in determining whether to try soldiers and sailors by court-martial.¹⁹ In the words of Brigadier General S. T. Ansell, acting Judge Advocate General of the Army in 1919, the commander "govern[ed] the trial from the moment of

16 *Transcript of RSP Public Meeting 270-71* (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, U.S. Army).

17 Active duty personnel figures reflect Feb. 28, 2014 data. Defense Manpower Data Center, "Active Duty Military Personnel by Service Rank/Grade: February 2014," at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>. Commander and convening authority data were provided by the Services in response to RSP Request for Information 154 (Jan. 14, 2014). The number of Coast Guard commanders includes 272 senior enlisted personnel who serve in officer-in-charge positions.

18 *Transcript of RSP Public Meeting 190-91* (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps).

19 Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 426 (Spring 2008).

accusation to the execution of the sentence, and such law adviser as he may have on his staff is without authority or right to interpose.”²⁰ Nevertheless, a committee appointed to investigate military justice during World War I endorsed the status quo, and the system continued without significant change through World War II.²¹

Reviews in the years following World War II challenged the commander’s unfettered discretion in convening courts-martial. In 1946, the Vanderbilt Commission, a committee of leading jurists and law professors, found “frequent breakdowns” in the administration of wartime military justice resulting largely from failure and excesses of command.²² This finding was based in part on evidence that trial by court-martial was “frequently used as a substitute for leadership,” and that its “frequency of use chang[ed] not only with each change in command, but also per the whim of a given commander.”²³ At the same time, the Commission found evidence of a consistent tendency of commanders to deliberately attempt to influence the outcomes of courts-martial, a practice that was sometimes “freely admitted.”²⁴

By the time it held hearings on drafts of the UCMJ in 1949, Congress heard from those opposing proposals to reduce commander authority over courts-martial,²⁵ and also from those “urg[ing] [it] to remove the authority to convene courts martial from ‘command’ and place that authority in judge advocates or legal officers, or at least in a superior command.”²⁶ While commanders retained convening authority under the UCMJ, the Code that was adopted was a compromise between those opposing any erosion of absolute commander control and those advocating change.²⁷ More specifically, in its 1949 report on the UCMJ, the House Armed Services

20 Brigadier General S. T. Ansell, *Military Justice?*, 5 CORNELL L. Q. 1 (1919), reprinted in MIL. L. REV. (bicen. issue) 53, 65 (Sept. 1975).

21 Hansen, *supra* note 19, at 427. One exception was the requirement established by the Articles of War of 1920 that the convening authority refer charges to his staff judge advocate for pretrial advice. THE JUDGE ADVOCATE GENERAL’S SCHOOL, THE BACKGROUND OF THE UNIFORM CODE OF MILITARY JUSTICE 5 (1959).

22 REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 3 (1946).

23 Maxwell A. Sturtz, “The Administration of Military Justice: A Summary of Constructive Criticisms Received by the War Department’s Advisory Committee on Military Justice,” at 4 (1946), at http://www.loc.gov/rr/frd/Military_Law/Vanderbilt-report.html.

24 REPORT OF WAR DEPARTMENT ADVISORY COMMITTEE ON MILITARY JUSTICE 6-7 (1946).

25 In 1946, while serving as the Army Chief of Staff, General Dwight D. Eisenhower wrote to the Acting Chairman of the House Armed Services Committee that the grave responsibility of commanders “can be fully discharged only by the exercise of commensurate authority without which the effectiveness of the commander will be seriously impaired.” General Eisenhower asserted his confidence that other experienced combat commanders would agree that “any other system would produce ruinous results.” Letter from General Dwight D. Eisenhower, U.S. Army, to Acting Chairman Dewey Short (June 30, 1947), reprinted in *Hearings Before Committee on Armed Services of the House of Representatives on Sundry Legislation Affecting the Naval and Military Establishments 1947*, 80th Cong., 1st Sess. 4157-58 (1947).

26 H.R. REP. NO. 81-491, at 7-8 (1949). The Committee addressed such testimony in its report as follows:
We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations. Our conclusions in this respect are contrary to the recommendations of numerous capable and respected witnesses who testified before our committee, but the responsibility for the choice was a matter which had to be resolved according to the dictates of our own conscience and judgment.

Id.

27 See Hansen, *supra* note 19, at 427; Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190, 226 (June 2003) (noting “legislative compromise” reflected in UCMJ in that Congress “retained the commander as the central figure of the military justice system, yet significantly modified his powers and added statutory checks and balances to limit outright despotism”); Major General Kenneth J. Hodson, U.S. Army, *Perspective: The Manual for Courts-Martial – 1984*, 57 MIL. L. REV. 1, 5 (July 1972) (describing UCMJ as representing “liberal compromise between the commanders and the lawyers”); TJAG’S SCHOOL, *supra* note 21, at 10.

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Committee detailed eight “restrictions on command” included in the Code that would be effective checks on the commanders with convening authority. For example, the Committee noted, the UCMJ would prohibit the commander from preferring charges until they were first examined for legal sufficiency by the staff judge advocate or legal officer and would authorize the staff judge advocate or legal officer to communicate directly with the Judge Advocate General.²⁸

The concerns that weighed most heavily in the minds of those who drafted the UCMJ were the issue of command control and the need to curb unlawful command influence.²⁹ In its current form, Article 37 of the UCMJ provides that no convening authority or commanding officer may “censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings.”³⁰ Article 37 further provides that no person subject to the UCMJ “may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”³¹

By adopting Article 37, Congress prohibited convening authorities and all commanding officers from unlawfully influencing the law officer, counsel, and members of courts-martial.³² Article 37 reflects Congress’s recognition that while a commanding officer is responsible for discipline, “in the long run, discipline will be better and morale will be higher if service personnel receive fair treatment.”³³ In particular, Article 37 represents

28 H.R. REP. NO. 81-491, at 7-8, 40-41 (1949). The other six “restrictions on command” identified by the Committee focus on the due process rights of the accused during and after trial. See *id.* (noting that UCMJ: requires that all counsel at general court-martial be lawyers and be certified as qualified by Judge Advocate General; requires that law officer (now known as military judge) be a lawyer, that his rulings on interlocutory questions of law be final, and that he instruct court-martial members on presumption of innocence, burden of proof, and elements of charged offense(s); requires staff judge advocate to examine record of trial for sufficiency before convening authority may act on findings or sentence; guarantees accused legally qualified appellate counsel; establishes civilian Court of Military Appeals (now known as Court of Appeals for the Armed Forces) that is “completely removed from all military influence or persuasion”; and makes it offense for any person subject to Code to unlawfully influence action of court-martial).

29 *Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate* 15 (1963) [hereinafter *Report of Hearings*]; H.R. REP. NO. 98-549, at 13 (1983). In *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), the Court of Military Appeals called command influence “the mortal enemy of military justice” and “a corruption of the truth-seeking function of the trial process.” *Id.* at 393-94 (internal quotation marks omitted). The Court noted the exercise of unlawful command influence, depending upon whom it is directed, could deny an accused access to favorable evidence, the right to effective assistance of counsel, or the right to an impartial court-martial forum. *Id.* at 393.

30 10 U.S.C. § 837(a). The prohibition on unlawful command influence also applies to others who act with the “mantle of official command authority.” *United States v. Stombaugh*, 40 M.J. 208, 211 (C.A.A.F. 1994). Actual unlawful command influence or an appearance of unlawful command influence may result from the actions of staff judge advocates, trial counsel, and other representatives of the government. See *United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006) (finding actual unlawful command influence by staff judge advocate and trial counsel in actions to unseat military trial judge and apparent unlawful command influence because they succeeded in removing judge without facing detriment or sanctions for their actions); *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013) (finding apparent unlawful command influence when government representatives used information from military judge’s personnel file to seek his disqualification from a case).

31 10 U.S.C. § 837(a).

32 While it incorporated the provisions of Article of War 88, Article 37 expanded upon Article 88 by including within the prohibition the influencing of law officers and counsel.

33 *Report of Hearings*, *supra* note 29, at 17.

an effort by Congress to achieve for the accused the right to an impartial trial that is guaranteed in the Sixth Amendment.³⁴

Congress's concern about unlawful command influence, however, permeates the Code far beyond Article 37. In fact, twelve other UCMJ provisions were designed to eliminate it; in addition to the eight "restrictions on command" enumerated by the House Armed Services Committee (see above); these include the accused's right to counsel, to present evidence, and to cross-examination at the pretrial investigation hearing; the prohibition against compelling self-incrimination; and the guarantee of equal access to witnesses.³⁵ Early decisions of the Court of Military Appeals that enhanced the law officer to a position similar to "the trial judge in a civilian court" aided in curbing unlawful command influence, as did as the Army's creation of a field judiciary.³⁶

Despite Congress's initial attempt to prevent unlawful command influence, some commanders viewed the original Article 37 as an obstacle to execution of their disciplinary responsibilities, just as others overcame it by exerting improper influence in more subtle ways.³⁷ In 1960, the Powell Committee³⁸ recommended that the Chief of Staff of the Army "publish a directive to clarify for all commanders the distinction between proper exercise of command responsibility and improper command influence."³⁹ Ultimately, Congress added a provision to Article 37 in its 1968 amendments to the UCMJ that prohibited adverse personnel actions based on members' participation in courts-martial.⁴⁰

The authority vested in senior commanders to convene courts-martial remains a central tenet of the UCMJ, but Congress has refined procedural requirements for their disposition decisions. For example, the UCMJ initially provided in Article 34(a) that the convening authority may not refer a charge for trial by general court-martial "unless he has found" that the charge alleges an offense under the UCMJ and is warranted by the evidence.⁴¹ In 1983, Congress changed Article 34(a) to state that the convening authority may not refer such a charge "unless

34 *Joint Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, United States Senate*, Appendix A, at 512.

35 TJAG's SCHOOL, *supra* note 21, at 12-13. Additional UCMJ provisions were designed to eliminate unlawful command influence during and after trial. *Id.* (noting enlisted accused's right to demand that panel include enlisted members; requirement that all voting on challenges, findings, and sentences be by secret ballot; automatic review of trial record for errors of law and of fact by Courts of Criminal Appeals (initially called Boards of Review); and right of accused to seek review in Court of Appeals for the Armed Forces).

36 *Report of Hearings, supra* note 29, at 18 & n.109 (collecting cases).

37 *Joint Hearings, supra* note 34, at 452, 458.

38 This ad hoc committee was appointed by Secretary of the Army Wilber M. Brucker and chaired by Lieutenant General Herbert B. Powell, U.S. Army. REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY, BY THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY i, iii (1960).

39 *Id.* at 3, 16.

40 See 10 U.S.C. § 837(b) (UCMJ art. 37(b)) ("In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.").

41 MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 35b (1969); MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 35b (1951). This "clarified th[e] ambiguity" that existed in this regard in the Articles of War. TJAG's SCHOOL, *supra* note 21, Annex A, at 13.

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he has been advised in writing by the staff judge advocate that” the charge alleges an offense, that the charges are supported by the evidence, and that there is jurisdiction over the accused and the offense.⁴²

There have been other significant changes and revisions to the UCMJ since its enactment. Most recently, the National Defense Authorization Act for Fiscal Year 2014 modified several provisions of the UCMJ related to commander authority and responsibility and the prosecution of sexual assault crimes.⁴³ As a military historian told the RSP, “the system has changed over time; first courts-martial [were] made more like courts, and then because of this desire to have our system mirror what’s going on in civilian courts, more and more courts-martial look like any trial in Federal District Court.”⁴⁴

D. SUPREME COURT REVIEW OF COMMANDER AUTHORITY UNDER THE UCMJ

Since the UCMJ was adopted, the Supreme Court has reviewed, but not substantially modified, the authority vested in military commanders to convene courts-martial for criminal offenses committed by military personnel. One notable exception was *O’Callahan v. Parker*,⁴⁵ a challenge to court-martial jurisdiction over an accused convicted of the rape of a civilian and related offenses that were committed off the installation. In a split decision, the majority of Justices held that any grant of jurisdiction to courts-martial must be limited to offenses that are “service connected” in order to bring the constitutional grant of power to Congress over the military⁴⁶ into harmony with the guarantees of the Bill of Rights.⁴⁷

Two years later, in *Relford v. Commandant*,⁴⁸ the Supreme Court described another application of the service-connection test. The *Relford* Court “stress[ed] . . . [t]he responsibility of the military commander for maintenance of order in his command” as well as “[t]he impact and adverse effect that a crime committed

42 MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ A2-11 (1984). In codifying this clarification, Congress noted that, in practice, commanders already “normally rel[ied] on” their staff judge advocates for such “complex legal determinations.” S. REP. NO. 98-53, at 4 (1983); accord H.R. REP. NO. 98-549, at 14 (1983). For discussion on the staff judge advocate’s advice under Article 34 and the underlying evidentiary standard, see note 309, *infra*, and accompanying text.

43 For a summary of the FY14 NDAA provisions that impact roles and responsibilities of commanders in sexual assault prevention and response, see Part III, *infra*.

44 Transcript of RSP Public Meeting 197 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian).

45 395 U.S. 258 (1969).

46 See U.S. CONST. art. I, § 8, cl. 14 (allocating to Congress power to “make Rules for the Government and Regulation of the land and naval Forces”).

47 *O’Callahan*, 395 U.S. at 272-73. The dissenting Justices foreshadowed the Court’s eventual return to its traditional adherence to military deference:

The United States has a vital interest in creating and maintaining an armed force of honest, upright, and well-disciplined persons, and in preserving the reputation, morale, and integrity of the military services. Furthermore, because its personnel must, perforce, live and work in close proximity to one another, the military has an obligation to protect each of its members from the misconduct of fellow servicemen. The commission of offenses against the civil order manifests qualities of attitude and character equally destructive of military order and safety. The soldier who acts the part of Mr. Hyde while on leave is, at best, a precarious Dr. Jekyll when back on duty. Thus, as General George Washington recognized: “All improper treatment of an inhabitant by an officer or soldier being destructive of good order and discipline as well as subversive of the rights of society is as much a breach of military, as civil law and as punishable by the one as the other.

Id. at 281-82 (Harlan, J., joined by Stewart & White, JJ., dissenting) (quoting 14 WRITINGS OF GEORGE WASHINGTON 140-41 (bicent. ed.)) (footnote omitted).

48 401 U.S. 355 (1971).

against a person or property on a military base . . . has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.”⁴⁹

Moreover, the *Relford* Court affirmed a soldier’s convictions for the on-base rapes of a military dependent and of the relative of another fellow Service member, expressly holding that “when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial.”⁵⁰ Thus, under *Relford*, sexual assaults committed by one Service member on another or on a dependent continued to be triable by courts-martial, even after the *O’Callahan* decision. In upholding jurisdiction in such cases, the military appellate courts recognized that such sexual-assault offenses “pose a serious threat to good order and discipline within the unit” regardless of where they occur and that “[m]ilitary jurisdiction provides a deterrent to such offenses and to the temptation . . . to wreak vengeance upon the wrongdoer.”⁵¹

In *Parker v. Levy*,⁵² the Supreme Court noted that the military’s purpose distinguishes it and its laws from civilian society, and the Court recalled the “particular position of responsibility and command” held by military officers.⁵³ *Parker* concerned a constitutional challenge to convictions under Articles 133 (“conduct unbecoming an officer and a gentleman”) and 134 (conduct prejudicial to “good order and discipline”) of the UCMJ⁵⁴ that arose out of an Army officer’s on-base public statements critical of the Vietnam War to enlisted Service members. In affirming the convictions, the Court noted it had “long recognized that the military is, by necessity, a specialized society separate from civilian society,” and that “[t]he differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise.’”⁵⁵ The *Parker* Court liberally quoted from earlier judicial deference decisions.⁵⁶ In particular, the Court took care to highlight

[t]he different relationship of the Government to members of the military. It is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often

49 *Id.* at 367.

50 *Id.* at 369 (“Expressing it another way: a serviceman’s crime against the person of an individual upon the base or against property on the base is ‘service connected,’ within the meaning of that requirement as specified in *O’Callahan*, 395 U.S., at 272[.]”).

51 *United States v. Ruggiero*, 1 M.J. 1089, 1098 (N.C.M.R. 1977) (rejecting challenge to court-martial jurisdiction over off-base rape and related offenses by marine of fellow marine); see also *United States v. White*, 1 M.J. 1048, 1051-52 (N.C.M.R. 1976) (rejecting challenge to court-martial jurisdiction over off-base indecent assault by sailor upon fellow sailor’s wife).

52 417 U.S. 733 (1974).

53 *Id.* at 743.

54 10 U.S.C. §§ 933, 934. *Parker* challenged both Articles under the First Amendment as unconstitutionally vague and overbroad.

55 *Parker*, 417 U.S. at 743 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

56 In *In re Grimley*, 137 U.S. 147, 153 (1890), the Court observed: “An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.” More recently we noted that “(t)he military constitutes a specialized community governed by a separate discipline from that of the civilian,” *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), and that “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty” *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion). We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces: “The President’s commission . . . recites that ‘reposing special trust and confidence in the patriotism, valor, fidelity and abilities’ of the appointee he is named to the specified rank during the pleasure of the President.” *Orloff*, 345 U.S. at 91.

Parker, 417 U.S. at 743-44 (omissions and alterations in original) (citation forms modified).

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employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities. As we observed in *In re Grimley*, 137 U.S. 147, 153 (1890), the military “is the executive arm” whose “law is that of obedience.” While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community.⁵⁷

The Supreme Court generally followed the precedent established in *Parker* in UCMJ cases it decided thereafter. In *Middendorf v. Henry*,⁵⁸ the Court declined to recognize a constitutional right,⁵⁹ to defense counsel at summary courts-martial, repeating its observation in *Parker* that individual rights in the Armed Forces “must perforce be conditioned to meet certain overriding demands of discipline and duty.”⁶⁰

In *Solorio v. United States*,⁶¹ the Court followed the standard it expressed in *Parker*, expressly overruling its decision in *O’Callahan*. *Solorio* again presented the question whether “non-military” offenses, this time child sexual abuse, committed off-post could be tried by court-martial. In holding that the military status of the accused was sufficient to support court-martial jurisdiction, as it had been prior to *O’Callahan*, the Court noted that “[i]mplicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress.”⁶²

More recently, in *Weiss v. United States*,⁶³ the Court rejected a structural challenge to the UCMJ based on its failure to provide for the presidential appointment of military judges or that they be appointed for a fixed term. As Professor Victor Hansen has noted:

the *Weiss* Court condoned a justice system where the military commander played such a critical and involved role. Rather than use this case as an opportunity to reexamine or question the role of the military commander, the Court pointed to this aspect of the military justice system to explain why no additional appointment is needed for an officer to serve as a military judge.⁶⁴

It was coincidence that *Solorio*, like *O’Callahan*, was convicted of sexual assault offenses; neither decision turned on the sexual nature of the offenses. Thus, even prior to the *Solorio* decision, a member of the military could be tried by court-martial for raping a fellow Service member on base. Indeed, the Court of Military Appeals found just months after *O’Callahan* that “where an offense cognizable under the Code is perpetrated

57 *Parker*, 417 U.S. at 751 (citation form modified).

58 425 U.S. 25 (1976).

59 The Court refused to recognize such a right either as a matter of Fifth Amendment due process, see *Middendorf*, 425 U.S. at 42-48, or under the Sixth Amendment right to counsel, see *id.* at 33-42. In considering the Sixth Amendment issue, the Court exhibited its level of deference by asking “whether the factors militating in favor of counsel at summary courts-martial [were] so extraordinarily weighty as to overcome the balance struck by Congress.” *Id.* at 44.

60 *Id.* at 43 (adding that it was up to Congress, not the Court, to “determine the precise balance to be struck in this adjustment”) (quoting *Burns*, 346 U.S. at 140).

61 483 U.S. 435 (1987).

62 *Solorio*, 483 U.S. at 440.

63 510 U.S. 163 (1994).

64 Hansen, *supra* note 19, at 447 (footnote omitted).

against the person or property of another serviceman, regardless of the circumstances, the offense is cognizable by court-martial.”⁶⁵

⁶⁵ *United States v. Everson*, 41 C.M.R. 70, 71 (C.M.A. 1969).

III. LEGISLATION AND POLICY AFFECTING COMMANDER ROLES AND RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION AND RESPONSE

Congress and the Secretary of Defense have recently adopted numerous statutory and policy changes that significantly impact the response to sexual assault in the military through enhanced prevention, investigation, and prosecution mechanisms. Many of these changes impact the roles and responsibilities of commanders and convening authorities in sexual assault prevention and response as well as military justice administration.

A. RECENT LEGISLATION

1. National Defense Authorization Act for Fiscal Year 2012

The National Defense Authorization Act for Fiscal Year 2012 (FY12 NDAA)⁶⁶ included eight provisions intended to improve sexual assault prevention and response in the Armed Forces. In the course of its study, the Subcommittee considered two statutory requirements that affect military commanders or convening authorities. Unless otherwise noted, the provisions were effective immediately:

Section	Report Discussion
Section 582. Consideration of application for permanent change of station or unit transfer based on humanitarian conditions for victim of sexual assault or related offense.	Part V, Section D (see note 275)
Section 585. Training and education programs for sexual assault prevention and response program. <ul style="list-style-type: none">• <i>Curriculum was to be developed by December 31, 2012 (one year after enactment of the Act).</i>• <i>Section 574 of the FY13 NDAA amends this section by requiring sexual assault prevention and response training for new or prospective commanders at all levels of command.</i>⁶⁷	Part IV; Part VIII, Section B

66 National Defense Authorization Act for Fiscal Year 2012 [hereinafter FY12 NDAA], Pub. L. No. 112-81, 125 Stat. 1298 (2011).

67 National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013).

2. National Defense Authorization Act for Fiscal Year 2013

The National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA)⁶⁸ included twelve provisions intended to improve sexual assault prevention and response in the Armed Forces. The subcommittee considered three statutory requirements that impact military commanders or convening authorities. Unless otherwise noted, the provisions were effective immediately:

Section	Report Discussion
Section 572 (a)(2). Requires administrative discharge processing if convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged. <ul style="list-style-type: none"> • <i>Effective June 2, 2013 (180 days after enactment of the Act).</i> 	Part VI, Section D (see note 350)
Section 572 (a)(3). Commander to conduct climate assessments within 120 days after commander assumes command and annually thereafter so long as in command. <ul style="list-style-type: none"> • <i>Effective June 2, 2013 (180 days after enactment of the Act).</i> • <i>Section 1721 of the FY14 NDAA amends this section by requiring the Secretary of Defense to direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments.</i> 	Part VII, Section C
Section 574. Enhancement to training and education for sexual assault prevention and response. <ul style="list-style-type: none"> • <i>Amends Section 585 of the FY12 NDAA to require sexual assault prevention and response training in the training for new or prospective commanders at all levels of command.</i> 	Part IV; Part VIII, Section B

3. National Defense Authorization Act for Fiscal Year 2014

The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA)⁶⁹ included 36 provisions intended to improve sexual assault prevention and response in the Armed Forces, including comprehensive changes to the roles of commanders and convening authorities in military justice cases. The Subcommittee considered sixteen statutory requirements that impact military commanders or convening authorities. Unless otherwise noted, the provisions were effective immediately:

Section	Report Discussion
Section 1702 (a). Revision of Article 32, Uniform Code of Military Justice. <ul style="list-style-type: none"> • <i>Effective December 26, 2014 (one year after enactment of the Act).</i> 	Part VI, Section B
Section 1702 (b). Revision of Article 60, Uniform Code of Military Justice. <ul style="list-style-type: none"> • <i>Effective June 24, 2014 (180 days after enactment of the Act).</i> 	Part IV, Section D

68 National Defense Authorization Act for Fiscal Year 2013 [hereinafter FY13 NDAA], Pub. L. No. 112-239, 126 Stat. 1632 (2013).

69 National Defense Authorization Act for Fiscal Year 2014 [hereinafter FY14 NDAA], Pub. L. NO. 113-66, 127 Stat. 672 (2013).

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<p>Section 1705. Discharge or dismissal for certain sex-related offenses and trial of such offenses by general courts-martial.</p> <ul style="list-style-type: none"> • <i>Effective June 24, 2014 (180 days after enactment of the Act).</i> • <i>For offenses committed on or after effective date, limits jurisdiction for offenses of rape or sexual assault (under Art. 120), rape or sexual assault of a child (under Art. 120b), forcible sodomy (under Art. 125), or attempts thereof (under Art. 80) to general courts-martial.</i> 	Part V, Section C
<p>Section 1706. Participation by victim in clemency phase of courts-martial process.</p> <ul style="list-style-type: none"> • <i>Effective June 24, 2014 (180 days after enactment of the Act).</i> • <i>Further amends Section 1702 of the FY14 NDAA (which amends Article 60 of the Uniform Code of Military Justice (UCMJ)).</i> 	Part IV, Section D
<p>Section 1708. Modification of Manual for Courts-Martial to eliminate factor relating to character and military service of the accused in rule on initial disposition of offenses.</p> <ul style="list-style-type: none"> • <i>Effective June 24, 2014 (180 days after enactment of the Act).</i> 	Part V, Section C; Part VI, Section A
<p>Section 1709. Prohibition of retaliation against members of the Armed Forces for reporting a criminal offense</p> <ul style="list-style-type: none"> • <i>Effective April 25, 2014 (120 days after enactment of the Act).</i> 	Part V, Section D (see note 276)
<p>Section 1712. Issuance of regulations applicable to the Coast Guard regarding consideration of request for permanent change of station or unit transfer by victim of sexual assault.</p>	Part V, Section D (see note 275)
<p>Section 1713. Temporary administrative reassignment or removal of a member of the Armed Forces on active duty who is accused of committing a sexual assault or related offense.</p>	Part III, Section B
<p>Section 1721. Amends Section 572 of the FY13 NDAA by requiring the Secretary of Defense to direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments.</p>	Part VIII, Section C (see note 508)
<p>Section 1742. Commanding officer action on reports on sexual offenses involving members of the Armed Forces.</p> <ul style="list-style-type: none"> • <i>Upon receipt of a report of a “sex-related offense” against a commander’s Service member, the commander must immediately forward the report to the military criminal investigative organization (MCIO).</i> 	Part V, Section B
<p>Section 1743. Eight-day incident reporting requirement in response to unrestricted report of sexual assault in which the victim is a member of the Armed Forces.</p> <ul style="list-style-type: none"> • <i>Requires the Secretary of Defense to prescribe regulations to carry out this section by June 24, 2014.</i> 	Part V, Section B

<p>Section 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.</p> <ul style="list-style-type: none"> • <i>Requires the Secretaries of the Military Departments to review all cases under Articles 120(a), 120(b), 125, and attempts thereof, where the staff judge advocate (SJA) recommends referral and the convening authority declines to refer charges to court-martial. Requires review by the next superior commander authorized to exercise general court-martial convening authority when both the SJA recommends not referring charges and the convening authority does not refer charges.</i> 	Part VI, Section B
<p>Section 1744(e)(6). Requirement for written statement explaining the reasons for convening authority's decision not to refer any charges for trial by court-martial.</p>	Part VI, Section B (note 313)
<p>Section 1751. Sense of Congress on commanding officer responsibility for command climate free of retaliation.</p>	Part VIII, Section C
<p>Section 1752. Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the UCMJ through courts-martial.</p>	Part V, Section C (note 262)
<p>Section 1753. Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.</p>	Part V, Section C (note 262)

B. DEPARTMENT OF DEFENSE POLICY

In addition to congressional mandates, the Secretary of Defense has issued numerous policy changes that impact commander and convening authority roles and responsibilities in sexual assault cases. Most notably, on April 20, 2012, the Secretary of Defense elevated the initial disposition authority for sexual assault offenses to commanders in the grade of O-6 or above who also serve as special or general court-martial convening authorities.⁷⁰ This change vested initial disposition authority at a level of command that is normally distanced from the accused and/or accuser. Since convening authorities at this level are generally removed by multiple levels of command from the unit to which an accused or accuser is assigned, the policy substantially mitigated the likelihood that a commander exercising disposition authority for these offenses will have a close personal connection to the victim or accused Service member. The Secretary of Defense's withholding policy became effective on June 28, 2012.⁷¹ Prior to the policy's implementation, Rule for Courts-Martial (R.C.M.) 401 authorized any commander who received preferred charges to dismiss or otherwise dispose of charges,⁷² unless that authority had otherwise been withheld or limited by a superior competent authority.⁷³ In practice, this meant

70 See U.S. Dep't of Def., Memorandum from the Secretary of Defense on Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012) [hereinafter Apr. 2012 SecDef Withhold Memo]]. See Part VI Section A of this report for additional discussion.

71 Any superior competent convening authority may withhold categories of misconduct from action by subordinate commanders. In accordance with R.C.M. 401(a), convening authorities across the services regularly exercise this authority with respect to certain serious offenses or offenses committed by officers and senior non-commissioned officers. See *Transcript of RSP Public Meeting 231-36* (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

72 Disposition of charges may include dismissal of charges with no additional action, returning charges to a subordinate commander for action, dismissal of charges with alternate administrative action, referral to a court-martial within that commander's convening authority, or forwarding to the next superior commander with recommendations as to disposition.

73 Individual Services had policies withholding authority to take action for sexual assault offenses prior to implementation of the DoD policy. See *Transcript of RSP Public Meeting 231-32* (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy).

III. LEGISLATION AND POLICY

less senior commanders with limited experience sometimes made disposition decisions for allegations of sexual assault. This is no longer possible.

Contemporaneous with the elevation of the initial disposition authority for certain sexual assault cases, the Secretary of Defense announced four other initiatives on April 17, 2012, that impacted commander roles and responsibilities in sexual assault prevention and response:⁷⁴

- Require explanation of sexual assault policies to all Service members within 14 days of their entrance on active duty.
- Mandate wide publication of information on sexual assault resources.
- Require commanders to conduct annual organization climate assessments.⁷⁵ *Section 572(a)(3) of the FY13 NDAA codified this policy. Section 1721 of the FY14 NDAA subsequently amended Section 572 of the FY13 NDAA to add a requirement that the Secretary of Defense direct the Secretaries of the Military Departments to verify and track compliance of commanding officers in conducting organizational climate assessments.*
- Enhance training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters. *Section 574 of the FY13 NDAA codified commander sexual assault prevention and response (SAPR) training requirements.*

The Secretary of Defense announced additional expanded sexual assault prevention efforts on September 25, 2012. Specifically, the Secretary ordered the Services to develop training programs for core competencies and methods of assessment, requiring each Service to: (1) provide a dedicated, two-hour block of SAPR training in all pre-command and senior enlisted leader training courses, (2) provide commanders a SAPR “quick reference” program and information guide, (3) assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts, and (4) develop and implement refresher training for sustainment of SAPR skills and knowledge.⁷⁶

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCMJ.⁷⁷ Following this review, the Secretary directed the Office of General Counsel to draft proposed legislation that amends Article 60. The proposal eliminated convening authority discretion to change courts-martial findings except for certain offenses and required convening authorities to explain in writing any changes made to courts-martial sentences.⁷⁸ Section 1702 of the FY14 NDAA codified this proposal.

74 U.S. Dep’t of Def., News Release, Secretary Panetta Remarks on Capitol Hill (Apr. 17, 2012); see also DoD, “Initiatives to Combat Sexual Assault in the Military,” at <http://www.defense.gov/news/DoDSexualAssault.pdf>.

75 Service policies previously mandated organizational climate assessments, but the policy standardized the requirement across all Services. See *infra* Part VIII, Section C.

76 U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Evaluation of Pre-Command Sexual Assault Prevention and Response Training (Sept. 25, 2012).

77 U.S. Dep’t of Def., News Release, Statement from Secretary Hagel on Sexual Assault Prevention and Response (Apr. 8, 2013).

78 *Id.*

On May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan and announced six additional measures that impacted commander roles and responsibilities in sexual assault prevention and response:⁷⁹

- Align military Services' programs with a revised SAPR strategic plan.
- Develop methods to hold military commanders accountable for establishing command climate. *Section 1751 of the FY14 NDAA provided a sense of Congress that commanders are responsible for creating a command climate free of retaliation.*
- Implement methods to improve victim treatment by their peers, coworkers, and chains of command.
- Require that commanders receive copies of their subordinate commanders' annual command climate surveys.
- Improve effectiveness of SAPR programs in recruiting organizations.
- Mandate comprehensive and regular visual inspections of all DoD workplaces, including military academies.

In response to the initiative requiring Service Secretaries to develop methods to assess performance of military commanders in establishing an appropriate command climate, each of the Services announced plans to modify annual performance evaluation programs so evaluations explicitly address the commander's execution of this responsibility.⁸⁰ At the November 20, 2013 Subcommittee meeting, each Service detailed plans to incorporate assessments into personnel systems, including plans for revising Service regulations and individual personnel evaluations.⁸¹

On August 14, 2013, the Secretary of Defense directed five additional SAPR measures that impact commander and convening authority roles and responsibilities in sexual assault prevention and response:⁸²

- Require the DoD General Counsel to draft language for an executive order that would amend the Manual for Courts Martial to provide victims of crime the opportunity to provide input in the post-trial action phase of courts-martial. *Section 1706 of the FY14 NDAA codified this requirement.*

79 U.S. Dep't of Def., News Release, Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy From the Pentagon (May 7, 2013); see also U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013).

80 See U.S. Dep't of the Air Force, Memorandum from the Acting Secretary of the Air Force to the Secretary of Defense on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013); U.S. Dep't of the Army, Memorandum from the Secretary of the Army to the Secretary of Defense on Sexual Assault Prevention and Response (SAPR) – Enhanced Commander Accountability (Nov. 1, 2013); U.S. Dep't of the Navy, Memorandum from the Secretary of the Navy to the Secretary of Defense on Report on Enhancing Commander Accountability (Oct. 28, 2013); U.S. Marine Corps, Memorandum from the Deputy Commandant for Manpower and Reserve Affairs to the Secretary of the Navy on Enhancing Commander Accountability (Sept. 19, 2013). Service requirements for how to assess and document commander oversight of unit climate in performance evaluations differ. See *infra* Part VIII, Section C.

81 *Transcript of RSP RoC Subcommittee Meeting* 189–282 (Nov. 20, 2013) (testimony of senior Service personnel representatives).

82 U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013).

- Require the Services to develop an enhanced protection policy that would allow the administrative reassignment or transfer of a member accused of committing a sexual assault or related offense. *Section 1713 of the FY14 NDAA codified this requirement.*
- Require consistent policies prohibiting inappropriate relations between trainers and trainees and recruiters and recruits across the Services. *Section 1741 of the FY14 NDAA codified this requirement.*
- Require the DoD Inspector General to evaluate the adequacy of closed sexual assault investigations on a recurring basis.
- Develop standard policy across the Services requiring status reports of unrestricted sexual assault allegations and actions taken to the first general/flag officer within the chain of command.

C. PROPOSED LEGISLATION

Following the broad reforms in the FY14 NDAA, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress made with respect to sexual assault prevention and response. This report is due to the President by December 1, 2014.⁸³ The President indicated he will consider additional reforms to the military justice system if significant improvements are not realized by that time.⁸⁴

Meanwhile, increased scrutiny of the military's handling of sexual assault cases has prompted several attempts to enact statutory change to the convening authority vested in certain senior military commanders. Some proposed legislation would divest commanders of convening authority for sex-related offenses, while other proposals seek to divest commanders of convening authority for most major crimes. Some members of Congress believe the convening authority vested in military commanders is central to the administration of military justice and must be retained.⁸⁵ These legislators propose additional enhancements to the sexual assault prevention and response activities of the U.S. military and other modifications to the UCMJ that do not alter convening authority responsibilities.

1. Sexual Assault Training Oversight and Prevention Act

On November 16, 2011, Representative Jackie Speier (D-CA) introduced H.R. 3435, the Sexual Assault Training Oversight and Prevention Act (STOP Act).⁸⁶ The bill was not passed during the 112th Congress. On April 17, 2013, Representative Speier reintroduced the STOP Act as H.R. 1593.⁸⁷ The STOP Act proposes to remove reporting, oversight, investigation and victim care of sexual assaults from the military chain of command and place jurisdiction in the newly created, autonomous Sexual Assault Oversight and Response Office.⁸⁸

83 The White House, Statement by the President on Eliminating Sexual Assault in the Armed Forces (Dec. 20, 2013).

84 *Id.*

85 See generally Part VII, Section C, for discussion of arguments advocating against change in commander roles in military justice actions.

86 H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2011).

87 H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevention Act (2013).

88 *Id.*

In addition, the STOP Act would create a Sexual Assault Oversight and Response Council, composed primarily of civilians “independent from the chain of command within the Department of Defense,” which would oversee the Sexual Assault Oversight and Response Office and appoint a Director of Military Prosecutions.⁸⁹ The Director of Military Prosecutions would have independent and final authority to oversee the prosecution of all sex-related offenses committed by a member of the Armed Forces, and to refer such cases to trial by courts-martial.⁹⁰ All other offenses under the UCMJ would remain under the current system. For discussion of arguments for and against changes to commander’s disposition authority in military justice actions, see Part VII, Sections B and C, respectively.

The STOP Act has not been enacted by Congress. The bill has 148 co-sponsors and remains pending in the House Armed Services Committee, Military Personnel Subcommittee.⁹¹

2. Military Justice Improvement Act of 2013

On May 16, 2013, Senator Kirsten Gillibrand (D-NY) introduced S. 967, the Military Justice Improvement Act of 2013 (MJIA). In contrast to the STOP Act, the MJIA proposed divesting convening authority from commanders for most serious crimes, not just sex-related offenses, and placing that authority in military legal officers in the grade of O-6 or above who meet certain specified criteria.⁹²

Under the MJIA, disposition authority for “covered offenses”⁹³ that are not “excluded offenses”⁹⁴ would no longer be vested in senior commanders in the chain of command who have authority to convene courts-martial. Instead, decisions whether to refer charges to trial by court-martial would be made by a new cadre of judge advocates, assigned by the Chiefs of the Services, who are independent of the chains of command of victims and those accused.⁹⁵ Senator Gillibrand’s rationale for this proposal was to shift prosecution decision-making authority for “serious crimes akin to a felony” to non-biased, “professionally trained” military prosecutors, while leaving disposition authority for “37 serious crimes that are unique to the military . . . , such as insubordination or going absent without leave” and less serious crimes punishable by less than one year of confinement, to the chain of command.⁹⁶

89 *Id.* at § 189(e).

90 Under the STOP Act, sexual-related offenses include rape, sexual assault, aggravated sexual contact, abusive sexual contact, indecent assault, nonconsensual sodomy, “any other sexual-related offense the Secretary of Defense determines should be covered,” and attempts to commit these offenses. See *id.* at § 940A(c).

91 Library of Congress, “Summary: H.R. 1593 – 113th Congress (2013–2014),” at <http://beta.congress.gov/bill/113th-congress/house-bill/1593?q=%7B%22search%22%3A%5B%22Speier%22%5D%7D>.

92 S. 967, 113th Cong., Military Justice Improvement Act of 2013 (2013) [hereinafter S. 967].

93 “Covered offenses” under the MJIA include offenses under the Uniform Code of Military Justice that are triable by court-martial and for which the maximum punishment authorized includes confinement for more than one year, unless otherwise excluded. Covered offenses under the current version of the MJIA (S. 1752) include conspiracy to commit such an offense under Article 81; solicitation for such an offense under Article 82; or attempt to commit such an offense under Article 80. S. 1752, 113th Cong., Military Justice Improvement Act of 2013, § 2(a)(2) (2013) [hereinafter S. 1752].

94 “Excluded offenses” under S. 967 included offenses under Articles 83 through 91, Articles 93 through 117, and Article 133. S. 967, § 2(a)(2). “Excluded offenses” under the current version of the MJIA (S. 1752) include offenses under Articles 83 through 117 and Articles 133 and 134 of the UCMJ, conspiracy to commit such an offense under Article 81, solicitation for such an offense under Article 82; or attempt to commit such an offense under Article 80. S. 1752, § 2(a)(3).

95 S. 1752, 113th Cong., Military Justice Improvement Act of 2013, § 3 (2013).

96 *Transcript of RSP Public Meeting* 308–09 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

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The Subcommittee heard testimony about technical challenges with S. 967.⁹⁷ Among the criticisms presented to the Subcommittee, the proposal appeared to create a bifurcated system where some crimes (covered offenses) were removed to a separate system for prosecution and others remained under the current system, at times with illogical outcomes. For example, an attempt to commit rape under Article 80 would be tried under the current system and a rape under Article 120 (which is a covered offense) would be tried in this new system.⁹⁸ The proposal also included no mechanism for combining covered and not-covered offenses that arose out of the same alleged criminal acts into one prosecution system. Consequently, it was unclear how multiple offenses arising out of the same alleged criminal conduct would be addressed.⁹⁹ This uncertainty raised due process concerns, with the potential for delayed trials and double jeopardy issues.

The Senate Armed Services Committee did not include the MJIA in its mark of the FY14 NDAA. On November 18, 2013, Senator Gillibrand filed an amended version of the MJIA.¹⁰⁰ The amendment addressed technical criticisms levied against S. 967 but retained the bill's primary feature of transferring convening authority for most serious crimes to independent, senior judge advocates.¹⁰¹ The amendment was not enacted as part of the FY14 NDAA. On November 20, 2013, Senator Gillibrand filed the MJIA as a stand-alone bill, S. 1752. On Thursday, March 6, 2014, the Senate, on a 55 to 45 vote, rejected a motion for cloture on the MJIA, which precluded the Senate from voting on the underlying bill.¹⁰² The MJIA remains pending in the Senate and Senator Gillibrand could try to incorporate it, or another version of it, into the next defense authorization bill.

Under the revised version of the MJIA, the decision by the new disposition authority to try covered offenses by courts-martial must include determinations with regard to "all known offenses."¹⁰³ This provision purports to ensure joinder for trial of all offenses arising out of the same criminal transaction, including lesser-included offenses and offenses that would otherwise be subject to a commander's convening and disposition authority (i.e., excluded offenses). As Senator Gillibrand explained: "We were also asked about crimes that happen simultaneously—for example, what if during a sexual assault, crimes are also committed that fall under the old system? In order to clarify any confusion about this question, the amendment says that all known crimes will be charged under the new system."¹⁰⁴ The MJIA provides that the determination by the proposed judge advocate disposition authority "to try" covered offenses by court-martial is binding on "any applicable convening authority for a trial by court-martial" as to those charges.¹⁰⁵

The MJIA requires each Service Chief or Commandant (for the Marine Corps and Coast Guard) to establish an office (Section 3(c) Office) to convene general and special courts-martial for covered offenses, and to

97 See generally *Transcript of RSP RoC Subcommittee Meeting* (Nov. 13, 2013).

98 S. 967, 113th Cong., Military Justice Improvement Act of 2013, § 2 (2013).

99 See *Transcript of RSP RoC Subcommittee Meeting* 69–70 (Nov. 13, 2013) (testimony of Brigadier General Charles Pede, U.S. Army).

100 S. 1197, § 552, amend. no. 2099 (2013).

101 See Senator Kirsten E. Gillibrand, Floor Speech on Technical Issues [hereinafter Floor Speech], at <http://www.gillibrand.senate.gov/mjia/technical-fixes>.

102 See Senate Rule XXII, available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXII>. Cloture is the procedure by which the Senate can vote to end debate on a bill without rejecting the bill; if cloture is invoked, a bill may proceed to a vote. The majority required to invoke cloture on this motion was 60 Senators.

103 S. 1752, § 2(a)(4)(C).

104 See Floor Speech, *supra* note 101.

105 S. 1752, § 2(a)(4)(D).

detail members to those courts-martial (responsibilities assigned currently to the convening authority).¹⁰⁶ The authority to convene general courts-martial under Article 22 of the UCMJ would be amended to add two additional convening authorities: (1) officers in the Section 3(c) Office and (2) officers in the grade of O-6 or higher who are assigned such responsibility by the Service Chief or Commandant. This new convening authority would have authority only with respect to covered offenses.¹⁰⁷

The MJIA mandates that staff for the Section 3(c) Office must be detailed or assigned to the office from billets already in existence on the date of enactment of the Act, and no additional resources are authorized for implementation of the Act.¹⁰⁸ For implementation of any legislation that creates additional structure, resources are an issue of primacy. For example, Section 1716 of the FY14 NDAA codified the Special Victim Counsel (SVC) program.¹⁰⁹ Unlike the current version of the MJIA, however, Section 1716 did not contain a prohibition of additional resources for implementation.¹¹⁰ In fact, to assist with the cost of staffing and operation, Congress specifically appropriated funds to the DoD to implement the SVC program.¹¹¹

DoD leadership expressed to the RSP that implementing a new convening authority for covered offenses as proposed by the MJIA would involve “significant personnel and administrative costs” and would remove senior O-6 judge advocates from other critical responsibilities. DoD expressed concern that developing “a sufficient number of O-6 judge advocates with significant trial experience while maintaining other critical competencies would take years.”¹¹² Additionally, the DoD Office of Cost Assessment and Program Evaluation (CAPE) estimated the additional personnel required for the MJIA would cost \$113 million dollars per year.¹¹³ Without endorsing the CAPE assessment, the Subcommittee recognizes the substantial likelihood that additional resources will be required to effectively implement the requirements of the MJIA.

3. Victims Protection Act of 2014

On January 14, 2014, Senator Claire McCaskill filed the Victims Protection Act of 2014 (VPA), which seeks to provide additional enhancements to the sexual assault prevention and response activities of the Armed Forces.¹¹⁴ On March 10, 2014, the Senate unanimously passed the VPA. The VPA contains three provisions that impact military commanders or convening authorities:

Section 2 of the VPA modifies Section 1744 of the FY14 NDAA to mandate Secretarial review of referral decisions where the senior trial counsel believes a case should be referred to court-martial and the convening authority decides to not refer the case, in addition to Section 1744’s mandate when the SJA differs similarly

106 *Id.* at § 3(c).

107 *Id.* at § 3(a).

108 *Id.* at § 2(a)(4)(c).

109 FY14 NDAA, Pub. L. No. 113-66, § 1716, 127 Stat. 672 (2013).

110 *Id.*

111 See Consolidated Appropriations Act for Fiscal Year 2014, Pub. L. No. 113-76, § 8124, 128 Stat. 5 (2014).

112 *Letter from the Assistant Secretary of Defense for Legislative Affairs to the Honorable Barbara Jones, Chair, RSP* (Jan. 28, 2014), currently available at <http://responsesystemspanel.whs.mil/index.php/pubcomment-gen>.

113 *Letter from the Judge Advocates General to Senator Carl Levin, Chair, Senate Armed Services Committee (SASC)* (Oct. 28, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131113_ROC/07_JointTJAG_Ltr_SenLevin.PDF.

114 S. 1917, 113th Cong., Victims Protection Act of 2014 (2014) [hereinafter S. 1917].

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from the convening authority. The DoD expressed concerns with this provision, explaining that it believes such review is not warranted where the SJA has thoroughly reviewed a case, consulted with the assigned trial counsel and recommended non-referral.¹¹⁵

While a contrary opinion from a staff judge advocate regarding a GCMCA's decision not to refer a sexual-related offense to court-martial may warrant Secretarial review, it is not clear that the same deference should be afforded in response to a senior trial counsel's disagreement over disposition. In nearly all circumstances, the "senior trial counsel" assigned to a case is a judge advocate with significantly less experience than the staff judge advocate advising the convening authority. The policy implications of allowing the opinion of a senior trial counsel, when he or she believes a case should be referred to courts-martial and the SJA and convening authority disagree, to trigger Secretarial level review seems patently unwise. Further, it is unlikely that the Service Secretary, who is more removed from the circumstances of the case, will be better positioned to determine an appropriate outcome than the original convening authority.

Section 3(c) of the VPA requires an assessment of SAPR program support in all performance appraisals, and the performance appraisals of commanding officers must specifically indicate the extent to which the commanding officer has or has not established a command climate in which allegations of sexual assault are properly managed and fairly evaluated and a victim can report criminal activity, including sexual assault, without fear of retaliation.¹¹⁶

Section 3(d) of the VPA requires the chain of command of both the victim and the accuse to conduct a command climate assessment following any incident involving a covered sexual offense. The assessment must be provided to the MCIO conducting the investigation of the offense concerned and the next higher-level commander.¹¹⁷

The DoD expressed concerns with Section 3(d). While DoD believes command climate assessments are an important tool, the Department is concerned that requiring a command climate survey after every report of an alleged sexual assault could lead to survey fatigue and resentment against victims for reporting offenses.¹¹⁸

Evaluating a unit's culture or climate may be helpful or may provide relevant information in some criminal investigations, but it is not clear to the Subcommittee 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.

115 *Letter from the Assistant Secretary of Defense for Legislative Affairs to Senator Carl Levin, Chair, SASC* (undated), currently available at <http://responsesystemspanel.whs.mil/index.php/pubcomment-gen>.

116 S. 1917, § 3(c).

117 *Id.* at § 3(d). For additional discussion on requirements for command climate assessments, see Part VIII, *infra*, of this report.

118 *Letter from the Assistant Secretary of Defense for Legislative Affairs to Senator Carl Levin, Chair, SASC* (undated), currently available at <http://responsesystemspanel.whs.mil/index.php/pubcomment-gen>.

D. PART III SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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).

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.

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 sexual-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.

Recommendation 3: Congress should not adopt Section 3(d) of the VPA. 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

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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.

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.

IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

Experts agree that sexual violence is learned and is fed by cultural norms such as dominance over others and the objectification of women.¹¹⁹ Sexual violence in the military is no different: solving the military's sexual assault problem "will require an integrated effort that includes a cultural transformation within the armed forces, education and training to recognize and prevent sexual assaults, [and] structural and organizational changes to reduce the opportunities for" their occurrence.¹²⁰ Accordingly, Section 585 of the FY12 NDAA required the Service Secretaries to develop a curriculum "to provide sexual assault prevention . . . training and education for members of the Armed Forces . . . to strengthen individual knowledge, skills, and capacity to prevent" sexual assault. Section 585 further directed that curriculum development include consultation with outside experts on sexual assault prevention training.¹²¹

While they may disagree as to the exact extent of commanders' responsibility within the military justice system, policymakers within and outside of DoD agree commanders play a central role in DoD's prevention efforts.¹²² To

119 See, e.g., *Transcript of RSP Public Meeting* 49-50 (June 27, 2013) (testimony of Ms. Delilah Rumberg, Executive Director, Pennsylvania Coalition Against Rape); accord *Transcript of RSP Public Meeting* 87-89 (Dec. 12, 2013) (testimony of Ms. Anne Munch, Owner, Anne Munch Consulting, Inc.).

120 *Transcript of RSP Public Meeting* 18-19 (Sept. 24, 2013) (testimony of Professor Christopher W. Behan, Southern Illinois University School of Law); accord *Transcript of SASC Hearing* 19 (June 4, 2013) (testimony of Admiral Robert J. Papp, Jr., Commandant, U.S. Coast Guard) (noting that prevention "is the first and best option"); *Transcript of Briefing on Sexual Assault in the Military, U.S. Comm'n on Civil Rights* 162 (Jan. 11, 2013) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office [hereinafter SAPRO]) ("Any effective strategy to combat sexual assault must include prevention.").

121 FY12 NDAA, Pub. L. No. 112-81, § 585(a), 125 Stat. 1298 (2011) (references to sexual assault response omitted to emphasize prevention references).

122 As the Deputy Director of DoD SAPRO testified before the Subcommittee, "Commanders and leaders are the center of gravity and the most important actors in th[e prevention] line of effort." *Transcript of RoC Subcommittee Meeting* 92 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO); *id.* at 23 (noting that "it's critical for commanders and leaders to be part of the solution because climate is a big part of it"). See also *Transcript of RSP Public Meeting* 19-20 (Sept. 24, 2013) (testimony of Professor Christopher W. Behan, Southern Illinois University School of Law) ("[N]o plan to resolve the crisis will succeed without the active involvement of military commanders in all phases of the problem from prevention to punishment."); *Transcript of RSP Public Meeting* 213 (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino, The Judge Advocate General, U.S. Army) ("It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders . . . It is commanders' focus, involvement, and emphasis that will bring the change in the culture we seek."); *Written Statement of Protect Our Defenders to RSP* 3 (Sept. 17, 2013) (arguing that removing convening authority from commanders would "free[] [them] to focus on preventing sexual assault"); *Transcript of SASC Hearing* 75 (June 4, 2013) (testimony of Colonel Tracy W. King, U.S. Marine Corps) ("Preventing sexual assault in my regiment is my personal responsibility."); *Transcript of Briefing on Sexual Assault in the Military, U.S. Comm'n on Civil Rights* 100-01 (Jan. 11, 2013) (testimony of Professor Victor Hansen, New England School of Law) ("[C]ommanders [must] do all that is reasonable and within their power and authority to investigate, prevent and suppress these sexual assault crimes within their ranks."); *Letter from Representatives of Government Accountability Office to The Honorable Louise M. Slaughter, Ranking Member, Committee on Rules, House of Representatives* (Mar. 30, 2012) ("DOD

ensure commanders are adequately trained to address these responsibilities, Section 585 directed the Secretary of Defense to “provide for the inclusion of a sexual assault prevention and response training module at each level of professional military education” and that the training “shall be tailored to the new responsibilities and leadership requirements of members of the Armed Forces as they are promoted.”¹²³

A. CONSENSUS AND DEBATES IN CURRENT PREVENTION RESEARCH

Generally speaking, the field of sexual violence prevention remains under-resourced, with budgets that “are not terribly deep.”¹²⁴ In the words of one behavioral science expert who testified before the Response Systems Panel, “there’s more that we don’t know than we know” about preventing sexual violence; “[w]e’re experts in a few things [] and ignorant about most.”¹²⁵ At its February 12, 2014 meeting, the Subcommittee heard testimony and received information outlining the best available science on preventing sexual violence from representatives from the Division of Violence Prevention of the Centers for Disease Control and Prevention (CDC), “the lead federal organization for violence prevention.”¹²⁶ Practitioners and academic researchers provided additional testimony and information at the meeting, including several presenters who had worked with the Services and/or studied the adaptation of prevention programs to military settings. From these sources, the Subcommittee gained valuable insight into the risk and protective factors for sexual violence, as well as effective prevention strategies and how best to implement them.

1. Public Health Approach to Sexual Assault Prevention

The CDC defines sexual violence as a public health problem.¹²⁷ Accordingly, prevention strategies involve three essential elements, consistent with approaching any threat to the public health such as those posed by life-threatening communicable diseases like HIV and tuberculosis. First, prevention efforts are directed at

and the military services rely largely on Commanders and Sexual Assault Response Coordinators to implement SAPR programs at military installations, including the coordinating and reporting of sexual assault incidents.”), *available at* <http://www.gao.gov/assets/590/589780.pdf>.

123 FY12 NDAA, Pub. L. No. 112-81, § 585(b), 125 Stat. 1298 (2011).

124 *Transcript of RoC Subcommittee Meeting* 56 (Feb. 12, 2014) (testimony of Ms. Elizabeth Reimels, Public Health Analyst, CDC Division of Violence Prevention).

125 *Transcript of RSP Public Meeting* 21 (Dec. 11, 2013) (testimony of Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School).

126 CDC, “Violence Prevention at CDC,” <http://www.cdc.gov/violenceprevention/overview/index.html>. The CDC’s research on the prevention of sexual assault is routinely consulted by federal policymakers. See, e.g., THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 27-32 (Jan. 2014) [hereinafter WHITE HOUSE REPORT].

127 While the CDC refers to “sexual violence” instead of “sexual assault,” the term used by DoD SAPRO, both terms are defined broadly so as to include sexual acts committed or attempted without the victim’s freely given consent. *Compare Transcript of RoC Subcommittee Meeting* 14-15 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC), with *Transcript of RSP Public Meeting* 96 (June 27, 2013) (testimony of Major General Gary Patton, Director, DoD SAPRO) (noting that “sexual assault” encompasses the statutory offenses of rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, and attempts to commit these offenses). Although the CDC includes within its definition of “sexual violence” certain non-contact offenses such as coerced viewing of pornography, the CDC has begun to use the term “contact sexual violence” in the context of military sexual assault to more closely align with the DoD definition. NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, PREVALENCE OF INTIMATE PARTNER VIOLENCE, STALKING, AND SEXUAL VIOLENCE AMONG ACTIVE DUTY WOMEN AND WIVES OF ACTIVE DUTY MEN – COMPARISONS WITH WOMEN IN THE U.S. GENERAL POPULATION, 2010: TECHNICAL REPORT 10 (Mar. 2010) [hereinafter NCIPC TECHNICAL REPORT]; *Transcript of RoC Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).

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the entire population. Second, partnerships are emphasized, as multiple levels of society are simultaneously targeted. Third, decisions and policies are driven by scientific data.¹²⁸

The public health approach translates these strategic elements into a workable model for sexual violence prevention. First, the nature, magnitude, and burden of sexual violence are defined. Second, risk factors (those factors that increase the risk of sexual violence) and protective factors (factors that either decrease the risk of sexual violence or buffer the effect of a risk factor) for sexual violence are identified. Third, prevention strategies that address the risk and protective factors are tested and developed, and successful strategies are identified and widely adopted.¹²⁹

As part of its approach, the CDC employs a sexual violence prevention framework called the social-ecological model. The social-ecological model recognizes four distinct levels or settings at which risk factors can occur: (1) the individual; (2) family/peer; (3) community; and (4) societal. Because risk factors can occur in each of these contexts, the social-ecological model envisions multiple strategies across multiple levels. This comprehensive approach creates a “surround sound” effect, such that people hear the same message in multiple ways from multiple influencers.¹³⁰

While it focuses on “primary prevention” strategies that target potential perpetrators, the CDC recognizes that strategies geared toward different or wider audiences may be effective, depending on particular risk and protective factors involved.¹³¹ For example, victim-focused strategies can “show some positive effects”; these programs stress risk reduction by teaching potential victims how to protect themselves from perpetrators.¹³² As described below, the CDC also recognizes “promising” approaches that target potential bystanders, appealing to the wider audience of the peer groups that are at risk for sexual violence.¹³³

2. Myths and popular misconceptions about sexual violence

The CDC noted that some sexual violence prevention strategies reflect popular beliefs and common understandings that may not provide an accurate, scientifically based assessment of sexual violence issues. For example, the CDC underscores the following common misconceptions about sexual violence:

128 *Transcript of RoC Subcommittee Meeting 7-8* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

129 *Id.* at 8-9, 17.

130 *Id.* at 9-14, 36. In addition to comprehensiveness, as the “best practices” of prevention, the CDC recommends that prevention programs: be based on theory and research; promote positive relationships; be appropriately timed in participants’ development; use varied teaching methods; reflect the culture of participants; use evaluation to assess impact and effects; employ well-trained staff; and be of sufficient dosage. *Id.*; accord National Sexual Violence Resource Center, “Resources for Sexual Violence Preventionists: Resource Packet: Intro” (2012); see also Andra Teten Tharp, *Preventing Sexual Violence Perpetration* 10-11 (Feb. 12, 2014) (PowerPoint presentation to RoC Subcommittee) [hereinafter CDC PowerPoint Presentation].

131 *Transcript of RoC Subcommittee Meeting 9-10, 16-17* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); *Letter from Scott Berkowitz and Rebecca O'Connor, RAINN (Rape, Abuse & Incest National Network) to White House Task Force to Protect Students from Sexual Assault* (Feb. 28, 2014), available at <http://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf>.

132 *Transcript of RoC Subcommittee Meeting 73* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

133 *Id.* at 72-76. When reviewing evaluations of a given program to determine whether it is effective, the CDC considers such factors as whether positive changes can be attributed to the program, whether changes in behavior resulted rather than merely changes in attitude, and whether such behavioral effects are sustained over time. When existing evaluations do not quite prove that a program meets such requirements but that it warrants continued research, the CDC deems such a program “promising.” *Id.* at 24-25.

- **'Sexual violence is perpetrated by relatively few men.'**¹³⁴ While 6 to 10 percent of men in some sexual violence surveys respond that they perpetrated rape, the self-report rate climbs to 25 to 50 percent of male respondents when sexual violence is defined more inclusively.¹³⁵ This dramatic difference in potential perpetrator risk justifies a public health approach where prevention efforts are universally directed toward the entire population. Moreover, because re-perpetration may be less common than conventional wisdom suggests, "there are so many more opportunities for prevention" beyond "a criminal justice kind of response."¹³⁶
- **'Perpetrators of sexual violence tend to fit a certain profile.'**¹³⁷ According to Dr. David Lisak, an expert on sexual violence whose research focuses on rape, "decades of social science research and media coverage [] have focused on the tiny handful of rapists whose crimes are reported by victims and who are then subsequently successfully prosecuted."¹³⁸ As Dr. Lisak explains, many of these incarcerated rapists "committed acts of grievous violence, inflicting gratuitous injuries on victims," many of whom were "total strangers." Resulting media attention spurs "classic" myths about rapists: "they wear ski masks, hide in ambush, attack strangers, and inflict brutal injuries on their victims."¹³⁹ In fact, according to the CDC, 35 different risk factors are associated with sexual violence, meaning perpetrators are actually a dissimilar population whose behavior is not easily explainable or predictable.¹⁴⁰
- **'All perpetrators re-perpetrate.'**¹⁴¹ A March 2014 study found that approximately 70 percent of the known "sex offending population" pose a low to low/moderate risk of reoffending.¹⁴² In contrast, Dr. Lisak contends that perpetrators of rape "tend to be serial offenders" and "are accurately and appropriately labeled as predator," noting that in a 2009 Naval Health Research Center survey where 13 percent of Navy recruits acknowledged having committed rapes, 71 percent of these who

134 *Transcript of RoC Subcommittee Meeting 22* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); see also Anna Mulrine, *US military's new tactic to curtail sexual assaults: nab serial predators*, THE CHRISTIAN SCIENCE MONITOR (Feb. 24, 2014) (noting that DoD "is putting new emphasis on ferreting out serial predators within the ranks, as military officials become increasingly convinced that relatively few people are responsible for the bulk of sex crimes").

135 *Transcript of RoC Subcommittee Meeting 20-21*, 41-47 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); *id.* at 49 (testimony of Sarah DeGue, Ph.D., Behavioral Scientist, Division of Violence Prevention, CDC). *But see Transcript of RSP Public Meeting 20*, 68 (Dec. 11, 2013) (testimony of Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School) (representing that "five percent of men in any given population will commit a sexual assault either one time or many times" and that "there's a small group of people, primarily men, who are creating a vast victim pool in our society, both in the military and outside the military").

136 *Transcript of RoC Subcommittee Meeting 20-21*, 42-47 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); *accord id.* at 49 (testimony of Sarah DeGue, Ph.D.).

137 *Id.* at 22 (testimony of Andra Teten Tharp, Ph.D.).

138 David Lisak, "The Undetected Rapist" (Mar. 2002), at http://www2.binghamton.edu/counseling/documents/RAPE_FACT_SHEET1.pdf.

139 David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 SEXUAL ASSAULT REPORT 49, 50 (2011).

140 *Transcript of RoC Subcommittee Meeting 21* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); see also *Transcript of RSP Public Meeting 37-38* (Dec. 11, 2013) (testimony of Mr. Russ Strand, U.S. Army Military Police School) ("[T]he biggest mistake we've made is that we viewed sex offenders as a group, a homogenous group of people. But they're not. They're as individual as everybody else and they offend for a variety of reasons.").

141 *Transcript of RoC Subcommittee Meeting 22* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

142 *Transcript of Comparative Systems Subcommittee Meeting 40* (Feb. 25, 2014) (testimony of Robin J. Wilson, Ph.D.) (citing R. Karl Hanson, et al., *High Risk Sex Offenders May Not Be High Risk Forever*, JOURNAL OF INTERPERSONAL VIOLENCE (2014)).

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acknowledged committing rape “were serial offenders who committed an average of six sexual assaults.”¹⁴³ Estimating re-perpetration risk may depend in part on the definition of sexual violence that is used, and because studies indicate differing conclusions about re-perpetration, it is important to ensure diverse perspectives help inform prevention strategies.

3. Current gaps in research

As noted, research into sexual violence prevention generally remains under-resourced, precluding research that experts believe is necessary to develop effective programs. A recent CDC review of 191 research studies found that certain areas are particularly under-researched. For example, the community and societal levels of the social-ecological model received relatively little attention.¹⁴⁴ The CDC also found prevention research concentrated on sexual violence perpetrated by male college students against their female peers. There is “very little work” that examines the risk and protective factors that are unique to male-on-male sexual violence.¹⁴⁵

The CDC also noted a need for further research into risk and protective factors that are “military-specific” when compared to the general population. For example, the CDC suggests further study of deployment (in particular, multiple deployments and combat deployments) as a potential military-specific risk factor. Military-specific protective factors warranting additional evaluation include having at least one fully employed family member and access to health care, stable housing, and family support services.¹⁴⁶

143 Lisak, *supra* note 139, at 56 (citing Stephanie K. McWhorter, et al., *Reports of Rape Reperpetration by Newly Enlisted Male Navy Personnel*, 24 VIOLENCE AND VICTIMS 209 (2009)); accord *Transcript of RSP Public Meeting* 39-40 (Dec. 12, 2013) (testimony of Ms. Anne Munch, Owner, Anne Munch Consulting, Inc.) (citing study by Dr. Lisak finding that 63 percent of the six percent of men who admitted in survey that they had committed rape self-reported as serial rapists, and finding that 71 percent of male respondents in military survey self-reported as serial rapists, averaging seven rapes each); *Transcript of RSP Public Meeting* 67 (Dec. 11, 2013) (testimony of Mr. Russ Strand, U.S. Army Military Police School) (representing that “a good part of sex offenders are serial”).

144 *Transcript of RoC Subcommittee Meeting* 17-19 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC); Caroline Lippy and Sarah DeGue, “Summary of Preliminary Findings for Members of the *Response Systems to Adult Sexual Assault Crimes Panel* in the Office of the General Counsel, Department of Defense,” at 1 (unnumbered) (Feb. 13, 2014) (summarizing preliminary findings of review expected to be made publicly available by late 2014 entitled *Using Alcohol Policy to Prevent Sexual Violence Perpetration: A Review of Current Evidence*) [hereinafter Lippy & DeGue Summary].

145 *Transcript of RoC Subcommittee Meeting* 17-20 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

146 NCIPC TECHNICAL REPORT, *supra* note 127, at 2.

4. Effective Prevention Strategies and Programs

Consistent with best practice, an effective public health approach to sexual violence prevention has greater potential to impact behavior to the extent that it applies multiple and varied strategies at the different levels of a given environment. The following diagram provides an example of such a comprehensive approach:¹⁴⁷



Thus, according to the CDC, applying multiple strategies simultaneously in each context has greater potential to impact behavior: conflict resolution and emotion regulation at the individual level; bystander intervention within peer groups; engaged and supportive leadership; instilling cultural change and monitoring of areas reported to feel unsafe at the local level; and introduction of alcohol policies and enforcement of victim protection measures at the societal level. A comprehensive approach employs cohesive and complementary skills and messages such that the strategies build upon one another, creating a “surround sound” effect that permeates the environment.¹⁴⁸

147 CDC PowerPoint Presentation, *supra* note 130, at 43 (bolded headings added for sake of clarity).

148 *Transcript of RoC Subcommittee Meeting* 36-38 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); accord NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, *ENGAGING BYSTANDERS TO PREVENT SEXUAL VIOLENCE: A GUIDE FOR PREVENTIONISTS 2* (2013) [hereinafter NSVRC, *ENGAGING BYSTANDERS*]; see also *Transcript of RoC Subcommittee Meeting* 107-10 (Feb. 12, 2014) (testimony of Ms. Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault) (emphasizing diversity of motivations for individuals' changes in behavior) (“[I]f we really want to be serious about preventing sexual violence, we have to look at it on all these different levels, because some things are going to resonate with some folks, and other things aren’t[.]”); *id.* at 121 (testimony of Victoria L. Banyard, Ph.D., Co-Director, Prevention Innovations, University of New Hampshire) (“[O]ne of the things that we have learned in our research on college campuses is that the same prevention program . . . will have different impacts for different people, based on their level of awareness, their level of motivation for engaging in it.”).

a. Bystander intervention

College campuses increasingly use bystander intervention education, and scientific studies show the military can effectively adapt it.¹⁴⁹ Compared to college campuses, peer groups on installations involve similar high concentrations of young adults aged 18-24 living in relatively small residential spaces, who can encounter similar potential sexual violence risks.¹⁵⁰

Bystander intervention programs teach peer group members how to be “engaged bystanders,” defined by the National Sexual Violence Resource Center (NSVRC) as “someone who intervenes in a positive way before, during, or after a situation or event in which they see or hear behaviors that promote sexual violence.”¹⁵¹ As defined, “bystander intervention” is somewhat of a misnomer, since the approach encourages preventive engagement in addition to interrupting incidents already occurring. The approach shifts prevention responsibility from the potential perpetrator or potential victim to everyone in the community.¹⁵²

Dr. Jackson Katz, co-founder of the successful Mentors in Violence Prevention (MVP),¹⁵³ told the Subcommittee that some prevention programs employ “a very narrow understanding” of bystander intervention, limited to interrupting an incident as it is occurring. In contrast, effective bystander intervention programs encourage peer groups to guard against attitudes, beliefs, and behaviors that contribute to a climate where sexual violence may occur. This spectrum includes language and behaviors including sexist comments, sexually objectifying jokes, and vulgar gestures.¹⁵⁴ Studies show bystander intervention programs can be effective among both male and female participants.¹⁵⁵

b. Alcohol policy

Studies indicate a strong and consistent relationship between alcohol consumption and sexual violence perpetration.¹⁵⁶ Alcohol policy strategies encompass laws and regulations at the local, state, and national level

149 See, e.g., Sharyn J. Potter and Mary M. Moynihan, *Bringing in the Bystander In-Person Prevention Program to a U.S. Military Installation: Results from a Pilot Study*, 176 *MILITARY MEDICINE* 870, 874 (2011) (finding that soldiers who participated in a bystander intervention program on their installation were “significantly more likely to report that they had engaged in” bystander-intervention behaviors); Sharyn J. Potter and Jane G. Stapleton, *Translating Sexual Assault Prevention from a College Campus to a United States Military Installation: Piloting the Know-Your-Power Bystander Social Marketing Campaign*, 27(8) *JOURNAL OF INTERPERSONAL VIOLENCE* 1593, 1613 (2012) (finding that soldiers’ exposure to a bystander-intervention social-marketing campaign increased their sense of responsibility for prevention of sexual assaults on their installation).

150 *Transcript of RoC Subcommittee Meeting 74-75* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); see also *Transcript of RSP Public Meeting 86-89* (Dec. 12, 2013) (testimony of Ms. Anne Munch, Owner, Anne Munch Consulting, Inc.) (endorsing bystander training as “a piece of the prevention model that we don’t focus enough on”).

151 NSVRC, *ENGAGING BYSTANDERS*, *supra* note 148, at 2.

152 *Id.* at 3; see, e.g., Potter and Moynihan, *supra* note 149, at 870; Victorial L. Banyard, et al., *Sexual Violence Prevention through Bystander Education: An Experimental Evaluation*, 35: 4 *J. OF CMTY. PSYCHOLOGY* 463, 464 (2007).

153 Evaluations find the MVP program effective in both college and high school environments, and promising as adapted in the Navy and Marine Corps, especially among E-1 to E-3 participants. NSVRC, *ENGAGING BYSTANDERS*, *supra* note 148, at 13. For more information about the history and development of the MVP program, see Jackson Katz, “Penn State: The mother of all teachable moments for the bystander approach” (Dec. 1, 2011), at http://nsvrc.org/news/Jackson-Katz-Series_Penn-State-Teachable-moment, and NSVRC, *ENGAGING BYSTANDERS*, *supra* note 148, at 12-13.

154 *Transcript of RoC Subcommittee Meeting 86-89* (Feb. 12, 2014) (testimony of Jackson Katz, Ph.D.); Katz, *supra* note 153.

155 See, e.g., Victoria L. Banyard, et al., *Sexual Violence Prevention through Bystander Education: An Experimental Evaluation*, 35: 4 *J. OF CMTY. PSYCHOLOGY* 463, 477-79 (2007).

156 *Transcript of RoC Subcommittee Meeting 34* (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); Lippy & DeGue Summary, *supra*

intended to regulate or modify the production, sale, and consumption of alcohol.¹⁵⁷ Extrapolating from a recent study of programs for middle and high school students, the CDC identified alcohol policy as another domain where promising programs may be applicable to military settings.¹⁵⁸

The CDC identified three alcohol policy strategies that appear to reduce consumption and, in turn, reduce incidence of sexual violence:

- **pricing strategies:** Increasing the price of alcohol is associated with reduced rates of rape and sexual assault, as well as risk factors such as risky sexual behaviors.
- **outlet density:** Decreasing the number of locations where alcohol is served or sold in a given area is associated with lower rates of self- and police-reported sexual violence, as well as risk factors such as hostility and aggression.
- **college campus restrictions:** Campus-wide bans of alcohol are associated with lower rates of on-campus sexual violence. In addition, substance-free dorms have been linked to a lower incidence of rape and sexual assault in the dating context.¹⁵⁹

The CDC considers these alcohol policy strategies promising based on study evidence. Studies focused on civilian universities, but the CDC believes they may be similarly promising in military settings, given demographic and risk factor similarities.¹⁶⁰

Identifying populations with heightened vulnerability

In addition to alcohol consumption, studies increasingly identify prior victimization as a sexual violence risk factor. Studies show that individuals, especially women, who are sexual assault victims are significantly more likely to suffer sexual victimization again later in life. One study found that more than one third of women raped as minors were also raped as adults. The 2012 Workplace and Gender Relations Survey conducted by the Defense Manpower Data Center found that 45 percent of women and 19 percent of men who experienced unwanted sexual contact in the past 12 months also experienced unwanted sexual contact before entering the military.¹⁶¹

note 144, at 1.

157 Lippy & DeGue Summary, *supra* note 144, at 1.

158 *Transcript of RoC Subcommittee Meeting* 31-34 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., observing that "approximately half of sexual assaults involve consumption of alcohol, 34 to 74 percent of sexual violence perpetrators used alcohol at the time of assault, and men who drink heavily are more likely to report committing sexual assault"); see also Lippy & DeGue Summary, *supra* note 144, at 1.

159 *Transcript of RoC Subcommittee Meeting* 34-35, 41 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); *id.* at 65-66 (testimony of Sarah DeGue, Ph.D., Behavioral Scientist, Division of Violence Prevention, CDC); Lippy & DeGue Summary, *supra* note 144, at Table 1; see also CDC PowerPoint Presentation, *supra* note 130, at 39-41.

160 *Transcript of RoC Subcommittee Meeting* 74-75 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.). *But see id.* at 342 (testimony of Command Sergeant Major Pamela Williams, U.S. Army) ("I would say even if we . . . raised the price, you know, made it limited hours, I mean, soldiers would still, you know, they're able to drive off-post, they would be able to acquire it in some manner."); *id.* at 343 (testimony of Senior Master Sergeant Patricia Granan, U.S. Air Force) (noting that after alcohol was banned in barracks at one installation, sexual assaults ceased on base but increased off base); *id.* at 344-45 (testimony of Sergeant Major Mark Allen Byrd, Sr., U.S. Marine Corps) (observing that enlisted Marines often find ways to get around alcohol restrictions).

161 WHITE HOUSE REPORT, *supra* note 126, at 9 & n.8 (citing NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL, NATIONAL INTIMATE PARTNER AND SEXUAL

Different theories seek to explain re-victimization levels. For example, once sexually assaulted, some survivors may initiate risky behavior such as heavy drinking to cope with resulting mental health issues, thereby putting themselves at increased risk for subsequent sexual assault.¹⁶² Other survivors may experience cognitive changes in how they perceive risk.¹⁶³ Programs that focus on survivors of sexual assault are a “secondary prevention” strategy.¹⁶⁴ For participants to be receptive to such programs, instruction must teach risk-reduction techniques in a way that avoids unintentional victim-blaming messages.¹⁶⁵

The Subcommittee also heard evidence that men who experienced physical abuse as children are more likely to perpetrate rape against women than those who were not abused.¹⁶⁶ This suggests opportunities to develop programs that help survivors of prior sexual assault and individuals at heightened risk for perpetration understand the consequences of prior victimization.

B. DOD SEXUAL ASSAULT PREVENTION EFFORTS

1. Evolution of DoD's Approach to Prevention

DoD established the Sexual Assault Prevention and Response (SAPR) program in 2005 “to promote prevention, encourage increased reporting of the crime, and improve response capabilities for victims.”¹⁶⁷ In July 2007, DoD SAPRO held its first Prevention Summit, a three-day meeting of DoD leadership, military SAPR program managers, and experts recommended by the NSVRC, including representatives from the CDC and the California Coalition Against Sexual Assault.¹⁶⁸ The Summit focused on a unified DoD approach to preventing sexual assault. The Pennsylvania Coalition Against Rape, with which SAPRO entered into a contract in 2006, issued a white paper that reported information from the Summit. The white paper informed DoD’s 2008 Prevention Strategy, which was authored under contract by two non-DoD experts. The 2008 Prevention Strategy outlined a comprehensive blueprint for DoD’s prevention efforts.¹⁶⁹

VIOLENCE SURVEY (2010)); DoD SAPRO, *Sexual Assault Prevention and Response Program 13* (June 27, 2013) (PowerPoint presentation to RSP) [hereinafter SAPRO June 2013 PowerPoint Presentation].

162 *Transcript of RoC Subcommittee Meeting* 69–71 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); WHITE HOUSE REPORT, *supra* note 126, at 13 & n.34 (citing study finding that “when controlling for previous substance abuse history, sexual assault survivors were more likely to abuse alcohol than women who were not assaulted”).

163 *Transcript of RoC Subcommittee Meeting* 69–71 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

164 *Id.* at 72–74.

165 *Id.* at 16–17, 72–74; Letter from Scott Berkowitz and Rebecca O’Connor, RAINN (Rape, Abuse & Incest National Network) to White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014).

166 *Transcript of RoC Subcommittee Meeting* 71–72 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); *accord* Lisak, *supra* note 139, at 50; Lisak, *supra* note 138.

167 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, at 1 (May 3, 2013) [hereinafter FY12 SAPRO ANNUAL REPORT]. DoD SAPRO oversees DoD policy for its SAPR program and is responsible for DoD oversight activities assessing SAPR program effectiveness.

168 *Transcript of RoC Subcommittee Meeting* 173–75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).

169 PATRICK MCGANN AND PAUL SCHEWE, THE DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION STRATEGY: CREATING A NATIONAL BENCHMARK PROGRAM (Sept. 30, 2008) [hereinafter 2008 PREVENTION STRATEGY]; *Transcript of RoC Subcommittee Meeting* 173–75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.); DoD Response to RSP Request for Information 79a (Dec. 19, 2013).

The 2008 Prevention Strategy introduced several key prevention strategy components, beginning with adoption of a “spectrum of prevention,” which is based on the CDC’s social-ecological model. The 2008 Strategy states that “[r]educing or eliminating sexual assault will require a comprehensive and coordinated set of interventions” at cultural, organizational, community, peer, family, and individual levels. The 2008 Strategy uses interconnected intervention categories to frame its recommendations: individual skill development, community education, service provider training, coalition building, organizational practice, and policy development.¹⁷⁰

DoD SAPRO’s 2008 Prevention Strategy emphasized bystander intervention education as a core prevention strategy. By shifting its focus to bystander intervention, DoD SAPRO began to educate and train commanders and leaders on “creat[ing] [a] non-permissive environment” where they and their subordinates do not tolerate, condone, or ignore “the types of . . . inappropriate jokes, crude and offensive language, sexist behaviors – things that are the precursors . . . that an offender might use to . . . test their victim.”¹⁷¹

The 2008 Prevention Strategy also recommended increased focus in SAPR training on the link between alcohol consumption and sexual assault. In particular, the 2008 Strategy recommended that Service members be trained on the “role of beliefs about alcohol, social norms that link masculinity and alcohol, negative stereotypes about drinking and women, and the pharmacological effects of alcohol on decision-making and violent behavior.”¹⁷² It did not, however, recommend any of the three alcohol mitigation strategies that were emphasized to the Subcommittee by the CDC as empirically promising.¹⁷³

In May 2013, the Secretary of Defense directed implementation of a new SAPR strategic plan. The 2013 SAPR Strategic Plan addressed prevention and the four other distinct SAPR “lines of effort”: investigation, accountability, advocacy/victim assistance, and assessment. Reflecting the May 2012 Strategic Direction to the Joint Force,¹⁷⁴ the 2013 SAPR Strategic Plan identified commanders and first line supervisors as the center of gravity of DoD SAPRO’s prevention efforts.¹⁷⁵ Accordingly, in addition to directing a collaborative review of and update to the 2008 strategy, the 2013 SAPR Strategic Plan identified other high-priority prevention tasks:

- enhancement and integration of SAPR professional military education, in accordance with NDAA FY12 requirements;
- development of core competencies and learning objectives for all SAPR training to ensure consistency and standardization throughout the military;

170 2008 PREVENTION STRATEGY, *supra* note 169, at 18-20; see also *Transcript of RoC Subcommittee Meeting* 175-77, 186 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO) (testifying that pursuant to 2008 Strategy, spectrum of prevention became “a lens through which” SAPRO focuses its prevention work to ensure that it is addressing prevention “at every level” of military society and emphasizing that “[t]here is no single bullet answer”); DoD SAPRO, *Prevention Strategy Update* 3 (Feb. 12, 2014) (PowerPoint presentation to RoC Subcommittee) [hereinafter Feb. 2014 SAPRO PowerPoint Presentation].

171 2008 PREVENTION STRATEGY, *supra* note 169, at 18-20, 41; *Transcript of RoC Subcommittee Meeting* 178-79, 187-88, 193-97 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.); *id.* at 193-97 (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO).

172 2008 PREVENTION STRATEGY, *supra* note 169, at 34-35.

173 See *id.*

174 Joint Chiefs of Staff, “Strategic Direction to the Joint Force on Sexual Assault Prevention and Response” (May 7, 2012).

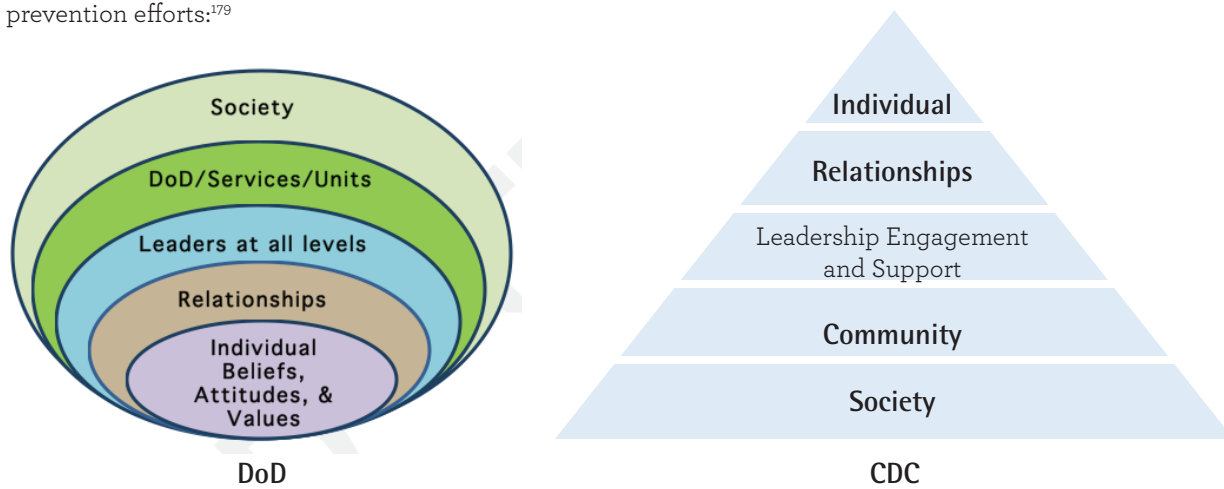
175 U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN 18 (Apr. 30, 2013) [hereinafter 2013 SAPR STRATEGIC PLAN]; *Transcript of RoC Subcommittee Meeting* 198-202 (Feb. 12, 2014) (testimony of Colonel Alan R. Metzler).

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- enhancement of SAPR training for pre-command and senior enlisted personnel; and
- establishment and implementation of “policies that mitigate high-risk behaviors and personal vulnerabilities (e.g., alcohol consumption, barracks visitation).”¹⁷⁶

In May 2013, DoD SAPRO began extensive and focused research of prevention strategies and programs. DoD SAPRO’s research included on-site visits and web- and teleconferences with more than 20 organizations, including the CDC and different universities referred by members of Congress, advocacy groups, the Services, and Allied militaries. DoD SAPRO has developed a database of more than 200 best practices, techniques, and programs to serve as a resource for commanders and organizations at all levels throughout the Services.¹⁷⁷ DoD SAPRO representatives visited the CDC in July and September 2013 to coordinate with the CDC’s sexual violence research experts and outside alcohol policy experts.¹⁷⁸

DoD SAPRO’s new prevention strategy further refines its adaptation of the CDC’s social-ecological model and shifts prevention focus to commanders and first line supervisors. The strategy introduces “leaders at all levels” as a distinct level/setting of the model, emphasizing the need to leverage leaders as “the cornerstone” of prevention efforts.¹⁷⁹



2. DoD Prevention Policies and Requirements

DoD revised its strategic SAPR policy in January 2012 to reflect that sexual assault prevention programs “shall be established and supported by all commanders” and that “[s]tandardized SAPR requirements, terminology,

176 2013 SAPR STRATEGIC PLAN, *supra* note 175, at 4, 7, 10–11, 18 (Apr. 30, 2013); *Transcript of RoC Subcommittee Meeting* 198–202 (Feb. 12, 2014) (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO); DoD Feb. 2014 PowerPoint Presentation, *supra* note 170, at 6–7; see also *id.* at 17 (enumerating and describing five core competencies and various learning objectives resulting from each).

177 *Transcript of RoC Subcommittee Meeting* 204–08 (Feb. 12, 2014) (Colonel Litonya Wilson, Chief of Prevention and Victim Assistance, DoD SAPRO); DoD Feb. 2014 PowerPoint Presentation, *supra* note 170, at 8–9.

178 *Transcript of RoC Subcommittee Meeting* 76–77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

179 *Id.* at 208–12 (testimony of Nathan Galbreath and Colonel Alan R. Metzler); DoD Feb. 2014 PowerPoint Presentation, *supra* note 170, at 12.

guidelines, protocols, and guidelines for instructional materials shall focus on” prevention.¹⁸⁰ DoD has since adopted initiatives to strengthen SAPR training for all Service members, as well as specific SAPR training for commanders and other leaders. On April 17, 2012, the Secretary of Defense directed enhanced training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters. The initiative required enhanced SAPR training for commanders and senior enlisted leaders.¹⁸¹

The Secretary of Defense announced additional sexual assault prevention efforts on September 25, 2012. Specifically, the Secretary directed the Services to develop training core competencies and methods of assessment, requiring each Service to: (1) provide a dedicated, two-hour block of SAPR training in all pre-command and senior enlisted leader training courses; (2) provide commanders a SAPR “quick reference” program and information guide; (3) assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts; and (4) develop and implement refresher training for sustainment of SAPR skills and knowledge.¹⁸²

Since March 28, 2013, DoD policy has required that “[m]ilitary and DoD civilian officials at each management level shall “advocate a robust SAPR program and provide education and training that shall enable them to prevent and appropriately respond to incidents of sexual assault.” Commanders are required to ensure that SAPR training for all Service members “who supervise Service members”:

- incorporates adult learning theory, including interaction and group participation;
- is appropriate to Service members’ grade and commensurate with their level of responsibility;
- identifies “prevention strategies and behaviors that may reduce sexual assault, including bystander intervention, risk reduction, and obtaining affirmative consent”; and
- provides “scenario-based, real-life situations to demonstrate the entire cycle of prevention, reporting, response, and accountability procedures.”¹⁸³

In addition, SAPR training has been added to professional military education (PME) curricula “from junior-level noncommissioned officer schools through the senior-level War Colleges.”¹⁸⁴ In particular, PME and leadership development training for senior NCOs and officers, as well as pre-command training, must explain:

rape myths, facts, and trends;

180 U.S. DEP’T OF DEF., DIR 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM [hereinafter DoDD 6495.01] ¶¶ 4.f, 4.d (Jan. 23, 2012).

181 U.S. Dep’t of Def., News Release, Secretary of Defense Leon E. Panetta (Apr. 17, 2012); see also DoD, “Initiatives to Combat Sexual Assault in the Military,” at <http://www.defense.gov/news/DoDSexualAssault.pdf>.

182 U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Evaluation of Pre-Command Sexual Assault Prevention and Response Training (Sept. 25, 2012).

183 U.S. DEP’T OF DEF., INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES [hereinafter DoDI 6495.02] encl. 10, ¶¶ 1–3 (Mar. 28, 2013); see also FY13 NDAA, PUB. L. NO. 112-239, § 574, 126 STAT. 1632 (2013) (requiring sexual assault prevention and response training for new or prospective commanders at all levels of command).

184 DoD SAPRO, “Fact Sheet: SAPR Training” at http://www.sapr.mil/public/docs/prevention/CoreCompetencies_LearningObjectives_FactSheet_20140407.pdf.

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- procedures to protect victims of sexual assault from coercion, retaliation, and reprisal; and
- actions that constitute reprisal.¹⁸⁵

These training requirements reinforce DoD's policy that "[v]ictims of sexual assault shall be protected from coercion, retaliation, and reprisal" in accordance with DoD Directive 7050.06 (Military Whistleblower Protection Act).¹⁸⁶

DoD-required SAPR training also addresses re-victimization. The 2012 DoD SAPRO report noted the "long-standing civilian research" finding that "sexual victimization is a likely risk factor for subsequent victimization,"¹⁸⁷ and DoD incorporated re-victimization in its SAPR program procedures regulation in March 2013. DoD defines re-victimization as a "pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse as a child" and that "[t]his latter pattern is particularly notable in cases of sexual abuse."¹⁸⁸ DoD noted in May 2013 that initiatives were "underway to address special populations within the Department that may require more targeted interventions."¹⁸⁹ For example, all DoD responder training, which is provided to all SARCs, SAPR Victim Advocates (VAs), healthcare personnel, DoD law enforcement, military criminal investigative organizations (MCIOs), judge advocates, chaplains, firefighters, and emergency medical technicians, now must explain the pattern of re-victimization.¹⁹⁰ In addition, DoD SAPRO began emphasizing outside agencies as alternative resources where male Service members may be less reluctant to self-identify as victims of sexual assault.¹⁹¹ Further, DoD SAPRO expects the 2014 Workplace and Gender Relations survey to yield a sufficient male response to significantly improve DoD's understanding of the unique aspects of the experiences of male victims of sexual assault.¹⁹²

On May 17, 2013, the Secretary of Defense directed a dedicated SAPR focus and training day for all organizations before July 1, 2013. In particular, he directed:

- review of credentials and qualifications of current-serving military recruiters, SARCs and SAPR VAs;
- refresher training on ethics and standards for recruiters, SARCs, and SAPR VAs; and

purposeful and direct commander and leader engagement with Service members and civilian employees on SAPR principles and command climate.

185 DoDI 6495.02 encl. 10, ¶¶ 1-3; see also FY13 NDAA, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013) (requiring sexual assault prevention and response training for new or prospective commanders at all levels of command).

186 DoDD 6495.01 ¶ 4.h. The FY14 NDAA ultimately codified this policy. See FY14 NDAA, Pub. L. No. 113-66, § 1715, 127 Stat. 672 (2013).

187 FY12 SAPRO ANNUAL REPORT, *supra* note 167, at 15.

188 DoDI 6495.02 Glossary.

189 FY12 SAPRO ANNUAL REPORT, *supra* note 167, at 15.

190 See DoDI 6495.02 encl. 10, ¶ 7.a(2)(d)(1).

191 See DoD SAPRO, "DOD Safe Help Line: Sexual Assault Support for the DoD Community" at <http://www.sapr.mil/index.php/victim-assistance/helpline-materials>.

192 *Transcript of RoC Subcommittee Meeting 236-37* (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).

The Secretary described his expectation for the stand-down, envisioning it would result in installations where:

leaders, recruiters, SARC, and every member of the Armed Forces clearly understand that they are accountable for fostering a climate where sexist behaviors, sexual harassment, and sexual assault are not tolerated, condoned, or ignored; where dignity, trust, and respect are core values we live by and define how we treat one another; where victims' reports are treated with the utmost seriousness, their privacy is protected, and they are treated with sensitivity; where bystanders are motivated to intervene because offensive or criminal conduct is neither tolerated or condoned; and where offenders know they will be held appropriately accountable.¹⁹³

Finally, effective February 12, 2014, SAPR training was required for new or prospective commanders at all levels. Tailored to specific commander responsibilities and leadership requirements, the pre-command training must “foster[] a command climate in which persons assigned to the command are encouraged to intervene to prevent potential incidents of sexual assault.”¹⁹⁴

3. DoD Assessment of Effectiveness of Prevention Efforts

In 2012, DoD revised its strategic SAPR policy to mandate that the Under Secretary of Defense for Personnel and Readiness “[d]evelop metrics to measure compliance and effectiveness of SAPR training, awareness, prevention, and response policies and programs” and to “[a]nalyze data and make recommendations regarding the SAPR policies and programs to the Secretaries of the Military Departments.”¹⁹⁵ The Director of SAPRO was similarly directed on March 28, 2013.¹⁹⁶ In addition, DoD’s policy mandated that its annual reports on sexual assault in the military must include an assessment of the implementation of SAPR policies and procedures, including those concerning prevention to determine their effectiveness.¹⁹⁷

Following the broad reforms in the FY14 NDAA, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress with respect to sexual assault prevention and response.¹⁹⁸ Pursuant to the President’s directive, DoD SAPRO recently developed twelve new assessment metrics that are in addition to the six metrics currently used.¹⁹⁹ Five of these new metrics will focus on prevention efforts.²⁰⁰ In the shorter term, DoD SAPRO told the Subcommittee it will focus on other assessment measures such as surveys, research studies, and on-site visits.²⁰¹ The Defense Equal Opportunity

193 U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response Stand-down (May 17, 2013).

194 DoDI 6495.02 encl. 10, ¶ 3.f(6) (Change 1) (Feb. 12, 2014).

195 DoDD 6495.01 encl. 2., ¶ 1.c.

196 See DoDI 6495.02 encl. 3, ¶ 1.g.

197 *Id.* at encl. 12, ¶ 1.b.

198 The White House, “Statement by the President on Eliminating Sexual Assault in the Armed Forces” (Dec. 20, 2013). The President directed the Secretary and Chairman to report to him by December 1, 2014.

199 *Transcript of RoC Subcommittee Meeting 214-15* (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).

200 *Id.* at 215.

201 *Id.* at 216-19.

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Climate Survey (DEOCS) in particular includes questions focused on prevention and leadership support of SAPR programs, including bystander intervention.²⁰²

In consultation with the CDC, DoD SAPRO is initiating a focused review of installation-level prevention efforts. By March 2015, DoD SAPRO plans to visit four or five installations and invite outside experts to educate leaders and “begin to shape policy that fits the environment in which that installation resides.” DoD SAPRO intends to engage the surrounding community, partnering with local law enforcement, prosecutors, providers of alcohol, and hotel managers, “to help check behaviors before they get out of hand.”²⁰³

C. SERVICE IMPLEMENTATION OF DOD'S POLICIES AND REQUIREMENTS FOR PREVENTION

1. Service SAPR Training

Pursuant to Section 574 of the FY13 NDAA,²⁰⁴ all of the Services now provide SAPR training to Service members within the first two weeks of initial entrance on active duty, to include bystander intervention training.²⁰⁵ SAPR training is also integrated into each of the Services’ pre-command and senior enlisted advisor courses.²⁰⁶

Prevention components in current Service-specific SAPR training also reflect DoD prevention policies and requirements:

- The Air Force provides airmen with prevention resources via newcomers’ orientation, posters, brochures, business cards, promotional items, etc. Enlisted airmen on the delayed entry program receive a SAPR class before basic training.
- In the Navy and the Marine Corps, SAPR training is facilitated and scenario-based and introduces members to risk reduction and bystander intervention as well as the role of alcohol in impairment of judgment specific to sexual assault. Sexual Assault Awareness Month and SAPR stand-down activities at the command level supplement this training throughout the year.
- All Coast Guard accession points include course information on sexual assault prevention and response. The Coast Guard Academy SARC typically meets with new cadets again within their first six weeks to also address bystander intervention. In addition, the Coast Guard is currently implementing a four-hour Sexual Assault Prevention Workshop Coast Guard-wide to increase awareness among Coast Guard personnel.²⁰⁷

202 *Id.*

203 *Transcript of RoC Subcommittee Meeting 219-22* (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.).

204 FY13 NDAA, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013).

205 U.S. Dep’t of Def., SAPRO, Memorandum from Major General Gary S. Patton, Director, on Assessment of Services’ Reviews of Prevention and Reporting of Sexual Assault and Other Misconduct in Initial Military Training at 3 (unnumbered) (Apr. 3, 2013).

206 *Id.* In a DEOCS survey conducted in January and February 2014, 94 percent of DoD respondents “indicated that they would take an intervening action if they witnessed a situation that might lead to sexual assault (selecting either seeking assistance, telling the person, or confronting the Service member).” DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SEXUAL ASSAULT PREVENTION AND RESPONSE CLIMATE REPORT: DEPARTMENT OF DEFENSE AND RESERVE COMPONENT RESULTS 37 (Mar. 2014).

207 Services’ Responses to RSP Request for Information 1b (Nov. 1, 2013); Services’ Responses to Requests for Information 79a, 80c (Dec.

The Services reported the following sexual assault prevention training efforts for commanders and leaders:

- As Army commanders and leaders progress through their careers and levels of responsibility, they are provided SAPR training, including on bystander intervention, tailored to specific leadership positions and/or increased rank, in addition to mandatory annual training. Each year, the Army conducts a Sexual Harassment/Assault Response and Prevention Summit where commanders hear from national leaders, DoD and Army leadership, and subject matter experts, as well as exchange ideas with one another and provide feedback to Army leadership on challenges in executing SAPR responsibilities. In addition, SARCs and Victim Advocates receive training on how to support commander efforts to prevent sexual harassment and sexual assault.
- SAPR training in the Navy and Marine Corps is integrated into critical leadership training, including the Senior Enlisted Academy and Command Leadership School. SAPR training for leaders emphasizes their role in educating subordinates about sexual assault, including “the influence and power of alcohol” and “the importance of Bystander Intervention.”
- All Coast Guard leadership courses include a SAPR module, and annual Coast Guard-specific training is offered to VAs and SARCs that includes prevention segments, including bystander intervention education.²⁰⁸

2. Recent Prevention Initiatives in the Services

Since implementing DoD SAPRO’s 2008 Prevention Strategy, the Services implemented bystander intervention and alcohol policy in various ways:

In the Army, initial military training at Basic Combat Training of newly enlisted soldiers includes “Sex Signals,” a 90-minute interactive series of improvisational skits that explore subjects like dating, rape, consent, body language, alcohol, and bystander intervention. At the Basic Officer Leadership Course, training of newly commissioned officers also includes the “Sex Signals” presentation, and officers apply leader decision-making in response to the vignettes.²⁰⁹

Air Force bystander intervention training introduced an interactive program where participants practice techniques by role-playing in realistic scenarios involving airmen in vulnerable situations.²¹⁰

The Navy and Marine Corps indicated that recent prevention initiatives include increased use of roving barracks patrols designed to increase the visible presence of leadership so as to deter behavior that may lead to sexual assault.²¹¹ The Navy also reported:

19, 2013); U.S. NAVY, TAKE THE HELM: SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING FOR THE FLEET (SAPR-F) FACILITATION GUIDE FY 12/13.

208 Services’ Responses to RSP Request for Information 1b (Nov. 1, 2013); Services’ Responses to Requests for Information 79a, 80c, 80d (Dec. 19, 2013); U.S. NAVY, TAKE THE HELM: SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING FOR LEADERS (SAPR-L) FACILITATION GUIDE FY 12/13, at 70.

209 Army’s Responses to RSP Requests for Information 79c, 80c (Dec. 19, 2013); accord *Transcript of RoC Subcommittee Meeting 348* (Feb. 12, 2014) (testimony of Command Sergeant Major Pamela Williams, U.S. Army) (describing interactive “got-your-back-type training” in which trainers use terminology more familiar to young enlisted soldiers and “the entire audience gets involved”).

210 *Transcript of RoC Subcommittee Meeting 264–68, 298–99* (Feb. 12, 2014) (testimony of Colonel Trent H. Edwards, U.S. Air Force) (describing program implemented at Maxwell Air Force Base).

211 NAVADMIN 181/13 re Implementation of Navy Sexual Assault Prevention and Response Program Initiatives ¶ 3.a (July 13, 2013); see

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- use of physical surveys of facility lighting and visibility to identify needed safety improvements to reduce members' vulnerability in transit on bases²¹² and a comprehensive alcohol de-glamorization campaign, including implementing Alcohol Detection Devices and changes to the sale of distilled spirits in on-base stores co-located with barracks and ships.²¹³
- during Fiscal Year 2013, presentation of "No Zebras, No Excuses," a 90-minute theater-based training show with twelve vignettes to over 41,000 junior Sailors and Marines. Discussions followed the presentations, with facilitators addressing issues relating to laws, behaviors, and the inactive bystander mentality;²¹⁴
- during Fiscal Year 2012, presentation of "All Hands" SAPR training to all Marines; the training included messages from the Commandant and video-based "ethical decision games" that present opportunity for bystanders to intervene passes;²¹⁵ and
- presentation to all Marine NCOs during Fiscal Year 2012 of "Take A Stand," a three-hour bystander intervention course comprised of mini-lectures, guided group discussions, activities, and video recordings.²¹⁶

D. SUBCOMMITTEE ASSESSMENT OF DOD'S SEXUAL ASSAULT PREVENTION EFFORTS

DoD's prevention policies and requirements adopted since 2012 reflect Department efforts to coordinate with the CDC and leading private organizations like the NSVRC. Moreover, installation-level initiatives described to the Subcommittee largely reflect prevention best practices.²¹⁷ In particular, the Navy's use of complementary prevention initiatives mirrors the comprehensive approach recommended the CDC. Nevertheless, areas of disconnect remain between DoD's current efforts and what the Subcommittee heard from sexual assault prevention experts.

also Transcript of RoC Subcommittee Meeting 339-40 (Feb. 12, 2014) (testimony of Sergeant Major Mark Allen Byrd, Sr., U.S. Marine Corps) (describing increased use of roving barracks patrols on Marine Corps Base Quantico).

212 NAVADMIN 181/13 re Implementation of Navy Sexual Assault Prevention and Response Program Initiatives ¶ 3.d (July 13, 2013); *see also Transcript of RoC Subcommittee Meeting 289 (Feb. 12, 2014) (testimony of Captain Peter R. Nette, U.S. Navy) (describing facility surveys conducted on bases in Naval Support Activities South Potomac); DoDI 6495.02 encl. 5, ¶ 8.e (requiring commanders to "implement a SAPR prevention program that [i]dentifies and remedies environmental factors specific to the location that may facilitate the commission of sexual assaults (e.g., insufficient lighting)").*

213 Navy Responses to Requests for Information 79c, 80a (Dec. 19, 2013); *see also Transcript of RoC Subcommittee Meeting 259-60, 341-42 (Feb. 12, 2014) (testimony of Colonel David W. Maxwell and Sergeant Major Mark Allen Byrd, Sr., U.S. Marine Corps) (describing removal of all liquor from Exchange stores on Marine Corps Base Quantico and limitation of sale of alcohol from 8:00 a.m. to 10:00 p.m.).*

214 Navy Responses to Requests for Information 79c, 80a (Dec. 19, 2013).

215 Marine Corps's Response to RSP Request for Information 81a (Dec. 19, 2013).

216 *Id.*

217 *See also Transcript of RoC Subcommittee Meeting 77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC) (noting that CDC prevention experts have "been very encouraged and pleased by the way that [DoD SAPRO] ha[s] taken so much information and, in the midst of all these gaps [in research], . . . distilled it to what could be a very profitable direction to move in to really create some change").*

For example, the Services have increased focus on bystander intervention and alcohol policy, but programs and prevention education that rely upon common misconceptions or overgeneralized perceptions will not be effective. In particular, overemphasizing the threat posed by the relatively few serial rapists and other types of sexual “predators” may reduce Service member attention and vigilance toward more common and seemingly harmless attitudes and behaviors that can increase the potential for sexual assault.

If primary prevention strategies like bystander intervention education are to succeed, commanders must encourage members to actively challenge attitudes and beliefs that lead to offenses and interrupt and/or report them when they occur, and then protect those who do so. As Dr. Katz explained, “men who speak out and confront or interrupt each other’s abusive behavior run the risk of fostering resentment from other men, increasing tensions in their daily interpersonal relationships, or in some cases, even suffering violent reprisals.”²¹⁸ DoD bystander intervention programs should educate Service members to guard against retaliation toward peers who intervene and/or report. Policies and requirements must ensure protection from retaliation against not just victims, but also the peers who speak out and step up on their behalf.

Bystander intervention and alcohol policy programs are essential, but DoD must also pursue other strategies. DoD must maintain a comprehensive approach to prevention by applying a range of strategies that target members and groups in different ways. For example, DoD should consider additional general deterrence strategies, such as publicizing findings and sentences adjudged at courts-martial for sexual assault offenses.

Likewise, DoD should not restrict prevention strategies to those emphasizing primary prevention. Victim-focused programs should educate Service members on important risk factors that are unique to the military, such as disparity in rank. Such programs can be designed and executed in a way that avoids unintentional messages of victim-blaming.

DoD has only begun to address strategies that target populations at heightened vulnerability, and increased consideration and emphasis are warranted. Research underscores the importance of developing programs to identify Service members who are victimized prior to entering the military and strengthen these members’ ability to deal with the consequences of prior victimization and avoid re-victimization. Through training, DoD has increased focus on special populations that may require targeted interventions, but it can and should do more by further developing targeted risk-management programs.

DoD must enhance its understanding of and response to male-on-male sexual assault. Cultural stigmas from barriers that existed in the past, such as “Don’t Ask, Don’t Tell,”²¹⁹ still serve to limit openness about the problem, which harms prevention and response efforts. Commanders must intentionally and directly acknowledge the potential for male-on-male sexual assault in their commands and directly confront the stigma associated with it. Service members must understand that demeaning or humiliating behaviors potentially minimized previously as hazing or labeled as “horseplay” constitute punishable offenses that are not tolerated. DoD should seek expert assistance to understand the risk and protective factors unique to male-on-male sexual assault in the military. Using information gained from research, DoD should develop targeted prevention programs that address male-on-male sexual assault.²²⁰

218 Jackson Katz, “Penn State & the bystander approach: Laying bare the dynamics in male peer culture” (Dec. 8, 2011), at http://www.nsvrc.org/news/Jackson-Katz-Series_Penn-State-and-Bystander-Approach.

219 10 U.S.C. § 654 (repealed Dec. 22, 2010).

220 Cf. 2008 PREVENTION STRATEGY, *supra* note 169, at 25 (calling generally for funding for sexual assault prevention that ultimately is “authorized, appropriated, and planned as part of established programming within the Department of Defense” and noting that primary prevention programs and staff specifically trained to conduct them require “stable and protected funding” from Congress);

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Commanders must recognize that robust prevention programs may raise concern about unlawful command influence. In particular, commanders must avoid creating perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials, or that compromise an accused Service member's presumption of innocence or access to witnesses or evidence.²²¹

In addition to supporting sexual assault victims, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes. Commanders must execute balanced prevention programs, to include emphasizing the presumption of innocence for anyone accused of misconduct, the right to fair investigation and resolution, and the right to seek and present witnesses and evidence. Without such balance, prevention initiatives may foster improper bias against any person accused of wrongdoing, including bias among those called to serve as court-martial panel members or witnesses whose testimony is sought on behalf of the accused. Additionally, if any accusation of sexual assault immediately creates irreparable consequences against an accused, inappropriately severe or ill-informed responses may actually create perceptions of unfairness that discourage reporting, as victims and/or witnesses may feel responsible for unduly harsh or unfair treatment of an accused.

DoD must further develop local coordination requirements on and off the installation. To leverage partnerships, DoD SAPRO's 2008 Prevention Strategy recognized that "sexual assault prevention cannot solely be the responsibility of SARCs and Victim Advocates on a military base or in a combat theater." Accordingly, the 2008 Strategy recommended inclusion of outside agencies and organizations such as rape crisis centers and domestic violence service providers in local prevention networks for military organizations.²²² One new requirement, made effective March 2013, is that SARCs must "[m]aintain liaison with commanders, DoD law enforcement, and MCIOs, and civilian authorities, as appropriate, for the purpose of facilitating . . . collaborati[on] on public safety, awareness, and prevention measures."²²³ DoD should expand requirements for installation commanders to liaison with victim support agencies in adjacent communities.²²⁴

Commanders must focus on meaningful prevention strategies and must demonstrate leadership of DoD's prevention approach and its principles. 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.

Transcript of RoC Subcommittee Meeting 227-28 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO) (noting that while FY14 NDAA introduces various requirements and resources that can be expected to have significant positive effects in terms of secondary prevention, "very little" in statute supports DoD's efforts in primary prevention).

221 See Services' Responses to RSP Request for Information 84 (Dec. 19, 2013) (identifying UCI motions and complaints arising in sexual assault cases in 2012 and 2013, some of which cite SAPR training).

222 2008 PREVENTION STRATEGY, *supra* note 169, at 29-31.

223 DoDI 6495.02 encl. 6, ¶ 1.h(17)(b).

224 The following Navy requirement as of July 2013 serves as a good model for the other Services:

Designate a Flag Officer, reporting to you, as the SAPR program leader for each Navy installation/Fleet Concentration Area and associated local commands. This designated Flag Officer will establish routine coordination meetings with appropriate installation/local command representatives, and local community and civic leaders to review SAPR program efforts. This designated Flag Officer will also ensure that community outreach and engagement – including base and region commander cooperation, coordination and consultation with local law enforcement, hospitals and hotels – is part of each area's prevention and response measures. Operational Flag Officers assigned to command positions, but not designated as lead for an oversight group, will participate to the maximum extent practicable. Local Naval Criminal Investigative Service (NCIS) representatives, Region Legal Service Offices, and installation SARCs will be included in these coordination meetings whenever possible.

NAVADMIN 181/13 re Implementation of Navy Sexual Assault Prevention and Response Program Initiatives, ¶ 3.e (July 2013).

Given existing training and curriculum mandates, the Subcommittee does not believe DoD should 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. 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. DoD SAPRO recently 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.

E. PART IV SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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 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.

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.

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

IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

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.

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.

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.

ROLE OF THE COMMANDER SUBCOMMITTEE

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.

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.

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.

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.

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.

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

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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.

V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

Crimes of sexual violence are a national concern, and efforts to improve sexual assault prevention and response in the military are influenced by many of the same factors and barriers that exist throughout American society. Studies indicate that the risk for “contact sexual violence” for women in the military is comparable to the risk for women in the civilian sector.²²⁵ A 2010 study conducted by the Centers for Disease Control and Prevention estimated that 40.3 percent of women in the general population experienced contact sexual violence during their lifetimes, compared to 36.3 percent of active duty females.²²⁶ When assessing more recent risk, the survey found the prevalence of contact sexual violence was also similar in the three years and in the twelve months prior to the survey for the two groups.

Sexual assault, however, is chronically underreported in both the military and the civilian sector when compared to reporting rates for other forms of violent crime. Studies indicate 65 percent of sexual violence victimizations are not reported to law enforcement or other authorities, with similar reporting rates in the civilian sector and the military among females.²²⁷ As a result, significant effort within DoD and the Services has been focused on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and . . . is a bridge to accountability where offenders can be held appropriately accountable.”²²⁸

225 *Transcript of RSP Public Meeting 124–26* (June 27, 2013) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO) (citing NCIPC, *TECHNICAL REPORT*, *supra* note 127); see also SAPRO June 2013 PowerPoint Presentation, *supra* note 161, at 60. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent. *Id.*

226 NCIPC *TECHNICAL REPORT*, *supra* note 127, at 27. The study did not compare prevalence rates for men. However, the study's survey of U.S. men determined one in 71 men in the general population experienced rape in their lifetimes (compared to one in five women), while 22.2 percent of men experienced sexual violence victimization other than rape at some point in their lives. NCIPC, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 18–19* (Nov. 2011).

227 *Transcript of RSP Public Meeting 26* (June 27, 2013) (testimony of Professor Lynn Addington, American University) (citing statistics from National Crime Victimization Survey and 2012 Workplace and Gender Relations Survey of Active Duty Personnel). Studies of military victims who reported their victimization indicate they did so because it was the right thing to do, to seek closure, or to protect others. In contrast, the most common reason cited by those who did not report was that they did not want anyone to know, felt uncomfortable making a report, or thought the report would not be kept confidential. *Transcript of RSP RoC Subcommittee Meeting 58–60* (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); see also DoD SAPRO PowerPoint Presentation to RoC Subcommittee at 8–9 (Oct. 23, 2013) [hereinafter Oct. 2013 SAPRO PowerPoint Presentation].

228 *Transcript of RSP Public Meeting 108–09* (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

A. REPORTING CHANNELS FOR VICTIMS OF SEXUAL ASSAULT

When a Service member believes he or she has been sexually assaulted, there are numerous options available for reporting the assault. A victim is never required to report the offense to his or her commander or any other military commander.

This protection of a victim's interests is reflected in Department of Defense (DoD) policy providing that sexual assault victims may choose to make a restricted or unrestricted report of the incident. In fact, DoD implemented restricted reporting in 2005 "before [the option] was even an item of discussion" in civilian jurisdictions.²²⁹ A restricted report remains confidential and will not result in notification of law enforcement or the victim's chain of command.²³⁰ Restricted reports allow victims to report an assault confidentially in order to obtain the support of healthcare treatment and services of a Sexual Assault Response Coordinator (SARC) or Sexual Assault Prevention and Response Victim Advocate (SAPR VA) without being forced to initiate a criminal investigation. This option is intended to maximize the provision of support for such victims without requiring them to choose between obtaining support or retaining their privacy.

Only SARCs, SAPR VAs, and healthcare personnel are authorized to accept restricted reports.²³¹ A SARC or SAPR VA is required to report the fact of the assault to the installation commander,²³² but the report will not contain personally identifiable information and may not be used for investigative purposes.²³³ Accordingly, the victim's identity remains confidential in a restricted report.²³⁴ If a victim confides in another person about a sexual assault, the victim retains the restricted reporting option, unless the confidant is a member of law enforcement or is in the victim's supervisory hierarchy or chain of command.²³⁵

Victims can make unrestricted reports of sexual assault to SARCs, SAPR VAs, and healthcare personnel, as well as chaplains,²³⁶ judge advocates, and military or civilian law enforcement personnel.²³⁷ Victims may also report an assault to a supervisor or their chain of command, but they are not required to do so. Unrestricted reports of sexual assault will result in investigation of the allegation, although military criminal investigative organizations (MCIOs) should honor a victim's choice to decline to participate in the investigation.²³⁸ Military personnel in the United States may always call civilian law enforcement or other civilian agencies to report a sexual assault if they are not comfortable notifying military authorities.

229 *Transcript of RSP Public Meeting* 421-22 (Dec. 11, 2013) (testimony of Ms. Joanne Archambault, Executive Director, End Violence Against Women International and President and Training Director, Sexual Assault Training and Investigations).

230 U.S. DEP'T OF DEF. INSTR. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES encl. 4, ¶ 1.b (Mar. 28, 2013) [hereinafter DoDI 6495.02].

231 *Id.* at encl. 4, ¶ 1.b(1); see also Military Rape Crisis Center, "Reporting Option," at <http://militaryrapecrisiscenter.org/for-active-duty/reporting-option/>.

232 In most cases, the installation commander is not the victim's immediate commander. The installation commander may or may not be in the victim's chain of command, depending on the organization to which the victim is assigned.

233 DoDI 6495.02 encl. 4, ¶ 1.b.

234 *Id.*

235 *Id.* at encl. 4, ¶ 1.e.

236 If a report is made in the course of otherwise privileged communications, chaplains are not required to disclose they have received a report of a sexual assault. *Id.* at encl. 4, ¶ 1.b(3).

237 Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. See *id.*

238 *Id.* at encl. 4, ¶ 1.c(1).

V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

Though several categories of military personnel are trained as initial responders to sexual assault reports, only SARC and SAPR VAs are responsible for documenting reports on a Defense Department Form 2910.²³⁹ The following chart depicts the different reporting resources available within DoD to victims of sexual assault:

Unrestricted Reporting Resources

- Sexual Assault Response Coordinators (SARCs)
- Victim Advocates (VAs)
- Health Care Professionals or Personnel
- *Chaplains*²⁴¹
- *Legal Personnel*
- *Chain of Command*
- *Law Enforcement – Military Police or Military Criminal Investigative Organizations*

Restricted Reporting Resources²⁴⁰

- Sexual Assault Response Coordinators (SARCs)
- Victim Advocates (VAs)
- Health Care Professionals or Personnel
- *Chaplains*²⁴²
- *Legal Assistance Attorneys*²⁴³ and *Special Victims Counsel*

Reporting options are well and broadly publicized throughout the military. DoD policy requires that all military personnel must receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and leadership development training, before and after deployments, and prior to filling a command position.²⁴⁴ Training must explain available restricted and unrestricted reporting options and the advantages and limitations of each option, and it must highlight that victims may seek help or report offenses outside their chain of command.²⁴⁵

Although reporting options are well publicized, it is less clear that all members of the military fully understand them. Recent results from organizational climate surveys conducted by the Defense Equal Opportunity Management Institute (DEOMI) indicated that 71 percent of DoD personnel surveyed correctly understood restricted reporting options.²⁴⁶ At the unit level, only 32 percent of units scored a mean of 75 percent or higher

239 See *id.* at encls. 4, 10.

240 See also *id.* at encl. 4, ¶ 1.e(1) ("A victim's communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information (e.g., roommate, friend, family member) is in the victim's officer and non-commissioned officer chain of command or DoD law enforcement, there can be no Restricted Report.").

241 Chaplains, Legal Personnel, members of the chain of command or supervisory chain, and law enforcement do not intake reports for purposes of SAPR reporting. Supervisors and leaders are trained to immediately contact their servicing SARC or VA, who will advise the victim of available services and options and document victim preferences on the DD Form 2910.

242 Outcry in the course of otherwise privileged communications does not eliminate the restricted reporting option. "In the course of otherwise privileged communications with a chaplain or legal assistance attorney, a victim may indicate that he or she wishes to file a Restricted Report. If this occurs, a chaplain and legal assistance attorney shall facilitate contact with a SARC or SAPR VA to ensure that a victim is offered SAPR services and so that a DD Form 2910 can be completed. A chaplain or legal assistance attorney cannot accept a Restricted Report." *Id.* at encl. 4, ¶ 1.b(3).

243 Legal Assistance attorneys, like chaplains, have privileged communications with clients. They are expected to facilitate contact with a SARC or VA if a victim expresses interest in filing a restricted report, but do not intake reports themselves.

244 *Id.* at encl. 10, ¶ 3. Training must be specific to a Service member's grade and commensurate with his or her level of responsibility. *Id.* at encl. 10, ¶ 2.d.

245 *Id.* at encl. 10, ¶ 2.d(6, 11).

246 DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SAPR CLIMATE REPORT: DEPARTMENT OF DEFENSE AND RESERVE COMPONENT RESULTS iii-iv, 45-46 (Mar. 2014). The information reflects data from 2,582 climate surveys conducted in January and February 2014, which

on restricted reporting options. Individually, junior enlisted personnel scored lowest on restricted reporting knowledge, with 65 percent of those surveyed correctly identifying which individuals can and cannot take a restricted report. Importantly, 50 percent of junior enlisted males and 41 percent of junior enlisted females incorrectly responded that “anyone in my chain of command” could take a restricted report of sexual assault.

B. INVESTIGATION OF SEXUAL ASSAULT ALLEGATIONS

DoD policy mandates that investigations of unrestricted reports of sexual assault will be conducted by specially trained investigators from the MCIOs, not the victim’s immediate commander or chain of command. All unrestricted reports of sexual assault must be immediately reported to an MCIO, regardless of the severity of the crime alleged.²⁴⁷ A commander of a victim or alleged offender may not ignore a complaint or judge its veracity, and Section 1743 of the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) requires written notification to the installation commander and first O-6 and general or flag officers in the chains of command of the victim and alleged offender within eight days of the filing of an unrestricted report of sexual assault.²⁴⁸ MCIOs are assigned to an independent chain of command from the accused and his or her Special Court-Martial Convening Authority (SPCMCA) and must independently report all sexual assault accusations to the Service Secretaries and Chiefs of Staff.²⁴⁹

MCIOs must initiate investigations for all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports.²⁵⁰ Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and access to services for the victim.²⁵¹

Allegations of sexual assault by a Service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction and may accept investigative responsibility if the MCIO declines, or the investigation may be worked jointly by the MCIO and the civilian agency.²⁵² If a reported crime occurs off a military installation in a location under civilian jurisdiction, civilian law enforcement has primary jurisdiction over the investigation, and the MCIO will provide assistance as requested or deemed appropriate.²⁵³

resulted in 122,003 responses from DoD and Coast Guard personnel.

247 U.S. DEP’T OF DEF. INSTR. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE ¶ 3.c (May 1, 2013) [hereinafter DoDI 5505.18]. Section 1742 of the FY14 NDAA codifies this requirement. FY14 NDAA, PUB. L. NO. 113-66, § 1742, 127 STAT. 672 (2013).

248 See FY14 NDAA, PUB. L. NO. 113-66, § 1743, 127 STAT. 672 (2013). DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. See DoDI 6495.02 encl. 4, ¶ 4.

249 *Transcript of RSP Public Meeting 222-23* (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

250 DoDI 5505.18 encl. 2, ¶ 6.

251 *Id.* at encl. 2, ¶ 1.

252 *Id.* at ¶ 3.c(3).

253 *Id.* Additionally, UCMJ jurisdiction over an accused Service member does not deprive state courts of concurrent jurisdiction over that Service member, and states may elect to charge and try military personnel for crimes that occurred in a civilian jurisdiction, regardless of whether the military prosecutes the accused. See *United States v. Delarosa*, 67 M.J. 318, 321 (C.A.A.F. 2009); see also

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In sexual assault investigations where the MCIO is the lead investigating agency, DoD policy requires implementation of Special Victim Capabilities.²⁵⁴ Special Victim Capabilities are

a distinct, recognizable group of appropriately skilled professionals, consisting of specially trained and selected MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel who work collaboratively to investigate allegations of adult sexual assault, domestic violence involving sexual assault, and/or aggravated assault with grievous bodily harm, and child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm; and provide support for victims of these offenses.²⁵⁵

MCIOs investigating sexual assault allegations must collaborate regularly with respective Special Victim Capability partners for periodic investigative case reviews and to ensure all aspects of the victim's needs are being met.²⁵⁶ Commanders are provided updates on significant developments in criminal investigations, but they may not impede an investigation or the use of investigative techniques.²⁵⁷ Once an investigation is complete, the case is provided to the appropriate military commander (the commander who is the initial disposition authority, as described below, for the accused) for consideration of "some form of punitive, corrective, or discharge action against an offender."²⁵⁸

C. DISPOSITION AUTHORITY FOR REPORTS OF SEXUAL ASSAULT

DoD policy also establishes the minimum level of command that may resolve an allegation of sexual assault. The first SPCMCA in the grade of O-6 or above in the chain of command of the accused serves as the "initial disposition authority" for all sexual assault allegations.²⁵⁹ Senior commanders with initial disposition authority often have no personal knowledge of either the accused or the victim. When an investigation is complete, the initial disposition authority reviews the results of the investigation in consultation with a judge advocate and determines the appropriate disposition of the case.²⁶⁰

Heath v. Alabama, 474 U.S. 82, 89 (1985) (holding that federal and state governments are treated as separate sovereigns, in which criminal proceedings by one sovereign do not preclude proceedings by the other). For offenses that occur on post, the local United States Attorney may also exercise jurisdiction as the Federal sovereign in place of the military. Crimes that occur overseas fall within the jurisdiction of the host country unless exempted by law or agreement with the United States, often through status of forces agreements that provide specific guidance for jurisdiction over Service members.

254 U.S. DEP'T OF DEF., DIRECTIVE-TYPE MEMORANDUM 14-002, THE ESTABLISHMENT OF SPECIAL VICTIM CAPABILITY (SVC) WITHIN THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS (Feb. 11, 2014) [hereinafter DTM 14-002]. See FY13 NDAA, PUB. L. NO. 113-239, § 573, 126 Stat. 1632 (2013) (mandating Special Victim Capabilities in DoD).

255 DTM-14-002 at Glossary.

256 For further discussion on structure and implementation of Special Victim Capabilities, see the Comparative Systems Subcommittee Report to the RSP.

257 U.S. DEP'T OF DEF., INSTR. 5505.03, INITIATION OF INVESTIGATIONS BY DEFENSE CRIMINAL INVESTIGATIVE ORGANIZATIONS (Mar. 24, 2011).

258 DoDI 6495.02 encl. 12 (app.), ¶ a (referring to standard reporting of substantiated reports).

259 *Id.* at encl. 5, ¶ 7.b (referring to Apr. 2012 SecDef Withhold Memo, *supra* note 70).

260 Apr. 2012 SecDef Withhold Memo, *supra* note 70; see also *Transcript of RSP Public Meeting 210-11* (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps) ("[C]ommanders do not make decisions in a vacuum . . . and their [j]udge [a]dvocates are involved at every step of the way . . ."). Disposition may include no action, nonjudicial punishment, administrative action such as administrative separation from the service, referral to a summary or special court-martial,

If the initial disposition authority determines that a court-martial is warranted, charges alleging the offense(s) are preferred against the accused.²⁶¹ The commander also may choose to dispose of offenses by nonjudicial punishment under Article 15 of the Uniform Code of Military Justice (UCMJ), initiate an administrative discharge to involuntarily separate an offender, take other adverse administrative action, or a combination of actions.²⁶² The commander may decline to take action or may be precluded from action based on evidentiary insufficiency, the running of the statute of limitations, or the unavailability of witnesses or evidence.²⁶³ The commander may also decline action and “unfound” an allegation when the commander determines the report was either false or baseless.²⁶⁴

In the Army, “[t]he decision as to whether an offense is founded or not, and whether the accused should be indexed as having committed a founded offense belongs to the supported prosecutor.”²⁶⁵ The Army defines a “founded” offense as a probable cause determination that an offense was committed.²⁶⁶ U.S. Army Criminal Investigation Command (CID) solicits an opinion from a supporting judge advocate, and is the only MCIO to provide the command with an investigation after making a qualitative evidentiary determination.²⁶⁷ Unlike the Army, the Air Force Office of Special Investigations (AFOSI), Naval Criminal Investigative Service (NCIS), and Coast Guard Investigative Service (CGIS) all provide investigations to relevant commanders without any legal conclusions or qualitative opinions on the evidence.²⁶⁸ Irrespective of any previous determinations made by judge advocates or MCIOs, commanders are required to review all open investigative reports and provide MCIOs a written response indicating what action was taken in a case prior to closure of a criminal investigation for any sexual assault allegation.²⁶⁹

or directing a pretrial investigation pursuant to Article 32 of the UCMJ if the disposition authority determines a general court-martial may be warranted. See MCM, *supra* note 4, R.C.M. 306(c). Section 1708 of the FY14 NDAA eliminated character and military service of the accused from matters that may be considered by the commander for initial disposition under R.C.M. 306, effective June 24, 2014. FY14 NDAA, Pub. L. No. 113-66, § 1708, 127 Stat. 672 (2013); see *infra* note 287 and accompanying text.

261 Any person subject to the UCMJ, including a Service member who has been the victim of a sexual assault, may prefer charges. MCM, *supra* note 4, R.C.M. 307(a). Often, however, charges are preferred by unit-level commanders.

262 DoDI 6495.02 encl. 12, ¶ b(1). In Section 1752 of the FY14 NDAA, Congress expressed its sense that charges of rape or sexual assault under Article 120, forcible sodomy under Article 125, and attempts to commit these offenses under Article 80 of the UCMJ should be disposed of by court-martial rather than nonjudicial punishment or administrative discharge. FY14 NDAA, Pub. L. No. 113-66, § 1752, 127 Stat. 672 (2013). In Section 1753, Congress expressed its sense that “the Armed Forces should be exceedingly sparing in discharging in lieu of court-martial” those who have committed these offenses. *Id.* at § 1753. Congress further provided its sense that victims should be consulted prior to deciding whether to discharge an alleged offender in lieu of court-martial, and convening authorities should consider the views of victims in their determination. *Id.*

263 DoDI 6495.02 encl. 12, ¶ c. Determining a report to be “unfounded” because it is false or baseless is the same standard used by the Department of Justice and Federal Bureau of Investigation. See U.S. DEP’T OF JUSTICE, UNIFORM CRIME REPORTING HANDBOOK 41 (2004), available at http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

264 *Id.* at encl. 12, ¶ d.

265 Army Response to RSP Request For Information 66 (Nov. 21, 2013).

266 U.S. DEP’T OF THE ARMY REG. 190-45, LAW ENFORCEMENT REPORTING 136 (Mar. 30, 2007).

267 DoD Instruction 6495.02 also authorizes MCIOs to unfound reports. DoDI 6495.02 encl. 12 (app.), ¶ f. There is inconsistency in terminology and application regarding qualitative evidentiary review and the naming conventions assigned thereto. Though all services are required by DoD Instruction and the NDAA FY11 to use the same definitions for “substantiated reports,” those definitions are inconsistent within DoD Instruction 6495.02, Enclosure 12 (Appendix). For a more in-depth analysis of investigative processes and conflicting terminology, see the Comparative Systems Subcommittee Report to the RSP.

268 Services’ Responses to RSP Request For Information 66 (Nov. 21, 2013).

269 DoDI 5505.18 encl. 2, ¶¶ 4, 5.

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For any offense committed after June 24, 2014, Section 1705 of the FY14 NDAA amends Article 18 of the UCMJ, to restrict jurisdiction for certain sexual assault offenses to general courts-martial.²⁷⁰ As such, the SPCMCA who is the initial disposition authority will not have the power to refer charges of rape or sexual assault under Article 120(a) or (b), rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts to commit these offenses under Article 80 of the UCMJ to a special court-martial. Any allegation warranting trial must be forwarded to the general court-martial convening authority (GCMCA) for referral, following completion of a pretrial investigation in accordance with Article 32 of the UCMJ. In other words, if the initial disposition authority believes there is sufficient evidence of one of these offenses to warrant trial by court-martial, the case cannot be referred to a special court-martial. Instead, the offense may be referred only to a general court-martial. If a judge advocate disagrees with the SPCMCA's disposition decision, that judge advocate may bring the issue to the attention of a higher authority.²⁷¹

D. OTHER COMMANDER RESPONSIBILITIES

In addition to their case disposition responsibilities, military commanders are also responsible for the care and protection of both the victim and the accused. Military commanders must ensure victims and those accused are treated fairly and their rights are respected. As one retired general officer explained to the Subcommittee, “[i]t’s not a matter of who holds convening authority to make members feel valued and understand they’ll be treated fairly. It’s about a commander’s role across the board to make sure people — our members are valued.”²⁷²

After a victim files an unrestricted report, which triggers an investigation and informs the chain of command of an allegation, the commander has means to safeguard the victim. A commander may impose a military protective order or other lawful order (e.g., a no-contact order) to insulate an alleged victim from the subject of the allegation.²⁷³ The commander may restrict or confine a subject, if warranted.²⁷⁴ The commander may also move the victim or subject to a different workplace or unit or pursue a location transfer for either individual. If a victim requests to change his or her unit, assignment, or location, DoD and Service policies require the commander to act on the request within 72 hours, and any request that is denied must be reviewed by the first general officer in the chain of command.²⁷⁵ In addition, a commander must ensure a victim has sufficient time to attend medical, legal, or other appointments and ensure he or she does not experience retaliation²⁷⁶ through personnel actions or from others in the organization when he or she reports or is a victim of a crime.

270 FY14 NDAA, Pub. L. No. 113-66, § 1705(b), 127 Stat. 672 (2013).

271 See 10 U.S.C. § 806(b) (UCMJ art. 6(b)); see also *Transcript of RSP Public Meeting* 239 (Sept. 25, 2013) (testimony of Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force); *id.* at 271-72 (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army).

272 *Transcript of RoC Subcommittee Meeting* 196-97 (Jan. 8, 2014) (testimony of Lieutenant General (Retired) Michael C. Gould, U.S. Air Force).

273 See DEP’T OF DEF. FORM 2873, MILITARY PROTECTIVE ORDER (July 2004).

274 For additional discussion on restriction and pretrial confinement, see Part VI, *infra*.

275 U.S. DEP’T OF DEF. DIRECTIVE-TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF MILITARY SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT (Dec. 16, 2011) (incorporated in DoDI 6495.02). The FY12 NDAA codified DoD’s December 2011 expedited transfer policy. FY12 NDAA, Pub. L. No. 112-81, § 582, 125 Stat. 1298 (2011). From policy implementation in December 2011 through the end of calendar year 2012, DoD SAPRO reported that commanders approved 334 of 336 victim transfer requests. See DoD SAPRO, “DoD Sexual Assault Prevention and Response Initiatives as of April 2013,” at 3, at <http://www.defense.gov/news/DoDSexualAssaultPreventionandResponseInitiatives.pdf>. Section 1712 of the FY14 NDAA incorporated the Coast Guard into this requirement. FY14 NDAA, Pub. L. No. 113-66, § 1712, 127 Stat. 672 (2013).

276 Section 1709 of FY14 NDAA requires the Secretary of Defense to prescribe regulations or require the Service Secretaries to prescribe

A commander must also ensure protection of the rights of an accused assigned to the organization throughout an investigation or any adjudication that results. A commander may not investigate and should not discuss allegations with a subject, but Article 31 of the UCMJ obligates a commander who interrogates or requests a statement from an accused to properly advise the accused of his or her right to remain silent and to seek counsel.²⁷⁷ A commander must ensure the accused is fairly treated and not improperly punished prior to trial.²⁷⁸ A commander must also ensure that a Service member who is accused has adequate time and opportunity to prepare for his or her defense, including adequate duty time to meet with his or her military defense counsel.

Whether intentional or not, commanders must remain ever cognizant that their words and actions may inappropriately influence resolution of cases. Article 37 of the UCMJ prohibits commanders from unlawfully influencing witnesses, court members, judge advocates, military judges, or investigators. In addition to their influence on others, commanders may also be subject themselves to undue or unlawful command influence.²⁷⁹ Cases of sexual assault pose a particular concern for undue or unlawful command influence, and commanders must be scrupulous in exercising their own independent discretion in actions they take before, during, and after a case.²⁸⁰

regulations by April 24, 2014, that prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense, with violations punishable under Article 92 of the UCMJ. FY14 NDAA, Pub. L. No. 113-66, § 1709, 127 Stat. 672 (2013). DoD Instruction 6495.02 requires the Service Secretaries to “[e]stablish procedures to protect victims of sexual assault from coercion, retaliation, and reprisal.” DoDI 6495.02 encl. 2, ¶ 6.q. Section 578 of the FY13 NDAA also directed the Secretary of Defense to develop a policy to require general or flag officer review of circumstances and grounds for the proposed involuntary separation of any member of the Armed Forces who is recommended for involuntary separation within one year after making an unrestricted report of sexual assault if the member requests review on the grounds that he or she believes the recommendation for involuntary separation was initiated in retaliation for making the report. FY13 NDAA, Pub. L. No. 112-239, § 578, 126 Stat. 1632 (2013)

277 10 U.S.C. § 831(b) (UCMJ art. 31(b)).

278 Article 13 of the UCMJ prohibits “punishment or penalty other than arrest or confinement upon the charges pending,” and if arrest or confinement is imposed, it may not be “any more rigorous than the circumstances required to insure his presence.” Infractions of discipline during this period, however, may subject an accused to “minor punishment.” 10 U.S.C. § 813 (UCMJ art. 13).

279 10 U.S.C. § 837(a) (UCMJ art. 37(a)); MCM, *supra* note 4, R.C.M. 104(a)(1).

280 The U.S. Army observed that “[a]fter comments [regarding sexual assault in the military] earlier [in 2013] by several high-profile officials including the President, two Secretaries of Defense, the Chief of Staff of the Army, the Sergeant Major of the Army, and several elected officials, the litigation has increased with the defense filing UCI motions in approximately one-fourth of contested sexual assault cases since those comments.” Army Response to RSP Request for Information 84 (Dec. 19, 2013). The U.S. Marine Corps estimated that UCI motions were filed in approximately 100 UCI cases following comments made by the Commandant of the Marine Corps during his worldwide 2012 Heritage Brief speaking tour, the Navy approximated 80 or more UCI motions were likely filed in 2012 and 2013, and the Air Force noted “numerous” UCI motions were pending litigation in sexual assault cases. The Coast Guard reported six UCI motions in 2012 and 2013 based on senior official commentary. See Services’ Responses to RSP Request for Information 84 (Dec. 19, 2013).

E. PART V SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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.

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.

VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

The evolution of military justice and the role of the commander in it reflect a systematic effort to ensure the good order, discipline, and readiness of U.S. forces by providing for the fair administration of justice. This essential relationship between justice and mission readiness is embodied in the preamble to the Manual for Courts-Martial: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”²⁸¹

A. PRETRIAL RESPONSIBILITIES OF COMMANDERS

The UCMJ vests commanders with military justice responsibilities that precede their responsibilities in courts-martial. Commanders are responsible for ensuring allegations of misconduct are properly investigated.²⁸² When any serious allegation is made, commanders may take steps to ensure the accused’s presence at trial and the prevention of serious misconduct (including threats against or intimidation of witnesses).²⁸³ If circumstances are appropriate, a commander may order a form of pretrial restraint, such as imposition of conditions on liberty, restriction to certain physical limitations, arrest, or confinement (with no option for bail).²⁸⁴ A commander may order an accused into pretrial confinement when there is probable cause to believe that an offense triable by court-martial has been committed, the accused committed the offense, and confinement is required by the circumstances.²⁸⁵ A commander need not have convening authority to order pretrial confinement, and it may be imposed any time before or after preferral (initiation) of charges.

When a commander receives the results of a preliminary inquiry into an offense, such as a report of investigation from a military criminal investigative organization (MCIO), the commander must exercise independent discretion in considering appropriate disposition.²⁸⁶ Commanders may consider the “nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command.”²⁸⁷ The commander

281 MCM, *supra* note 4, at pt. I, ¶ 3.

282 See *id.* at R.C.M. 303.

283 See *id.* at R.C.M. 305.

284 *Id.* at R.C.M. 304.

285 *Id.* at R.C.M. 305(h)(2)(B).

286 Apr. 2012 SecDef Withhold Memo, *supra* note 70. For additional discussion, see Part III, Section B, *supra*.

287 See MCM, *supra* note 4, at R.C.M. 306(b) disc. Section 1708 of the FY14 NDAA eliminated character and military service of the

may weigh those factors, as well as several other recommended jurisdictional and evidentiary issues, prior to making an initial determination on disposition. This decision is usually made after consultation with and recommendation from a judge advocate officer. As explained in Part V, Section C of this report, DoD policy reserves the authority to decide initial disposition for sexual assault allegations to O-6 commanders serving as SPCMCAs, who must consult with a judge advocate before determining disposition.

If the allegation and information warrants court-martial, charges are preferred against the accused.²⁸⁸ Once charges are properly preferred, the immediate commander or higher echelon commander “cause[s] the accused to be informed” of the charges.²⁸⁹ Charges are then forwarded through the chain of command for prompt disposition determination.²⁹⁰ A commander does not necessarily need convening authority to dispose of charges. Unless a higher-level commander has withheld disposition authority, as the Secretary of Defense did for certain sexual offenses, commanders with authority to impose nonjudicial punishment under Article 15 of the UCMJ may dispose of charges.²⁹¹ Charges may be disposed by dismissing some or all of the charges, forwarding any or all of them to the next higher commander, or referring any or all of them to a court-martial that commander is authorized to convene.²⁹² Like the preferral decision, these decisions are normally made after consultation with, and recommendation from, a judge advocate officer.

B. PRETRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES

The convening authority, in conjunction with the military judge, is responsible for ensuring a military member is brought to trial, in general, within 120 days after preferral of charges or the imposition of pretrial restraint, the speedy trial standard established by the UCMJ.²⁹³ Prior to referral, the convening authority is responsible for granting pretrial delays and approving exclusion of any delays from the statutory speedy trial right of the accused.²⁹⁴

Referral is the act of ordering a charge tried by court-martial, and only a general court-martial convening authority (GCMCA) may refer a charge to trial by general court-martial. However, pursuant to Article 32 of the UCMJ, no charge may be referred to a general court-martial until the completion of a pretrial investigation, unless waived by the accused. Unless limited by Service regulation, the Article 32 investigation may be ordered by any convening authority.²⁹⁵ The convening authority who orders the Article 32 also details the investigating

accused from matters that may be considered by the command for initial disposition under R.C.M. 306. FY14 NDAA, Pub. L. No. 113-66, § 1708, 127 Stat. 672 (2013).

288 Unit-level commanders typically prefer charges, but any person subject to the UCMJ may do so. The individual preferring charges must sign the charges under oath and must swear to having personal knowledge of the charges, and that the signer believes they are true. See MCM, *supra* note 4, at R.C.M. 307.

289 *Id.* at R.C.M. 308(a).

290 *Id.* at R.C.M. 306, R.C.M. 401(b).

291 Withheld offenses include rape and sexual assault under 10 U.S.C. § 920 (UCMJ art. 120); forcible sodomy under 10 U.S.C. § 925 (UCMJ art. 125); and any attempts thereof under 10 U.S.C. § 880 (UCMJ art. 80); see *also* Apr. 2012 SecDef Withhold Memo, *supra* note 70.

292 MCM, *supra* note 4, at R.C.M. 401(c).

293 *Id.* at R.C.M. 707.

294 Section 1701 of the FY14 NDAA incorporates eight rights for victims of offenses under the UCMJ into Article 6b of the UCMJ. One right is the “right to proceedings free from unreasonable delay.” FY14 NDAA, Pub. L. No. 113-66, § 1701, 127 Stat. 672 (2013). It is not clear at this time how this right will affect existing speedy trial considerations and procedures.

295 MCM, *supra* note 4, at R.C.M. 405(c). Article 32 investigations are normally ordered by the SPCMCA.

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officer.²⁹⁶ Under current law, an Article 32 investigation “shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of the charges, and a recommendation as to disposition which should be made of the case in the interest of justice and discipline.”²⁹⁷ In addition to other amendments, Section 1702(a) of the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) changes the review standard under Article 32 from a “thorough and impartial investigation” of charges to a preliminary hearing for the narrow purposes of: (1) determining whether probable cause exists to believe an offense has been committed and that the accused committed the offense; (2) determining whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) consideration of the form of charges; and (4) recommending disposition.²⁹⁸ These changes are effective December 27, 2014, one year after enactment of the FY14 NDAA.²⁹⁹

Once the investigation is complete, the Article 32 investigating officer provides findings and recommendations to the convening authority who directed the Article 32.³⁰⁰ That convening authority then makes an informed decision on the disposition of charges. Where the evidence supports the charged offenses, the charges and the Article 32 investigating officer’s report, recommendations of subordinate commanders, and any documents accompanying the charges will normally be forwarded to the GCMCA. A convening authority disposing of charges may also return the charges to a subordinate commander for action, but may not direct or influence that action.³⁰¹ For any offense committed after June 24, 2014, Section 1705 of the FY14 NDAA amends Article 18 of the UCMJ to restrict jurisdiction for charges of rape or sexual assault under Article 120(a) or (b), rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts to commit these offenses under Article 80 of the UCMJ to general courts-martial.³⁰² As such, an initial disposition authority or GCMCA will not have authority to return charges for these offenses to a subordinate commander for possible referral to a special court-martial.

Upon receipt of preferred charges with a recommendation that the case be tried by general court-martial, the GCMCA must comply with certain statutory requirements prior to referring the case to trial. The GCMCA must ensure that a thorough and impartial investigation was conducted in accordance with Article 32 of the UCMJ,³⁰³ and he or she must refer the charges to his or her staff judge advocate for advice and consideration.³⁰⁴

296 *Id.* at R.C.M. 405(d)(1). Section 1702 mandates that a judge advocate of equal or senior rank to the military counsel is required to serve as the hearing officer “whenever practicable” in all cases. FY14 NDAA, Pub. L. No. 113-66, § 1702(b)(2), 127 Stat. 672 (2013). In an August 2013 memorandum, the Secretary of Defense mandated that all Services would provide judge advocates as investigating officers in Article 32 investigations where sexual assault is alleged by December 1, 2013. U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013).

297 10 U.S.C. § 832 (UCMJ art. 32).

298 See FY14 NDAA, Pub. L. No. 113-66, § 1702(a), 127 Stat. 672 (2013).

299 *Id.* at § 1702(d)(1).

300 See MCM, *supra* note 4, at R.C.M. 405(j). The report should include the name of the defense counsel, the substance of the testimony taken, other matters considered, a statement of any reasonable grounds to question the accused’s mental responsibility for the offense or ability to participate, a statement regarding the availability of witnesses and evidence, an explanation of delays, a conclusion as to whether the charges are in their proper form, a conclusion as to whether reasonable grounds exist to believe the accused committed the charged offenses, and a recommendation that includes disposition.

301 See *id.* at R.C.M. 401(c)(2)(B) and disc. (referencing R.C.M. 104); see also 10 U.S.C. § 837 (UCMJ art. 37).

302 See FY14 NDAA, Pub. L. No. 113-66, § 1705, 127 Stat. 672 (2013).

303 10 U.S.C. § 832 (UCMJ art. 32); MCM, *supra* note 4, R.C.M. 405. As noted above, the FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 26, 2014. See *supra* note 299 and accompanying text.

304 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 4, at R.C.M. 406.

A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command.³⁰⁵ Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6.³⁰⁶ Before the convening authority may refer charges to a general court-martial, the staff judge advocate must provide, in writing, his or her own personal legal opinion expressing whether the charges state an offense, whether the charges are warranted³⁰⁷ by the Article 32 investigation report, and whether a court-martial would have jurisdiction over the individual and the offense. In advising convening authorities, all military attorneys acting on behalf of the Government are bound by their Service's rules of professional conduct, which require them to advise the convening authority when a charge is not warranted by the evidence or supported by probable cause.³⁰⁸ The staff judge advocate must also provide a recommendation as to the disposition of the offenses, but this recommendation is not binding on the convening authority.³⁰⁹ Once the staff judge advocate has provided written advice and a disposition recommendation, the GCMCA may decide whether to refer the case to court-martial or send it to a lesser forum for adjudication.³¹⁰

Information presented to the Subcommittee indicates that convening authorities and staff judge advocates agree on disposition of allegations in the overwhelming majority of cases. However, as a matter of law the GCMCA is not bound by the staff judge advocate's recommendation. So long as the staff judge advocate advises that the charge states an offense, that the charge is warranted by the evidence, and that there is jurisdiction over the person and offense, the convening authority may refer the charge to court-martial, even if the staff judge advocate recommends a different disposition. The convening authority may also elect, contrary to the staff judge advocate's recommendation, not to refer the charge for trial.³¹¹ The staff judge advocate may communicate directly with the staff judge advocate of the superior commander (the next higher commander in the chain of command) or with the Judge Advocate General of his or her Service if he or she disagrees with the convening authority's decision.³¹² While a superior commander is prohibited from attempting to influence the subordinate convening authority in response to being notified of such a disagreement, the superior convening

305 MCM, *supra* note 4, at R.C.M. 103(17), R.C.M. 105(a).

306 See *Transcript of RSP Public Meeting 244* (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

307 The discussion to R.C.M. 406 provides that a staff judge advocate will use a probable cause standard of proof in assessing whether the allegation of each offense is warranted by the evidence in the report of investigation. MCM, *supra* note 4, at R.C.M. 406(b)(2) disc.

308 See U.S. DEP'T OF ARMY, ARMY REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 23 (Rule 3.8) (May 1, 1992); U.S. DEP'T OF AIR FORCE, AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE 299 (Standard 3-3.9) (June 6, 2013); U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5803.1D, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE COGNIZANCE AND SUPERVISION OF THE JUDGE ADVOCATE GENERAL 95 (Rule 3.8) (May 1, 2012).

309 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 4, at R.C.M. 406. Article 34 of the UCMJ requires only written SJA advice for referral to general courts-martial, but written advice may be provided to the convening authority in referrals to lesser courts-martial as well.

310 As noted above, for offenses committed after June 27, 2014, adjudication of sexual assault offenses at a lesser forum than general court-martial will no longer be an option, as only general courts-martial will have subject-matter jurisdiction over sexual assault offenses. See *supra* note 299 and accompanying text.

311 A review of criminal cases between January 1, 2010 and April 23, 2013 showed that Air Force commanders and their staff judge advocates agreed on appropriate disposition in more than 99 percent of cases where the staff judge advocate recommended trial by court-martial. *Written Statement of Lieutenant General Richard C. Harding, U.S. Air Force, to the RSP* (Sept. 25, 2013). Retired officers who held GCMCA testified they had never personally disagreed or heard of a case where a GCMCA disagreed with a staff judge advocate's recommendation to refer charges to court-martial. *Transcript of RSP RoC Subcommittee Meeting 278-79* (Jan. 8, 2014) (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy; General (Retired) Roger A. Brady, U.S. Air Force; and Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps).

312 See 10 U.S.C. § 806(b) (UCMJ art. 6(b)).

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authorities may withdraw a decision from a subordinate commander and dispose of the charges pursuant to his or her own independent judgment.

To ensure more rigorous scrutiny of a convening authority's referral discretion, Section 1744 of the FY14 NDAA imposed a new review requirement for any decision not to refer charges of sex-related offenses to trial by court-martial. If the staff judge advocate recommends charges be referred to trial by court-martial and the convening authority rejects that advice, the convening authority must forward the case file to the Service Secretary for review. If the staff judge advocate recommends that charges not be referred to trial by court-martial and the convening authority concurs, the convening authority must forward the case file to a superior commander authorized to exercise general court-martial convening authority for review.³¹³

Before referring charges to court-martial, the convening authority must select and detail personnel who will serve as voting members of the court-martial, normally referred to as panel members (jurors) in accordance with Article 25 of the UCMJ. The convening authority must consider all personnel assigned to his or her command, regardless of rank or occupational specialty.³¹⁴ The convening authority personally details members of the command as voting members of the court-martial convened by referral of the charges to trial. His discretion is not, however, absolute. Instead, Article 25 of the UCMJ requires detail of panel members who are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."³¹⁵ Members must be senior to the accused,³¹⁶ and may be officer or enlisted personnel. If an enlisted accused requests enlisted members, at least one-third of the panel will be comprised of enlisted members.³¹⁷ The convening authority's decision is recorded on a court-martial convening order, which is a written order designating the type of court-martial, court-martial panel members, the authority under which the court is convened (statutory or Secretarial), and location of the court-martial.³¹⁸ The convening authority may then refer charges to a court-martial constituted under the court-martial convening order.³¹⁹

The convening authority may excuse and detail new members for any reason before the court is assembled (the court is assembled after the detailed members have undergone voir dire, all challenges have been exercised, and the remaining panel members are sworn for their duty as voting members of the court), and for good cause following assembly of the court.³²⁰ As a senior commander, the convening authority assesses different and

313 FY14 NDAA, Pub. L. No. 113-66, § 1744(c),(d), 127 Stat. 672 (2013). Section 1744(e)(6) requires "[a] written statement explaining the reasons for the convening authority's decision not to refer any charges for trial by court-martial" to be included in the case file forwarded for review.

314 See, e.g., *United States v. Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999) (noting that rank cannot be used to short cut selection process); *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) (deciding that members cannot be excluded from consideration based on occupational specialty).

315 10 U.S.C. 825(d)(2) (UCMJ art. 25(d)(2)).

316 Court members may be in the same grade as the accused, but they must have seniority based on the date they were promoted to that grade. In other words, for an accused who is an Army captain, other captains may serve as court members so long as their date of promotion to captain is earlier than the accused's date. 10 U.S.C. § 825(d)(1) (UCMJ art. 25(d)(1)).

317 MCM, *supra* note 4, at R.C.M. 503(a)(2).

318 *Id.* at R.C.M. 504(d).

319 *Id.* at R.C.M. 601.

320 *Id.* at R.C.M. 505.

sometimes competing priorities, including operational requirements, readiness considerations, and individual hardships in determining whether a member is available for service on a court-martial panel.³²¹

Unlike the members of a court-martial, the military judge for a court-martial is detailed in accordance with Service regulations by a senior military judge directly responsible to the Judge Advocate General or the Judge Advocate General's designee.³²² Nevertheless, a court-martial convening order is required to properly constitute the court, even when an accused requests trial by military judge alone instead of trial before members.

The convening authority who referred the charges may enter into a pretrial agreement with the accused. Pretrial agreements are used primarily as the military method of plea bargaining, with the accused agreeing to plead guilty to one or more charges, enter into a stipulation of fact, or agree to other conditions not prohibited by law, including the waiver of certain non-jurisdictional procedural or legal errors.³²³ In exchange for the accused's offer, the convening authority may agree to refer the charges to a certain type of court-martial, withdraw one or more charges or specifications from court-martial, and/or direct the trial counsel to present no evidence on one or more specifications (resulting in acquittal on those offenses). Because a sentence adjudged by court-martial must be approved by the convening authority, and because the convening authority is vested with authority to reduce the punishment adjudged by the court, perhaps the most common commitment made by convening authorities is to take a specified action on the adjudged sentence, for example a commitment to disapprove confinement in excess of a certain amount, or to disapprove a certain level of punitive discharge. However, based on changes under Section 1702 of the FY14 NDAA to the convening authority's Article 60 clemency authority,³²⁴ which take effect on June 24, 2014, the convening authority will no longer have authority to enter into a pretrial agreement for certain sex offenses in which he or she agrees to disapprove a punitive discharge entirely, but may still agree to commute a mandatory minimum dishonorable discharge to a bad-conduct discharge.³²⁵

C. TRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES AND THE MILITARY JUDGE

Once a case is referred for trial by court-martial, Rule for Courts-Martial (R.C.M.) 701 establishes compulsory discovery provisions for the government. Article 46 of the UCMJ and R.C.M. 703 require that the trial counsel, defense counsel, and court-martial have equal opportunity to obtain witnesses and evidence.³²⁶

321 A retired Air Force judge advocate and former senior representative from the Department of Defense Office of the General Counsel described the challenge in assessing member availability based on competing military interests, particularly in times or locations of active military operations. Since once assembled, the duty as a member of the court takes priority over all other duties, he observed that panel service "[impacts] the fighting force available at the tip of the [spear]. Now who makes that decision as to who is expendable at the tip of the [spear]? Should it be the judge advocate? Should it be pulling the name out of the hat? Or should it be the Commander whose responsibility it is to execute the war?" *Transcript of RSP RoC Subcommittee Meeting* 36 (Mar. 12, 2014) (testimony of Mr. Robert Reed, former DoD Associate Deputy General Counsel for Military Justice and Personnel Policy).

322 MCM, *supra* note 4, at R.C.M. 503(b)(1).

323 *Id.* at R.C.M. 705.

324 The convening authority's ability to enter into certain terms of a pre-trial agreement will be limited based on statutory changes to Articles 18 and 60 of the UCMJ. See FY14 NDAA, Pub. L. No. 113-66, § 1702, 127 Stat. 672 (2013).

325 *Id.* at §§ 1702(b), 1705.

326 10 U.S.C. § 846; MCM, *supra* note 4, at R.C.M. 701. Section 1704 of the FY14 NDAA amends Article 46 of the UCMJ to include a provision limiting defense counsel access to interview victims of sex-related offenses. If a trial counsel notifies a defense counsel of the name of an alleged victim of an alleged sexual offense whom the trial counsel intends to call at an Article 32 hearing or court-martial, the defense counsel must submit any request to interview the alleged victim through the trial counsel. If requested by the

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The trial counsel, acting under the supervision of the staff judge advocate and on behalf of the convening authority, approves or disapproves specific requests for witnesses and evidence. The convening authority funds government and defense witness and travel costs, and defense requests for production of witnesses are approved or disapproved by the trial counsel.³²⁷ If disapproved, the defense may file a motion requesting the military judge to compel production of the witness. If the military judge grants a motion to compel a defense witness, the trial counsel must produce the witness. If the convening authority persists in the refusal to produce the witness, the military judge may abate the proceedings or take other appropriate action.³²⁸

Except where the Services have established central funding resources, the convening authority is also responsible for funding expert assistance or expert witnesses for the prosecution and defense, including the expert assistance of defense investigators. Both trial and defense counsel are required to submit a request to the convening authority to obtain expert assistance and funding. A request can be renewed to the military judge if denied, but only after the case is referred for trial. Prior to referral, there is no process for challenging a convening authority's denial of expert assistance in preparation for trial.³²⁹ Instead, the defense must await referral to trial by court-martial in order to invoke the procedures permitting a military judge to review the denial.³³⁰

Following referral of charges, several of the pretrial responsibilities vested in the convening authority shift to the military judge, who schedules and presides over any initial sessions and trial.³³¹ Prior to that first session, the convening authority may order an inquiry into the mental capacity and mental responsibility of the accused. After the first session, the authority to order an inquiry into mental capacity and responsibility belongs to the military judge.³³² Prior to referral, the convening authority may make minor changes to charges and specifications; following arraignment, the military judge may permit changes upon motion of the parties.³³³ At any time after referral, the military judge may grant a motion to dismiss specifications or charges based on factual or legal insufficiency, or other irreparable procedural error.³³⁴ The military judge also has authority to grant appropriate relief, including sentence credit, suppression of evidence, and rule on many other legal issues

alleged victim, "any interview of the victim by defense counsel shall take place only in the presence of trial counsel, a counsel for the victim, or a Sexual Assault Victim Advocate." "Alleged sex-related offense" under Section 1704 includes any allegation of a violation of Articles 120, 120a, 120b, 120c, 125, or attempts to commit any of these offenses under Article 80. FY14 NDAA, Pub. L. No. 113-66, § 1704, 127 Stat. 672 (2013).

327 MCM, *supra* note 4, at R.C.M. 703(c)(2)(D).

328 *Id.*

329 See *Transcript of RSP Public Meeting* 389-403 (Dec. 12, 2013) (testimony of Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force; Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy; Captain Scott Shinn, Officer-in-Charge, Defense Counsel Assistance Program, U.S. Marine Corps; and Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program U.S. Army, regarding funding and travel of lay and expert witnesses at court-martial).

330 A defense counsel from the Navy told the RSP that this can impact trial preparation for the defense and the speedy trial rights of an accused: "The Government is able to use consultant and expert witness, essentially from preferral. But if the defense asks for an expert consultant . . . we have to wait until it's referred to trial . . . We can't use a consultant prior to that unless we can convince the convening authority to give us one." *Id.* at 402 (testimony of Commander Don King, U.S. Navy).

331 MCM, *supra* note 4, at R.C.M. 801. Under Article 35 of the UCMJ, the initial session cannot be held earlier than five days following referral to general court-martial, and three days in the case of a special court-martial. 10 U.S.C. § 835.

332 MCM, *supra* note 4, at R.C.M. 706(b)(2).

333 *Id.* at R.C.M. 603.

334 *Id.* at R.C.M. 907.

as the facts and law determine.³³⁵ Notably, the military judge may also grant appropriate relief in the form of dismissal, with or without prejudice, as the result of unlawful command influence.

Nevertheless, the convening authority retains several responsibilities throughout the trial. The convening authority is responsible for funding and producing witnesses or expert assistance the military judge orders, or face abatement of the proceedings or other appropriate relief as the judge determines. The convening authority may order depositions upon request of a party before or after referral, while the military judge only has that authority after referral.³³⁶ Although a military judge may compel a convening authority to do so, only a GCMCA may grant testimonial or transactional immunity for members subject to the UCMJ.³³⁷ The authority to grant immunity may not be delegated.³³⁸

D. POST-TRIAL RESPONSIBILITIES OF COMMANDERS AND CONVENING AUTHORITIES

A convening authority may not disapprove a finding of not guilty or any ruling amounting to a finding of not guilty.³³⁹ If an accused is convicted of a charge and sentenced to confinement, he or she begins serving confinement immediately following the announcement of the sentence by the court-martial, and the immediate commander and convening authority are notified of the findings and sentence. The accused may petition the convening authority to defer the effective date of any sentence to confinement, forfeitures of pay, or reduction in grade/rank which have not been ordered executed.³⁴⁰ If granted, the deferment ends when the sentence is ordered executed by the convening authority, or it may be rescinded by the convening authority at any time prior to action.³⁴¹

After trial, a court reporter assigned to the staff judge advocate prepares the record of trial, which is then reviewed by all counsel and authenticated by the military judge. The record is served on the accused with a copy of the staff judge advocate's recommendation to the convening authority, which summarizes the trial result, advises whether any corrective action should be taken on allegation of legal error, and provides a recommendation on clemency. The accused, with the advice of counsel, has ten days (up to 30 days with an extension request), to submit additional clemency matters to the convening authority.³⁴² Section 1706 of the FY14 NDAA requires that the victim of any offense "in which findings and sentence have been adjudged for an offense that involved a victim . . . shall be provided an opportunity to submit matters for consideration by the

335 *Id.* at R.C.M. 906.

336 *Id.* at R.C.M. 702(b).

337 MCM, *supra* note 4, at R.C.M. 704. Only a GCMCA may grant immunity against prosecution or other adverse action for those subject to the Code, even alleged victims of sexual assault who may be concerned about their own collateral misconduct. For further discussion on collateral misconduct, see the Comparative Systems Subcommittee Report to the RSP.

338 MCM, *supra* note 4, at R.C.M. 704(c)(3).

339 MCM, *supra* note 4, at R.C.M. 1107(b)(4).

340 10 U.S.C. §§ 857, 857a (UCMJ arts. 57, 57a); MCM, *supra* note 4, at R.C.M. 1101.

341 10 U.S.C. § 857(a)(2) (UCMJ art. 57(a)(2)); MCM, *supra* note 4, at R.C.M. 1101(c)(7).

342 MCM, *supra* note 4, at R.C.M. 1103, 1104, 1105; see also FY14 NDAA, Pub. L. No. 113-66, § 1706(b), 127 Stat. 672 (2013) (prohibiting the convening authority from considering "submitted matters that relate to the character of a victim unless such matters were presented as evidence at trial and not excluded at trial").

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convening authority” within ten days (up to 30 days with an extension request) from receipt of the record and the SJA’s post-trial recommendation.³⁴³

Action on the findings of a court-martial by the convening authority is not required, but Article 60 of the UCMJ provides significant discretion to a convening authority, deemed “a matter of command prerogative involving the sole discretion of the convening authority,” to disapprove or commute findings of guilt.³⁴⁴ Section 1702(b) of the FY14 NDAA, which takes effect on June 24, 2014, significantly reduces the convening authority’s authority to commute or otherwise disapprove findings. Findings of guilt may only be set aside or commuted for “qualifying offense[s]” — i.e., when the maximum sentence of confinement that may be adjudged does not exceed two years; the sentence adjudged does not include a punitive discharge or confinement for more than six months; and none of the offenses is a violation of Article 120(a) (rape) or 120(b) (sexual assault), Article 120b (rape and sexual assault of a child), or Article 125 (forcible sodomy) of the UCMJ.³⁴⁵

In contrast to the presumptive regularity of court-martial findings, the convening authority must take action on the adjudged sentence.³⁴⁶ A convening authority may not increase the severity of the sentence. While Article 60 provides broad discretion to convening authorities as a matter of “command prerogative” to disapprove, commute, or suspend punishments, Section 1702 of the FY14 NDAA reduces this discretion.³⁴⁷ Under Section 1702’s revisions to Article 60, convening authorities may not disapprove, commute, or suspend adjudged sentences of confinement of more than six months or sentences that include a punitive discharge except for limited circumstances upon recommendation of the trial counsel in recognition of “substantial assistance by the accused in the investigation or prosecution of another person” or in accordance with a pretrial agreement, subject to certain limitations where the offense requires a mandatory minimum sentence.³⁴⁸ If the convening authority disapproves, commutes, or reduces any portion of a court-martial sentence, the convening authority must explain the reason in writing, and the written explanation becomes part of the record of trial and convening authority action.³⁴⁹

Following convening authority action on the sentence,³⁵⁰ the record of trial is either reviewed by a judge advocate under Article 64 of the UCMJ, or transmitted to the Judge Advocate General of the Service for

343 FY14 NDAA, Pub. L. No. 113-66, § 1706(a), 127 Stat. 672 (2013). Section 1706 does not specify what matters a victim may submit for consideration. See *id.*

344 10 U.S.C. § 860 (UCMJ art. 60(a)(4)).

345 FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).

346 MCM, *supra* note 4, at R.C.M. 1107(d).

347 FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).

348 Unlike civilian jurisdictions, the accused in a court-martial benefits from the lower of the adjudged punishment or the agreed-upon punishment in a pretrial agreement. The authority vested in convening authorities under Article 60 of the UCMJ permits them to reduce sentencing terms in an adjudged sentence to comply with provisions of pretrial agreements limiting sentencing terms. Under Section 1702(b), a convening authority may not commute a mandatory minimum sentence except to reduce a mandatory dishonorable discharge to a bad-conduct discharge. FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013).

349 *Id.*

350 Section 572(a)(2) of the FY13 NDAA also requires initiation of administrative discharge proceedings against any Service member who is convicted of a covered offense (rape or sexual assault under Article 120, forcible sodomy under Article 125, or an attempt to commit one of these offenses under Article 80) and not punitively discharged. FY13 NDAA, Pub. L. No. 112-239, § 572(a)(2), 126 Stat. 1632 (2013).

appellate action in accordance with Articles 66 and 69 of the UCMJ, respectively.³⁵¹ After the record of trial and convening authority action are forwarded, the convening authority may not modify the action unless an appellate review authority directs.³⁵²

E. PART VI SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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.

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 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.

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 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.

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.

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 a recommendation from an investigating officer against referral of an investigated charge for trial by court-martial.

351 10 U.S.C. §§ 864, 865 (UCMJ arts. 64, 65).

352 See *United States v. Alexander*, 63 M.J. 269, 274 (C.A.A.F. 2006).

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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.

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 FY 14 NDAA, which modifies Article 60 of the UMCJ, 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.

VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

The Subcommittee heard and received substantial information about the roles assigned to military commanders under the UCMJ. The Subcommittee considered numerous proposals and supporting materials advocating for removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Proponents for change articulated a number of reasons why the UCMJ's current disposition authority framework discourages sexual assault victims and reporting of sexual assault crimes. The Subcommittee also heard from many who believe convening authority is a vital tool for commanders and that changing the UCMJ's convening authority framework would be counter-productive to military effectiveness and sexual assault response.

A. RECENT STUDIES OF COMMANDER AUTHORITY UNDER THE UCMJ

Recent reviews conducted by organizations outside of DoD have considered the disciplinary powers of commanders under the UCMJ. In 2001, the Cox Commission³⁵³ undertook a review of the system in light of the many changes the U.S. military experienced after a half-century under the UCMJ as well as significant military-justice reforms adopted in several Allied countries. As the Commission noted in its report, many witnesses testified that “the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces.”³⁵⁴

Citing such testimony, the Commission concluded that “[t]he combined power of the convening authority to determine which charges shall be preferred, the level of court-martial, and the venue where the charges will be tried, coupled with the idea that this same convening authority selects the members of the court-martial to try the cases, is unacceptable in a society that deems due process of law to be the bulwark of a fair justice system.”³⁵⁵ Nevertheless, the Cox Commission did not recommend changing the authority held by commanders to convene courts-martial, but recommended other changes to pretrial responsibilities, such as removing commanders from panel selection, approval of witness travel for pretrial hearings, funding for expert witnesses and assistance, and funding for pretrial investigative assistance.³⁵⁶ As for the wisdom of possible additional changes to commanders' role in matters of military justice, the Commission recommended further study.³⁵⁷

353 The Commission was sponsored by the National Institute of Military Justice and chaired by the Honorable Walter T. Cox, III, former Chief Judge of the Court of Appeals for the Armed Forces.

354 REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 6 (2001).

355 *Id.* at 8.

356 *Id.* at 7-8.

357 *Id.* at 7.

The U.S. Commission on Civil Rights (USCCR) considered the topic of sexual assault in the military for its 2013 annual report. The USCCR held three sessions during a one-day hearing on January 11, 2013, focused on victim and accused perspectives, academic scholar perspectives, and perspectives of military officials. The USCCR issued its report in September 2013.

The USCCR concluded that greater accountability was needed for “leadership failures to implement” the policies implemented by the Department of Defense (DoD) to combat sexual harassment and sexual assault, as well as increased data collection to measure the effects of changes implemented by the military.”³⁵⁸ The eight commissioners did not reach a majority conclusion regarding the military justice authority of commanders, but individual commissioners proposed recommendations regarding the role of the commander as convening authority. Four commissioners joined in a statement recommending that “Congress should pass, and the President should sign, legislation creating an authority outside of the military in which is vested the power to investigate, prosecute, try, and impose sentence upon conviction in all sexual assault cases which arise within the military’s ranks.”³⁵⁹ If the military retained jurisdiction, the opinion recommended

legislation establishing within each branch of the military a centralized legal body . . . [with] authority to investigate all reported sexual assault offenses within its Branch, to file charges, and to pursue prosecutions of those allegations in cases where the potential punishment of a perpetrator is not less than imprisonment of six months. In cases where the maximum punishment for [sic] upon conviction is imprisonment of less than six months, these bodies shall return the case to command for Article 15 proceedings.³⁶⁰

The commissioners called on DoD and the Armed Forces to “strip commanders of discretion in the investigation and disposition decisions of sexual assault cases in the military” as an improvement to the current military justice system.³⁶¹

In a separate statement, one USCCR commissioner opined that the most controversial issue was “whether command should retain the authority to refer soldiers, sailors, marines and airmen to courts martial or merely administer Article 15 discipline.”³⁶² He proposed that “a separate prosecutor’s office should be created in DoD, made up of civilian and military lawyers and investigators. This office should decide, after its investigative staff has examined an incident, whether to bring charges and, if charges are brought, whether they will be at a court martial or an Article 15.”³⁶³ The commissioner reasoned that because commanders do not have special legal training to make prosecutorial decisions, it “puts the determining officer at a disadvantage. As hard as they might try not to, the officer will almost inevitably consider conflicts that arise above and/or below their rank in the chain of command.”³⁶⁴

In a separate opinion, the USCCR Vice Chair observed that the military’s prosecution rate for sexual offenses is comparable to that in the civilian sector, and she stated that “[p]olitical pressure from Congress and advocacy

358 U.S. COMM’N ON CIVIL RIGHTS, *SEXUAL ASSAULT IN THE MILITARY* V (2013).

359 *Id.* at 135.

360 *Id.* at 135–36.

361 *Id.* at 137.

362 *Id.* at 200 (Statement of Commissioner Dave Kladney).

363 *Id.* at 200–01.

364 *Id.* at 201.

groups has resulted in an increase of charges and prosecutions while doing little to reduce the problem.”³⁶⁵ She further stated that “[r]emoving the commander’s discretion over sexual assault cases would represent a loss, however small, of the commander’s authority and her ability to command her personnel.”³⁶⁶ A separate opinion of three USCCR commissioners said “the radical change . . . pending in Congress won’t fix anything. The damage that could be done to command authority far outweighs any benefit that might accrue, and there is no evidence such proposals would benefit sexual assault victims anyway.”³⁶⁷

At its quarterly meeting held on September 26-27, 2013, the Defense Advisory Committee on Women in the Services (DACOWITS) considered the proposal to remove commanders’ convening authority. DACOWITS is a Federal Advisory Committee established by the Secretary of Defense to “examine and advise [the Secretary] on matters relating to women in the Armed Forces.”³⁶⁸ On September 26, the Committee heard from Senator Kirsten Gillibrand and Senator Claire McCaskill about their perspectives on sexual assault in military justice and proposed changes to command authority in the UCMJ.³⁶⁹ The Committee also received public comment on September 27 from representatives of two advocacy organizations that support removal of commanders’ convening authority: the Women in the Military Project, Women’s Research and Education Institute, and the Service Women’s Action Network (SWAN) but did not hear any other testimony on the matter.³⁷⁰ During deliberations, DACOWITS adopted the following recommendation:

DoD should support legislation to remove from the chain of command the prosecution of military cases involving serious crimes, including sexual assault, except crimes that are uniquely military in nature. Instead, the decisions to prosecute, to determine the kind of court martial to convene, to detail the judges and members of the court martial, and to decide the extent of the punishment, should be placed in the hands of the military personnel with legal expertise and experience and who are outside the chain of command of the victim and the accused.³⁷¹

B. ARGUMENTS FOR CHANGES TO COMMANDER ROLES FOR SEXUAL ASSAULT CRIMES

The Subcommittee considered numerous proposals and supporting materials advocating the removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Many proponents for change asserted that the current role played by commanders as convening authorities discourages Service members from reporting sexual assaults and fosters apprehension among victims about

³⁶⁵ *Id.* at 144 (Statement of Vice Chair Abigail Thernstrom).

³⁶⁶ *Id.* at 146-47.

³⁶⁷ *Id.* at 149 (Statement of Commissioner Todd Gaziano, joined by Vice Chair Thernstrom and Commissioner Kirsanow).

³⁶⁸ Defense Advisory Committee on Women in the Services, “Charter – Defense Advisory Committee [sic] on Women in the Services” (Apr. 17, 2012), available at <http://dacowits.defense.gov/About/Charter.aspx>.

³⁶⁹ See Defense Advisory Committee on Women in the Services, “Quarterly Meeting Minutes” 8-9 (Sept. 26-27, 2013), available at <http://dacowits.defense.gov/About/Charter.aspx>.

³⁷⁰ *Id.* at 10.

³⁷¹ *Id.* at 12-13. Committee discussion on the proposal “generally centered around whether to proceed with the recommendation based on information from the existing briefings and materials or to postpone making a recommendation to further study the issue.” *Id.* at 13. The DACOWITS committee voted to adopt the recommendation as proposed, with ten votes in favor and six abstentions. *Id.*

retaliation and retribution. The Subcommittee reviewed the following arguments in favor of eliminating the military justice authority vested in commanders:

1. Victim Reporting

Proponents for change assert that the current system with commanders serving as convening authority discourages Service members from reporting sexual assaults. According to the military sexual assault advocacy organization Protect Our Defenders (POD), “[v]ictims are often discouraged or sometimes outright told not to report a sexual assault. Of the 26,000 incidents of sexual assaults and other sexual crimes that occurred in 2012, only 3,374 were officially reported. Many times, victims are advised by people in their chain of command that if they report, the victim could face criminal charges or non-judicial punishment for collateral misconduct. This is often enough to silence a victim who is already intimidated or distrustful of the system.”³⁷² In June 2013, the President of POD told the Senate Armed Services Committee (SASC) that

[Victims] don’t report because they are disbelieved. They don’t report because the often higher-ranking perpetrator is buddies with those that they must report to. They don’t report because they are told when they are given their options to report that, oh, by the way, you were drinking. You are under age. You will be charged with collateral misconduct.

You don’t report because the thought that you have heard from your friend who tried to report that – and you see what happens to them, and they are being drummed out and diagnosed with a personality disorder. These things are not going to change at any tweaks to the system, even common sense tweaks that are good. It is still not going to fundamentally address this issue.³⁷³

At the same hearing, a representative from SWAN told the SASC, “[s]ervicemembers tell us that they do not report for two reasons primarily. They fear retaliation, and they are convinced that nothing will happen to their perpetrator.”³⁷⁴

A former congressman and Army judge advocate told the Subcommittee, “[s]oldiers don’t understand what’s going on. And when they’re victims they fear the worst. And that’s why if you have an independent military justice system at the felony level I do believe more women will come forward.”³⁷⁵ A former senior Navy chaplain said placing prosecutorial authority in the hands of independent Judge Advocate General (JAG) officers will lead to increased prosecutions and influence victims to report once they see a greater number of perpetrators being “tried and convicted and put out of the service and jailed and all the other appropriate punishments which they’re not seeing. That’s what will send the strong message.”³⁷⁶

2. Reprisal and Retribution against Alleged Victims

Several proponents recommending change described frequent allegations of retaliation and retribution against victims. Elaborating on SWAN’s testimony about victim fear of retaliation serving as a deterrent to reporting,

372 Protect Our Defenders, “Nine Roadblocks to Justice: The Need for an Independent, Impartial Military Justice System” [hereinafter “Nine Roadblocks”], at <http://www.protectourdefenders.com/roadblocks-to-justice/>.

373 *Transcript of SASC Hearing 130* (June 4, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).

374 *Id.* at 110 (testimony of Ms. Anu Bhagwati, Executive Director, Service Women’s Action Network).

375 *Transcript of RSP RoC Subcommittee Meeting 67* (Jan. 8, 2014) (testimony of former U.S. Representative Patrick J. Murphy).

376 *Id.* at 149 (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy).

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Senator Kirsten Gillibrand said victims “have told us that the reason they do not report these crimes is because they fear retaliation. More than half say they think nothing is going to be done, and close to half say they fear they will have negative consequences. They will be retaliated against.”³⁷⁷

The Subcommittee received different perspectives on retaliation concerns and why removing prosecutorial authority from commanders would impact the problem. A representative from SWAN described different types of retaliation and retribution against victims:

Retaliation happens in many respects. We see on a day-to-day basis that our callers, both servicemembers and veterans who have recently been discharged, have been punished with anything from personal retaliation from roommates and family members to professional retaliation by their chain of command from the lowest levels to the highest levels, platoon sergeants all the way up the chain.

They are also retaliated in more kind of insidious ways. They are given false diagnoses, mental health diagnoses, like personality disorders, which bar them from service, which force them to be discharged, which ban them from getting VA services, VA benefits. So it is comprehensive retaliation.³⁷⁸

Sexual assault survivors also described retaliation they experienced. “The colonel at one point said, you know, . . . boys, girls and alcohol just don’t mix. We’ll never really know what happened inside that office—only you and the major know and he’s not talking. So, at this point, the investigation is closed for a lack of evidence and we’ve reopened a new investigation against you for conduct unbecoming of an officer and public intoxication.”³⁷⁹ Another survivor recalled “[t]his officer bragged to his fellow officer friends that he had ‘bagged’ me. I got called up to a major’s office and he charged me with fraternization and adultery. He was married, I wasn’t, and I was charged with adultery.”³⁸⁰

POD said victims also face the threat of discipline for collateral misconduct. POD’s president told the RSP in November that “victims who want to come forward are often directed not to report. They are often inappropriately threatened with collateral misconduct, and if they do go forward, targeted with a barrage of minor [disciplinary] infractions as a pretext to force them out of the service.”³⁸¹ POD notes that “[t]his is often enough to silence a victim who is already intimidated or distrustful of the system.”³⁸² POD’s president told the SASC that “[u]ntil you remove the bias and conflict of interest out of the chain of command, you will not solve

377 *Transcript of SASC Hearing 48* (June 4, 2013) (statement of Senator Kirsten E. Gillibrand). In September, Senator Gillibrand told the RSP it wasn’t certain whether removing commanders from the courts-martial referral process would increase sexual assault reporting. She observed that victims indicated it would increase reporting, but “[m]aybe it won’t.” Regardless, Senator Gillibrand said her proposed reform would be a “very good first step.” *Transcript of RSP Public Meeting 331* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

378 *Transcript of SASC Hearing 116* (June 4, 2013) (testimony of Ms. Anu Bhagwati, Executive Director, Service Women’s Action Network).

379 *THE INVISIBLE WAR* (Chain Camera Pictures 2012) (statement of Ms. Elle Helmer).

380 *Id.* (statement of unidentified soldier).

381 *Transcript of RSP Public Meeting 325–26* (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Out Defenders).

382 “Nine Roadblocks,” *supra* note 372.

this problem. The retaliation is not about peer pressure. The retaliation is about the lower-ranking victim being disbelieved by the higher-ranking perpetrators and their friends.”³⁸³

3. Expectations of Victims and Survivors

Many proponents for changing the role of the commander described the expectations of victims and survivors. Senator Gillibrand told the RSP she suggested her solution because it is what “victims have said over and over and over again” and that victims indicated “the problem is that our only decision maker is in the chain of command.”³⁸⁴ A retired Navy admiral told the Subcommittee “[w]hat has come through loud and clear in my encounters, particularly recently, is optimism from women who are serving. Optimism that this is a time of change.”³⁸⁵ Another presenter said the proposed change will build trust in victims to report because it “will send the signal that the commander doesn’t have the authority to make the decision anymore.”³⁸⁶ At its September and November RSP public meetings, the Panel received accounts, in person and through written public comment, from survivors who support removing decision authority for sexual assault cases from the chain of command.³⁸⁷

Similarly, a retired senior Navy commander and women’s advocate commented on the significant expectations of some victims and survivors. She said “there is so much psychological focus on [the Military Justice Improvement Act] that if it fails there will be repercussions within what they call themselves[,] the victim community.”³⁸⁸ Another presenter to the Subcommittee stated that “from the eyes of the victims, the survivors, this Gillibrand amendment is huge. It is to them a proxy for what might have made it different in their situation.”³⁸⁹

4. Fundamental Fairness and Objectivity

In explaining POD’s support of proposals to remove convening authority from commanders, a representative from POD told the RSP this issue “is fundamentally about American values of fairness and justice. We must ensure that the men and women who have signed up to serve this country and risk their lives for our rights are given the same access to impartial justice that every other citizen of this country is entitled to. In order to make that a reality, the military justice system must be reformed to ensure that there is fairness, objectivity, and impartiality. This cannot be achieved without removing the prosecution and adjudication from commanders.”³⁹⁰

Senator Gillibrand emphasized the need to ensure the victim and accused are treated fairly, which she asserts will happen if prosecutorial discretion is removed from commanders. “[A]t the end of the day, you want to have as close to an unbiased system as possible. I don’t want to weigh the scales of justice in favor of the victim.

383 *Transcript of SASC Hearing 122* (June 4, 2013) (testimony of Ms. Nancy Parrish).

384 *Transcript of RSP Public Meeting 339–40* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

385 *Transcript of RSP RoC Subcommittee Meeting 105–06* (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Marty Evans, U.S. Navy).

386 *Id.* at 100 (testimony of Ms. K. Denise Rucker Krepp, former Chief Counsel, U.S. Maritime Administration).

387 *Transcript of RSP Public Meeting 17–75* (Nov. 8, 2013); *Written Statement of Protect Our Defenders to RSP, Attachment 1* (Sept. 17, 2013).

388 *Transcript of RSP RoC Subcommittee Meeting 153–54* (Jan. 8, 2014) (testimony of Captain (Retired) Lory Manning, U.S. Navy).

389 *Id.* at 147 (testimony of Brigadier General (Retired) Loree Sutton, U.S. Army).

390 *Transcript of RSP Public Meeting 346–47* (Sept. 25, 2013) (public comment of Ms. Miranda Petersen, Policy Advisor & Program Director, Protect Our Defenders).

I don't want to weigh the scales of justice in favor of the defendant. I want it to be even. . . . I want justice to be blind. That's the whole point. And in today's system, it is not blind."³⁹¹ A retired Army general officer who supports Senator Gillibrand said "objectivity at a level not seen before will be introduced in the process by taking out of the chain of command the responsibility for adjudication."³⁹²

Some former senior military officers also emphasized fairness and objectivity as reasons for change. According to a retired Army general officer, removing convening authority from commanders "will remove the inherent conflict of interest that clouds the perception and, all too often, the decision-making process under the current system. Implementing these reforms will actually support leaders to build and sustain unit cultures marked by respect, good order and discipline."³⁹³ Another retired Army general officer stated that "[t]o hold leadership accountable means there must be independence and transparency in the system. Permitting professionally trained prosecutors rather than commanding officers to decide whether to take sexual assault cases to trial is a measured first step toward such accountability."³⁹⁴ A retired Air Force general officer said removing military justice authority from commanders will allow them to focus on improving the command climate "[b]ecause [commanders] don't have to be the judge and jury. They can be the commander and they can analyze their units and the command climate. They can work to change it. . . . We leave it in the hands of professionals and the commanders then can really command and they can lead. And our men and women can have faith in the system."³⁹⁵

5. Independence and Training of Judge Advocates

Closely related to the perspective that removing prosecutorial discretion from commanders will promote judicial fairness is the sense that independent JAG officers are better trained to make these decisions. "I think what we need so urgently is transparency, and accountability, and an objective review of facts by someone who knows what they're doing, who is trained to be a prosecutor, who understand [sic] prosecutorial discretion. And these cases on a good day for any prosecutor in America to get right is [sic] difficult. So why would we be giving it to someone who doesn't have a law degree[?]"³⁹⁶

Some victim advocates and former military officers agreed with this perspective. A civilian lawyer and victim advocate wrote in a letter to POD that "[m]ilitary commanders are the appropriate arbiters where most matters of discipline and good order are concerned, and will always have a crucial role in prevention as well as response. But because of the often misunderstood dynamics that arise in major felonies—particularly but not exclusively sexual violence—their prosecution under the UCMJ is better handled by prosecutors still in uniform but possessed of specialized knowledge. This knowledge involves legal details, cultural aspects, and offense

391 *Transcript of RSP Public Meeting 325–26* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

392 *Transcript of RSP Public Meeting 78* (Jan. 30, 2014) (testimony of Brigadier General (Retired) Evelyn P. Foote, U.S. Army).

393 *Letter from Brigadier General (Retired) Loree Sutton to Senator Kirsten E. Gillibrand* (Aug. 26, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/20140130/Materials_To_Members/02_Signed_Sutton_Letter.pdf.

394 *Letter from Lieutenant General (Retired) Claudia J. Kennedy to Senator Kirsten E. Gillibrand* (Aug. 16, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/20140130/Materials_To_Members/03_Kennedy_Letter.pdf.

395 *Transcript of RSP RoC Subcommittee Meeting 94–95* (Jan. 8, 2014) (testimony of Major General (Retired) Martha T. Rainville, U.S. Air Force).

396 *Transcript of RSP Public Meeting 312–13* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

dynamics. Military lawyers specially trained and unburdened by command concerns are in a better position to pursue justice and make our military healthier and more efficient.”³⁹⁷

A retired general officer and former commander acknowledged that her decision to support removing prosecutorial decision from commanders was difficult, but she explained her support is “driven by my conviction that our men and women in uniform deserve to know without doubt that they are valued and will be treated fairly with all due process should they report an offense and seek help or face being accused of an offense. When allegations of serious criminal misconduct have been made, the decision of whether to prosecute should be made by a trained legal professional. Fairness and justice requires [sic] sound judgment based on evidence and facts independent of preexisting command relationships.”³⁹⁸ One former congressman and Marine officer reiterated this point by noting “commanders are rarely trained or prepared to exercise informed judgment regarding the weight of evidence in pending criminal matters.”³⁹⁹

Another retired Army general officer told the RSP that “[a]s a commander of soldiers throughout my career, I would have welcomed the wise counsel and action of independent legal experts in determining the resolution of sexual assault cases.”⁴⁰⁰ She said:

[W]e need to think out of the box. We need new direction. We need creative thinking. We need not to be so married to the chain of command, which I believe in, I truly believe in, as the mechanism to command, manage, and administer to the Army in war and peace. But when you have got a weak link in that chain, then it behooves us to take that weak link out and come up with a different mechanism for handling the very complex cases of sexual assault with which we deal.⁴⁰¹

6. Problems Arising from Conflicts of Interest

According to some, the perceived or actual conflict of interest commanders face as convening authorities is an inherent problem in the current military justice system. A retired Navy senior commander who served as a general court-martial convening authority (GCMCA)⁴⁰² described her concern to the RSP:

With commanders retaining the decision on which cases go to trial, I believe overcoming the fact or appearance of conflict of interest is too huge a mountain to climb. From my own experience, it was gut-wrenching to receive a sailor’s allegation of sexual assault by another member of the command, particularly one who was senior and perhaps had an excellent performance record. But it is even more gut-wrenching to reflect on what crimes may not have

397 Letter from Mr. Roger A. Canaff to Ms. Taryn Meeks, Executive Director of Protect Our Defenders (Sept. 16, 2013), reprinted in *Written Statement of Protect Our Defenders to RSP, Attachment 1* (Sept. 17, 2013).

398 Transcript of RSP Public Meeting 304-05 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand) (quoting Major General (Retired) Martha T. Rainville, U.S. Air Force).

399 Transcript of RSP RoC Subcommittee Meeting 50 (Jan. 8, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense for Homeland Defense and U.S. Representative).

400 Written Statement of Brigadier General (Retired) Evelyn P. Foote to the RSP (Jan 30, 2014).

401 Transcript of RSP Public Meeting 21 (Jan. 30, 2014) (testimony of Brigadier General (Retired) Evelyn P. Foote, U.S. Army).

402 Of the retired and former senior commanders who presented to the RSP or Subcommittee and advocated for change, only Rear Admiral Evans had previously served as a GCMCA.

VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

been reported because the man or woman in my command did not believe I would believe their side of the story or they thought there would be retaliation.⁴⁰³

Advocacy groups cited to comments made by senior officers that led to recent claims of undue command influence in the military justice system:

The classic kind of example of why the current problem is so serious is the Commandant of the Marine Corps doing the right thing as the head of the Marine Corps by speaking out strongly against sexual assault in the Marines. We were very excited to hear that kind of language, but because he is in everyone's chain of command, it is seen as problematic. But if he were removed from that process like all other unit commanders, he could speak strongly about this issue, as he should, as everyone within the Armed Forces should. But we have this perception that there is undue influence by the Commandant or other military commanders because commanders have this discretion over these cases.⁴⁰⁴

A former Army criminal investigator expressed her concern with command discretion in *The Invisible War* documentary. "As a CID agent, I found it tremendously frustrating when I would demonstrate that an offender had committed an offense, and taking it to a commander and having a commander being the deciding authority. You know, I don't think commanders are capable of making an objective decision. I do not think it should be in their hands."⁴⁰⁵ A retired general officer voiced her agreement on this aspect. "There has to be independent oversight over what's happening in these cases. Simply put, we must remove the conflicts of interest in the current system, the system in which a commander can sweep his own crime or the crime of a decorated soldier or friend under the rug, protects the guilty and protects serial predators."⁴⁰⁶

Recognizing the difficulty commanders face in being truly impartial and objective, a former Marine officer and congressman said the necessity for commanders to develop relationships in their command will always lead to "lingering doubts as to the commander's impartiality regarding previously well-known subordinates."⁴⁰⁷ At a January RSP public meeting, he further observed that

[c]ommanders are rightly held accountable for their command climate. . . . In that context, each court martial referral may be seen by some as proof of poor command climate, potentially affecting a commander's own career and thereby deterring justified criminal referrals. By contrast, some commanders may be tempted to pursue unwarranted prosecutions, try the accused, to quickly distance themselves and the command from notorious criminal allegations.⁴⁰⁸

403 *Id.* at 26 (testimony of Rear Admiral (Retired) Marty Evans, U.S. Navy).

404 *Transcript of Hearing to Receive Testimony on Sexual Assaults in the Military, SASC Personnel Subcommittee* 28 (Mar. 13, 2013) (testimony of Ms. Anu Bhagwati, Executive Director, Service Women's Action Network).

405 *THE INVISIBLE WAR* (CHAIN CAMERA PICTURES 2012) (STATEMENT OF MS. MYLA HAIDER).

406 *Transcript of RSP Public Meeting* 302 (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand (quoting Lieutenant General (Retired) Claudia J. Kennedy, U.S. Army)).

407 *Transcript of RSP RoC Subcommittee Meeting* 52 (Jan. 8, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense for Homeland Defense and U.S. Representative).

408 *Transcript of RSP Public Meeting* 52-53 (Jan 30, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps).

7. Military Justice Systems of Allied Nations

Proponents highlighted examples from military justice systems employed by our Allies as support for the contention that commanders should not have convening authority in the U.S. military justice system.⁴⁰⁹ A frequent assertion has been that removing the commander as convening authority will increase the confidence of sexual assault victims in the military justice system and thereby increase reporting of sexual assault offenses.⁴¹⁰

Others asserted that Allied military justice systems validate that good order and discipline does not suffer if commanders are not responsible for prosecutorial decisions for serious crimes. In a June 2013 media interview, Senator Kirsten Gillibrand said “[t]he allies that we fight side by side with have already made this change. Israel, the UK, Canada, Australia, Germany. They’ve all said in order to have justice within the military system, you need decision making about whether to go to trial done by trained prosecutors. All felonies and above, serious crimes, have been taken out of their chains of command into trained military prosecutor systems.”⁴¹¹

Addressing the Panel in September 2013, Senator Gillibrand said that the UK, Israel, and Australia “do not see a lack of good order and discipline because this one legal decision isn’t being made in their chain of command. . . They will not tell you that their militaries have fallen apart. They will not tell you that their commanders have no ability to set the command climate without this one ability to make a legal decision.”⁴¹² She further stated, “[n]ow, you may be told . . . these other jurisdictions, they don’t have less sexual assault than ours. . . . That’s not why we’re citing them. We’re citing them because their militaries didn’t fall apart. . . . Yes, they’re different militaries than us. You can have a panoply of differences. But they still have good order and discipline and have been able to maintain a command climate without this one legal decision.”⁴¹³

409 On November 6, 2013, the Subcommittee submitted an initial assessment to the RSP on whether reducing the commander’s role in the military justice systems in Israel, Canada, Australia, and the United Kingdom increased reporting for sexual assault crimes under those systems. See RSP RoC Subcommittee, Memorandum to RSP on Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes (Nov. 6, 2013) at Appendix F.

410 Professor Amos Guiora, a former judge advocate in the Israel Defense Forces, commented on an increase in sexual assault reporting in Israel between 2007 and 2011 in a June letter to the SASC. This letter stated in part: “There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers’ confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the ‘chain of command.’” *Letter from Professor Amos N. Guiora, S.J. Quinney College of Law, University of Utah, to SASC* (undated), currently available at http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/Guiora/Prof_Guiora_Statement_to_Senate_Armed%20Services_Committee.pdf. The Deputy Military Advocate General for the IDF, Colonel Eli Bar-On, noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increased reporting. While IDF reports increased, sexual offense indictments declined each year between 2007 and 2011, and Colonel Bar-On observed that many reported incidents do not warrant a criminal indictment and are referred to disciplinary adjudication. *Email from Colonel Eli Bar-On to Colonel Patricia Ham, Staff Director, RSP, “Statistical Tables Relating to Sexual Assault Within the IDF: 2007 – 2012”* (Aug. 11, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/israel-mj-sys/01_Email_To_RSP_from_COL_Eli_Bar_On_Israeli_Defence_Forces.pdf.

411 *Morning Joe: Interview with Senator Kirsten Gillibrand (D-NY)* (MSNBC television broadcast Jun. 24, 2013), video available at <http://video.msnbc.msn.com/morning-joe/52294442>.

412 *Transcript of RSP Public Meeting 309* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

413 *Id.* at 329.

An academic expert on Israel's military justice system highlighted the importance of preventing undue command influence as reason to remove prosecutorial discretion from the chain of command. "The decision in Israel to create a system whereby indictment decisions are an exclusive bailiwick of the JAG reflects a profound belief in the system and also, I think, in the country that the separation between judge advocates and commanders is necessary in order to prevent undue command influence."⁴¹⁴ He also noted "that in the Israeli system in the context of ensuring or seeking to ensure objectivity in court martial decisions, and ensuring that they are based on legal analysis rather than unit or command interest, it is in many ways for that reason that the JAG is the decision maker rather than the commander."⁴¹⁵

An academic expert on Canada's military justice system told the RSP, "I have commanded myself in the past. I cannot see what the interest of a commander would be. Even in combat, if one of his soldiers is accused of sexual assault, murder, torture, a major crime, why would he want to continue to be involved in any aspect of prosecution [] as opposed to putting it into the hands of the proper authorities that would prosecute this and see this [] come to trial? If for no other reason, he also owes a duty to both his unit and other people under his command, particularly if the victim is residing from within. So why would he want to take a role and lose any objectivity that he may have, impartiality, and [h]is focus on delivering the mission?"⁴¹⁶

An expert on the United Kingdom's military justice system said, "I'm hearing [the suggestion] that the purpose of maintaining the [commanding officer (CO)'s] position is to enhance his status as a wise leader, and to improve his status to be seen to be a fair decision maker. But, of course, it may diminish his status if he's seen to be an unfair decision maker when it comes to prosecution. And you can have a situation where in one regiment, the CO is thought to be very strict, and in the other regiment he's seen to be very weak. How does that help? Why don't we have an independent [authority] . . . who achieves parity across the whole system?"⁴¹⁷

C. ARGUMENTS AGAINST CHANGES TO COMMANDER ROLES FOR SEXUAL ASSAULT CRIMES

In contrast, the Subcommittee also heard from those who believe divesting military commanders of their existing convening authority role is both unjustified and counter-productive. A consistent theme among these proponents was that UCMJ authority is essential and integral to the leadership authority, responsibility, and function of those in command. This authority is, according to these proponents, integral to the command function of setting and enforcing standards by holding accountable those who fail to meet standards, which in turn contributes to good order and discipline in their organizations necessary for the Armed Forces to accomplish its mission. Removing convening authority from senior commanders, supporters assert, would not only limit the ability of commanders to address sexual assault issues in their organizations effectively, it would fundamentally impair operational readiness and effectiveness in military organizations. The Subcommittee reviewed the following arguments in favor of retaining the military justice authority vested in commanders.

1. Good Order and Discipline

Many presenters and written submissions to the RSP argued that removing the authority of senior commanders to convene courts-martial for crimes under the UCMJ would impact mission accomplishment and have a detrimental effect on the commander's ability to ensure good order and discipline within their organizations.

414 *Id.* at 53 (testimony of Professor Amos N. Guiora).

415 *Id.* at 54-55.

416 *Id.* at 80-81 (testimony of Professor Michel Drapeau, University of Ottawa).

417 *Id.* at 91 (testimony of Lord Martin Thomas of Gresford, QC).

One presenter noted “the commander is accountable for taking all reasonable and necessary means to ensure good order and discipline, and certain obligations are non-delegable. These include disciplining subordinates and understanding both the context of the misconduct and the impact on order and discipline within the unit. These, I believe, represent the core functions of command, and I believe it would be both unwise and inefficient — ineffective, rather, to remove that responsib[ility] from the commander.”⁴¹⁸

Operational commanders with GCMCA argued the authority to convene courts-martial is essential to their ability to lead the development, readiness, and performance of their organizations. A senior Navy commander with GCM convening authority noted the ability of commanders “to hold offenders accountable for their behavior and their crimes is key to maintaining good order and discipline and also the interests of justice.” He stated “remov[ing] a commander from that role with respect to sexual assault or any other criminal offenses would have a detrimental impact on the role of the commander to fulfill the mission.”⁴¹⁹ A senior Air Force GCMCA said giving a commander responsibility without authority is a “recipe for failure,” reasoning that commanders must be trusted to “be fair, impartial, and timely in the execution of [their] responsibilities and authorities,” and confidence in the system weakens without this trust, which “weakens the environment of good order and discipline” and ultimately military effectiveness.⁴²⁰ Retired senior commanders who held and exercised GCMCA authority also indicated convening authority was a necessary element of their authority for ensuring good order and discipline within the organization.⁴²¹

Senior legal representatives of the Services and staff judge advocates to GCMCAs appearing before the RSP also said a senior commander’s convening authority is essential to his or her ability to effectively lead the organization. One observed that “[r]emoval of the commander from this central role will, in my opinion, have a negative impact both on the commander’s authority to maintain a disciplined force and the commander’s ability to engage in military operations which could require kinetic force.”⁴²² Another reasoned that “[i]nherent in the concept of military discipline is an accepted senior-subordinate relationship. If that is diminished because the commander cannot hold accountable those in his unit who commit the most serious offenses, the discipline of the military structure will erode.”⁴²³

2. Command Authority

Analogous to the contention that removing a commander’s convening authority would undermine his or her ability to ensure good order and discipline is the perspective that reducing the disciplinary capability of commanders would damage the ability to lead and enforce standards within their organizations. A former senior Army commander described the “totality of command,” and he reasoned that commanders “must pay attention to everything that goes on in their command” to ensure the right thing is done for the organization’s

418 *Transcript of RSP Public Meeting 32* (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).

419 *Transcript of RSP Public Meeting 22* (Sept. 25, 2013) (testimony of Rear Admiral Dixon Smith, U.S. Navy).

420 *Id.* at 28-29 (testimony of General Edward A. Rice, Jr., U.S. Air Force). General Rice has since retired.

421 See, e.g., *Transcript of RSP RoC Subcommittee Meeting 192* (Jan. 8, 2014) (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy); *id.* at 196 (testimony of Lieutenant General (Retired) Michael C. Gould, U.S. Air Force); *id.* at 200-01 (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps); *id.* at 204 (testimony of Lieutenant General (Retired) Thomas F. Metz, U.S. Army); *id.* at 306 (testimony of Major General (Retired) K.C. McClain, U.S. Air Force).

422 *Written Statement of Lieutenant General Flora D. Darpino, U.S. Army, to RSP ¶ 19* (undated).

423 *Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard, to RSP* (Sept. 25, 2013).

mission, people, and families.⁴²⁴ Another retired senior commander said that removing a commander's military justice authority and placing him or her on the sideline would mean "the [S]ervices lose an asset and the commander loses credibility and[,] in turn[,] effectiveness."⁴²⁵

In a June 2013 statement to the Senate Armed Services Committee, General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, stated that "[t]he commander's ability to preserve good order and discipline remains essential to accomplishing any change within our profession. Reducing command responsibility could adversely affect the ability of the commander to enforce professional standards and ultimately, to accomplish the mission."⁴²⁶ The Judge Advocate General of the Air Force said that "[o]ut-sourcing enforcement of standards to faraway lawyers diminishes the authority of commanders and cannot, despite its best effort, achieve optimal military discipline."⁴²⁷ According to the Staff Judge Advocate to the Commandant of the Marine Corps, "[w]hen their commanders have court martial convening authority, marines know that they can and will be held accountable for failing to act like a responsible and honorable marine. Removing such authority undermines the ability of commanders to enforce the standards they set."⁴²⁸

More specifically, a panel of retired senior commanders who all held GCMCA spoke with the Subcommittee and expressed concern that removing convening authority from the chain of command would reduce a commander's capability to address sexual assault issues in the organization. One told the Subcommittee, "our commanders need every tool in the UCMJ including non-judicial punishment to enforce [a] climate of trust and respect."⁴²⁹ Another said that "any removal or lessening of the authority of the commander will have attendant impact on the commander's ability to lead, . . . to shape, to mold the command climate, to hold people accountable and to aggressively . . . attack all of the leadership challenges including sexual assault."⁴³⁰

3. Commander Objectivity and Perceived Conflicts of Interest

Retired senior commanders expressed their views that commanders regularly make objective decisions on disciplinary issues and are not influenced by personal relationships with, or knowledge of, those involved. A retired Air Force general officer told the RSP that the conflict of interest issue

is a valid question because occasionally, I think rarely, frankly, . . . commanders flunk that test. Command 101 is do the right thing. We are taught [that] from the beginning. . . . [C]ommanders are the guardians of that value. [I]t means that nobody is bigger than the team. Nobody is bigger than the mission, including the commander. . . . We need to distinguish between the uncomfortable and the difficult. What was right was easy. That is not a difficult decision. It is uncomfortable. . . . And I think most commanders understand that.⁴³¹

424 *Transcript of RSP RoC Subcommittee Meeting* 321 (Jan. 8, 2014) (testimony of General (Retired) Fred M. Franks, Jr., U.S. Army).

425 *Id.* at 214 (testimony of Major General (Retired) K.C. McClain, U.S. Air Force).

426 *Written Statement of General Martin E. Dempsey, U.S. Army, to SASC* 3 (June 4, 2013); see also *Transcript of RSP Role of the Commander Subcommittee Meeting* 214 (Jan. 8, 2014) (testimony of General (Retired) Roger A. Brady, U.S. Air Force).

427 *Written Statement of Lieutenant General Richard C. Harding, U.S. Air Force, to RSP* (Sept. 25, 2013).

428 *Transcript of RSP Public Meeting* 248 (Sept. 25, 2013) (testimony of Major General Vaughn A. Ary, U.S. Marine Corps).

429 *Transcript of RSP RoC Subcommittee Meeting* 219 (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

430 *Id.* at 192-93 (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy).

431 *Transcript of RSP Public Meeting* 135-36 (Jan. 30, 2014) (testimony of General (Retired) Roger A. Brady, U.S. Air Force).

Another retired Air Force general officer described his decision to investigate and then remove a senior subordinate commander after he received a complaint against the commander. The general acknowledged that the decision was “one of the hardest . . . I have ever had to make in my Air Force career,” he took action because he had “lost faith, trust and confidence” in the commander and “there was no question that that was the right decision.”⁴³² He observed that “commanders can be objective. . . . They wrestle with [these issues] day in and day out and it comes down to . . . what do we need for good order and discipline in the overall unit.”⁴³³

Retired senior commanders also rebutted arguments that commanders felt pressure to minimize cases to preclude negative perceptions about their unit. They told the RSP they never looked unfavorably on subordinate commanders who referred a case to trial or perceived such action was indicative of a bad climate in that unit. A retired Army general officer said:

[A]ll inquiries need to be looked at. And the stats are not important. What’s important is your role as a commander, which is about leadership and command is a privilege. And with the command authority comes responsibilities and accountability, and that is what soldiers, men and women, and their families look to the commander for. . . . I can assure you . . . the cost of not doing the right thing is much more damaging than doing the right thing. Soldiers are looking to you to see what action you take both in rewarding good soldiers or disciplining poor performance and not disciplining poor performance, it is not invisible on them.⁴³⁴

A retired senior Navy commander added to the Subcommittee that the role of staff judge advocates on military justice matters and recent changes providing for review of case disposition decisions by more senior commanders also alleviate real or perceived concerns about conflicts of interest. He called the commander’s authority and oversight afforded on such decisions “a very positive element for the victim and for justice.”⁴³⁵

4. Operational Effectiveness

Proponents for retaining commanders in convening authority roles also addressed the potential impact that change could have on military operations. The Legal Counsel to the Chairman of the Joint Chiefs of Staff told the RSP that “the question of military discipline is fundamentally intertwined with the greater question of the commander’s responsibility for operational readiness,”⁴³⁶ and some presenters described potential negative consequences to military operations if commanders lacked military justice convening authority.

Military officials expressed concern that removing or limiting a commander’s military justice authority may impair the essential decisiveness of effective military operations. Speaking about his recent experiences in Afghanistan, a senior Army commander observed that Allied commanders lacked the comprehensive military justice authority he held, which he believed “made for tentative actions on the battlefield or on decision making in general.”⁴³⁷ Similarly, The Judge Advocate General of the U.S. Army said that “commanders and other forces sometimes hesitate to engage the opposing force in combat operations based on their concerns that their

432 *Id.* at 133 (testimony of Lieutenant General (Retired) Ralph Jodice, II, U.S. Air Force).

433 *Id.* at 134.

434 *Id.* at 137-38 (testimony of General (Retired) Ann Dunwoody, U.S. Army).

435 *Transcript of RSP RoC Subcommittee Meeting* 260 (Jan. 8, 2014) (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy)

436 *Transcript of RSP Public Meeting* 205-06 (Sept. 25, 2013) (testimony of Brigadier General Richard C. Gross, U.S. Army).

437 *Id.* at 11 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

actions will be viewed in hindsight by individuals who do not understand combat. There is actually a term of art used to describe this hesitation. It is called ‘judicial insecurity.’”⁴³⁸

Additionally, some argue that removing convening authority from a commander with operational responsibility may create issues for subordinates. A retired senior Army commander observed that removing court-martial authority from a commander “would seriously undermine the ability of that commander to ensure justice in his or her entire organization and thereby gain the trust that is absolutely essential to success in any kind of military operation.”⁴³⁹ The Judge Advocate General of the Air Force said that removing a commander’s military justice authority would send a message that “you can trust your commander to send you into battle where his or her decisions may cause you to pay the ultimate price . . . but you cannot trust your commander to hold your fellow airm[a]n accountable for his crime against you. This message is more than just confusing and counterintuitive. It degrades airmen’s trust and confidence in their commanders and, in turn, degrades military discipline.”⁴⁴⁰

5. Commander Accountability for Sexual Assault Prevention and Response

Many presenters emphasized the importance of commanders in addressing the issue of sexual assault in the military. A senior Army commander said that “[i]ncreasing commander involvement and accountability is key to solving this problem.”⁴⁴¹ According to a professor who presented to the RSP, removing commanders from responsibility “could create a perverse incentive for military justice matters in which commanders feel a diminished sense of responsibility because a distant set of judge advocates somewhere else is in charge of these things. This could erode the relationship between the military justice system and the command it is designed to serve.”⁴⁴²

Some presenters articulated issues of particular importance to victims of sexual assault that could be affected by removing convening authority from commanders. “In every Service, we have heard that victims are concerned about the length of the process, their inclusion and ability to voice preferences within the process, and the opacity of the system. Taking military justice decision-making authority away from commanders will exacerbate all of these problems.”⁴⁴³ A senior Air Force commander noted that

in my experience, . . . one of the top reasons people don’t report is because they perceive that the environment into which they are going to report is either, at worst, hostile or, at best, not welcoming. And my experience is in many cases that’s true, but it’s not at the level of the commander, it’s the level below the commander and the individual offices and the unit. I believe the way forward is not to take the commander further out of that responsibility to make

438 *Id.* at 222-23 (testimony of Lieutenant General Flora D. Darpino, U.S. Army) (noting that judge advocates from other countries indicated commanders were reluctant to engage in aggressive operations when they perceived their actions would be reviewed, investigated, or prosecuted according to common law principles rather than through the lens of armed conflict).

439 *Transcript of RSP RoC Subcommittee Meeting 322* (Jan. 8, 2014) (testimony of General (Retired) Fred M. Franks, Jr., U.S. Army).

440 *Transcript of RSP Public Meeting 236* (Sept. 25, 2013) (testimony of Lieutenant General Richard C. Harding, U.S. Air Force).

441 *Id.* at 13 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

442 *Written Statement of Professor Christopher Behan, Southern Illinois University School of Law, to RSP* (undated).

443 *Written Statement of Brigadier General Richard C. Gross, U.S. Army, to RSP 3* (Sept. 25, 2013).

sure that that environment is the one that we want to . . . increase reporting, but to hold them further accountable for it.⁴⁴⁴

Presenters also stressed that addressing sexual assault in military organizations requires more than changes to legal authority or procedures. “The eradication of sexual assault within the Coast Guard requires more than extra lawyers or added legal procedures. It requires a cultural change. Cultural change requires leadership; and leadership in the military is provided by the commander. . . . It is imperative that the commander have a role in the disciplinary process so that they remain engaged in the fight to eliminate sexual assault and that their subordinates see that commitment. . . . Currently, our commanders are openly and frankly discussing the issues of sexual assault with their subordinates while at the same time backing up that talk by holding those accountable who fail to follow the law. If the ability to hold members accountable is removed, the importance of the prevention message will also be diminished, no matter how much the commanders stress it.”⁴⁴⁵

The Subcommittee considered views of survivors of sexual assault who did not advocate removing the commander from the process and from those who expressed satisfaction at the manner in which their cases were handled in the military justice system.⁴⁴⁶ One survivor told the RSP in November that “[t]he chain of command must be held responsible and accountable for serious errors in judgment. Complainants and victims must be protected from retaliation and reprisal. A process must be in place now to ensure this does not happen. This is the only area that should be taken out of the Department of Defense.”⁴⁴⁷

6. Convening Authority and Staff Judge Advocate Relationship and Interaction

Proponents stressed the importance and nature of the relationship between a convening authority and his or her staff judge advocate. Current GCMCAs said they value and rely on advice and recommendations of their staff judge advocates and legal staffs in making military justice decisions. Commanders said they communicate frequently with their legal advisors, and they highlighted the importance of the advice provided to them in evaluating cases. A current Army GCMCA noted he didn’t always view cases with the same perspective as his staff judge advocate, but he knew he could count on receiving “the very best legal advice, unvarnished and free from influence, except by the laws of our military.”⁴⁴⁸

Legal advisors indicated they felt comfortable and well trained to independently advise senior commanders and disagree with their decisions, when appropriate. A staff judge advocate to a Navy GCMCA said Navy judge advocates receive ethics training from the Naval Justice School prior to serving as advisors to Navy flag officers, which helps them understand how to respond to disagreements with their commanders.⁴⁴⁹ A current GCMCA from the Marine Corps said he expects his staff judge advocate “to be a second and third order

444 *Transcript of RSP Public Meeting* 156–57 (Sept. 25, 2013) (testimony of General Edward A. Rice, Jr., U.S. Air Force).

445 *Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard, to RSP* (Sept. 25, 2013).

446 *Transcript of RSP Public Meeting* 411–22 (Nov. 7, 2013) (public comment of DA); *Transcript of RSP Public Meeting* 7–17 (Nov. 8, 2013) (testimony of Command Sergeant Major JG, U.S. Army); *Transcript of RSP Public Meeting* 496–505 (Dec. 11, 2013) (testimony of Major MB, Texas National Guard); *Letter with Enclosures from Lieutenant General Flora D. Darpino, U.S. Army, to RSP* (Nov. 6, 2013), available at <http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08>.

447 *Transcript of RSP Public Meeting* 418–19 (Nov. 7, 2013) (public comment of DA).

448 *Transcript of RSP Public Meeting* 13–14 (Sept. 25, 2013) (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

449 *Id.* at 124–25 (testimony of Captain David M. Harrison, U.S. Navy).

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thinker,”⁴⁵⁰ and a staff judge advocate from the Coast Guard observed that legal advisors must have “open and frank conversation with the commander” at levels unlike any other staff officers.⁴⁵¹

Lawyers stressed, however, that convening authorities weigh factors differently than lawyers when assessing whether cases should be tried by court-martial. “Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk adverse. Commanders zealously seek accountability when they hear there’s a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline, and we need to maintain the ability to do so.”⁴⁵² Brigadier General Richard Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff, cited information provided by the Vice Chairman of the Joint Chiefs of Staff to the Senate Armed Services Committee that indicated commanders took recent action in roughly 100 cases where civilian prosecutors had declined to prosecute.⁴⁵³ The Judge Advocate General of the Army described 79 cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute. She said the cases demonstrated that “Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community.”⁴⁵⁴ Legal advisors said commanders bring other factors to the table, including responsibility for good order and discipline and accountability to the organization, which legal advisors do not.⁴⁵⁵

When legal advisors have concerns about military justice decisions of a convening authority, they described the statutory authority of the staff judge advocate under Article 6 of the UCMJ⁴⁵⁶ as an effective check on convening authority discretion. The Judge Advocate General of the Army said Article 6 gives judge advocates “the authority . . . to take [cases] up . . . through the judge advocate chains, and make sure that justice is done. It is an independent authority that exists by statute that while we work for the commander, we are also independent of the commander when it comes to our legal advice, because our client is the Army, not the commander.”⁴⁵⁷ A staff judge advocate to a Marine Corps GCMCA called Article 6 authority “an effective method which a staff judge advocate can use in order to get to the right decision for the organization.”⁴⁵⁸

7. Deployability and Logistics of the U.S. Military Justice System

Numerous presenters mentioned the transportability of the U.S. military justice system, which is controlled by commanders and deployable to any location where U.S. Forces operate. Unlike civilian court systems, one staff judge advocate observed that military “courts martial are not standing. They’re created for limited purposes and limitation durations. And so all of the resources that are required to constitute that, or most of the resources, right now are owned by the commander.”⁴⁵⁹

450 *Id.* at 135 (testimony of Major General Steven W. Busby, U.S. Marine Corps).

451 *Id.* at 62 (testimony of Commander William Dwyer, U.S. Coast Guard).

452 *Id.* at 207 (testimony of Brigadier General Richard Gross, U.S. Army).

453 *Id.* at 206-07.

454 *Letter with Enclosures from Lieutenant General Flora D. Darpino, U.S. Army, to RSP* (Nov. 6, 2013).

455 *Transcript of RSP Public Meeting 148-50* (Sept. 25, 2013) (testimony of Commander William Dwyer, U.S. Coast Guard, and Captain David Harrison, U.S. Navy).

456 10 U.S.C. § 806.

457 *Transcript of RSP Public Meeting 271-72* (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, U.S. Army).

458 *Id.* at 123-24 (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps).

459 *Id.* at 80.

A senior commander with GCMCA authority said he perceived benefits in the current system when operating in a deployed location. “Operationally, I have witnessed firsthand . . . the advantages U.S. commanders had in making use of the military justice system that affords investigation, prosecution, and adjudication cases from a deployed footprint, while affording the military justice system access to witnesses, trial attorneys representing both sides, and an impartial judge, and, if necessary, a military jury.”⁴⁶⁰ In contrast, he observed that the military justice systems of Allied nations were “inefficient, costly, and less effective system[s] for dealing with these unique cases.”⁴⁶¹ For example, statistics provided by the former Army Prosecuting Authority for the British Army showed the United Kingdom had not tried any cases in theater in either of the conflicts in Iraq or Afghanistan, despite its commitment of forces to those operations.⁴⁶²

Numerous presenters discussed resource impacts if convening authority were vested in someone other than the organizational commander. Some said the U.S. military is sufficiently resourced and adaptable to accommodate increased logistical requirements that might result, if such requirements are prioritized.⁴⁶³ However, a senior Service legal official said “[c]reating two parallel systems of military justice, each run by a completely different authority will create an inefficient system that will stress existing resources.”⁴⁶⁴ A staff judge advocate stated that “when you have the decision making process bifurcated, you create the inherent possibility of a conflict in prioritization . . . [T]here may be times where a referral decision authority may view the importance of when and where that court-martial stands differently than a commander. And by bifurcating that, you create the possibility of conflict in that decision making process.”⁴⁶⁵

8. Military Justice Systems of Allied Nations

Many presenters highlighted differences between the U.S. and Allied military justice systems, and many noted that our Allies have not produced better results under different legal frameworks in combating sexual assault crimes. The Legal Counsel to the Chairman of the Joint Chiefs of Staff said that “the move by our [A]llies to more civilianized systems mirrors a general global trend towards demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and it will continue to be different. While many countries can afford for the center of the [ir] military justice systems to be located . . . far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.”⁴⁶⁶ General Gross further noted that “[i]t is also important to keep in mind that the scope and scale of our [A]llies’ caseloads are vastly different than ours. None of our [A]llies handle the volume of cases that the U.S. military does. This is likely due to the greater size of our military forces in comparison.”⁴⁶⁷

460 *Id.* at 10-11 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

461 *Id.* at 11.

462 See Brigadier (Retired) Anthony Paphiti, “UK Military Prosecutions for Sexual Offences” at 2 n.6 (undated), *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/uk-mj-sys/02_UK_Mil_Prosecution_Sexual_Offences.pdf.

463 See *Transcript of RSP Public Meeting 64* (Sept. 25, 2013) (testimony of Captain David M. Harrison, U.S. Navy); *Transcript of RSP Public Meeting 100-01* (Sept. 24, 2013) (testimony of Professor Eugene R. Fidell, Yale Law School); *id.* at 55-56 (testimony of Professor Amos N. Guiora, S.J. Quinney College of Law, University of Utah).

464 *Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP 12* (Sept. 25, 2013).

465 *Transcript of RSP Public Meeting 81-82* (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps).

466 *Id.* at 209 (testimony of Brigadier General Richard C. Gross, U.S. Army).

467 *Id.*

Changes made by our Allies to their military justice systems have occurred at different times, and Allied representatives told the RSP that changes were not made in order to improve sexual assault reporting or prosecution.⁴⁶⁸ A professor stated that our Allies removed prosecutorial discretion and the ability to convene and administer courts-martial from commanders “in the wake of court decisions interpreting treaty obligations and changes in national charters of rights and freedoms.” He noted that “similar changes are not constitutionally required in our system. With respect to military justice, the foundational constitutional principles [in the United States] have never been amended or changed.”⁴⁶⁹ A recent article observed that, contrary to the view that the United States is “lagging behind” its Allies in modifying its military justice system, the United States was actually “the forerunner in considering the role of the commander in its military justice system.”⁴⁷⁰ The article notes that the Elston Act of 1948, the adoption of the UCMJ, the Military Justice Act of 1968, the enactment of the Military Rules of Evidence in 1980, and the Military Justice Act of 1983 all reflect the civilianization of the U.S. military justice system, but they “did not fundamentally alter the command-centric focus of the chain of command in relation to court martial procedures.”⁴⁷¹

Current and former military officials from our Allied partners addressed structural changes that removed the commander from the prosecution of cases and what effect, if any, the changes had on reporting trends for sexual assault offenses. None found the changes increased sexual assault reporting. The Deputy Military Advocate General for the Israeli Defense Forces (IDF) noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increase.⁴⁷² Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue.⁴⁷³ The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010.⁴⁷⁴ The Canadians were unable to present statistics addressing whether the change in commanders’ role in the military justice system affected sex crime reporting.⁴⁷⁵ The Commodore of Naval Legal Services for Britain’s Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had “no discernible” effect on the reporting of sexual assault offenses.⁴⁷⁶ The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and

468 *Transcript of RSP Public Meeting* 181 (Sept. 24, 2013) (testimony of Major General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces); *id.* at 244–45 (testimony of Commodore Andrei Spence, Naval Legal Services, British Royal Navy); *id.* at 238–39 (testimony of Air Commodore Paul A. Cronan, Director General, Australian Defence Force Legal Service).

469 *Written Statement of Professor Christopher Behan, Southern Illinois University School of Law, to RSP* (Sept. 21, 2013).

470 Stephen S. Strickey, ‘Anglo-American’ Military Justice Systems and the Wave of Civilianization: Will Discipline Survive?, (2)4 *CAMBRIDGE J. INT’L & COMP. L.* 763, 793 (2014).

471 *Id.*

472 For discussion regarding Israel’s reporting increase and Colonel Bar-On’s assessment that this increase cannot be attributed to changes in prosecutorial authority for sexual offenses see note 410, *supra*.

473 *Id.*

474 *Transcript of RSP Public Meeting* 163–64 (Sept. 24, 2013) (testimony of Major General Blaise Cathcart, Canadian Armed Forces).

475 *Id.* at 181–82.

476 *Id.* at 282–83 (testimony of Commodore Andrei Spence, British Royal Navy). Recent discussion also indicates that prosecution authority changes in the United Kingdom have not quelled concern about sexual assault reporting and prosecution or the protection of Service members. Member of Parliament Madeleine Moon, commenting on recent data from the Ministry of Defence on sexual assault reporting and prosecution, said that the figures could simply be the “tip of the iceberg” and that many more sex attacks in the armed forces could be going unreported. She said “[n]ot enough is being done to make sure that people who join the armed forces are safe from attack and abuse by colleagues.” *Sexual assault allegations in military number 200 in three years*, *THE GUARDIAN* (Mar. 2, 2014).

2006 reforms.⁴⁷⁷ The Australian Defence Force, however, estimates that between 2008 and 2011, 80% of sexual assaults in their armed forces were unreported even though, by that time, sex offenses had been removed from the criminal jurisdiction of their defense forces.⁴⁷⁸

Moreover, the Legal Counsel to the Chairman of the Joint Chiefs of Staff said he surveyed legal advisors from Allied nations and learned that none could correlate system changes to increased or decreased sexual assault reporting. He indicated there was no statistical or anecdotal evidence among U.S. Allies that removing commanders from the charging decision had any effect on victims' willingness to report crimes.⁴⁷⁹

9. Progress Indicated through Recent Efforts under Current System

Senior command and legal officials from the Services stated that any proposals for change to the U.S. military justice system must be considered carefully in the context of changes already made and functionality of the overall system. The Staff Judge Advocate to the Commandant of the Marine Corps observed that the Services are "in the middle of executing a remarkable amount of change. Included in this change was a complete revision of the substantive law defining sexual assault."⁴⁸⁰ The Judge Advocate General of the Navy said "when you [consider] . . . the importance of discipline in our business, changing the system, frankly, standing it on its head to get at the possibility is something that we should think very, very carefully about before we go forth and do it, particularly when we've improved a lot of the victim support processes, reporting processes."⁴⁸¹ The Chief of Staff of the Army stated that changes to the UCMJ, even where everyone agrees change is required, should "not be made in a piecemeal fashion. . . By taking a deliberate and thoughtful approach, we can ensure that the UCMJ remains a first class piece of legislation, but also ensure that unforeseen or unanticipated consequences do not adversely affect our military legal system. Any changes to our system must be done with a full appreciation for the second and third order effects on our pre-trial, post-trial and appellate process."⁴⁸²

Service officials also warned against implementing systemic change before there is adequate time to assess the effects of current initiatives, and in the absence of any evidence that change would achieve the objectives those advocating removal of convening authority seek. The Staff Judge Advocate to the Commandant of the Marine Corps commented that there has been a "staggering amount of evolutionary change for one particular class of offenses. We should embrace these changes if they improve our ability to prosecute and defend cases, and protect victims. We must also fully assess the effects of these changes before implementing more revolutionary and fundamental changes to the military justice system. Replacing a commander-driven system of justice with a lawyer-driven model is revolutionary, not evolutionary, and will do more harm than good."⁴⁸³

477 *Transcript of RSP Public Meeting 238-39* (Sept. 24, 2013) (testimony of Air Commodore Paul A. Cronan, Australian Defence Force Legal Service).

478 Lisa M. Schenck, "Fact Sheet on Australian Military Justice," at 4-5 (Sept. 18, 2013), *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/other/01_Australia_Fact_Sheet.pdf.

479 *Transcript of RSP Public Meeting 207-09* (Sept. 25, 2013) (testimony of Brigadier General Richard C. Gross, U.S. Army).

480 *Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP 11* (Sept. 25, 2013).

481 *Transcript of RSP Public Meeting 299-300* (Sept. 25, 2013) (testimony of Vice Admiral Nanette DeRenzi, U.S. Navy).

482 *Written Statement of General Raymond T. Odierno, U.S. Army, to SASC 11-12* (June 4, 2013).

483 *Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP* (Sept. 25, 2013).

D. RECENT SEXUAL ASSAULT REPORTING AND PROSECUTION TRENDS

The DoD Sexual Assault Prevention and Response Office (SAPRO) oversees DoD policy for the sexual assault prevention and response (SAPR) program and is responsible for oversight activities assessing SAPR program effectiveness. Pursuant to reporting requirements imposed by Congress, DoD SAPRO maintains statistical data by fiscal year on restricted and unrestricted reports of sexual assault.

In Fiscal Year 2012 (FY12), DoD SAPRO reported the Services received 3,374 reports of sexual assault involving Service members as either victims or subjects.⁴⁸⁴ This number includes both restricted and unrestricted reports. The number of reports received in FY12 increased by 6 percent from Fiscal Year 2011 (FY11), and FY12 represented the highest number of reports received since DoD began tracking reports in 2004.⁴⁸⁵ FY12 reports increased for every Service,⁴⁸⁶ and the number of Service members making reports of sexual assault increased by eight percent from FY11 and 33 percent compared to Fiscal Year 2007 (FY07).⁴⁸⁷ Unrestricted reporting increased by 5 percent in FY12, and restricted reporting increased by 12 percent.⁴⁸⁸ Restricted report conversions to unrestricted reports increased from 14.1 percent in FY11 to 16.8 percent in FY12.⁴⁸⁹

In FY12, courts-martial charges were preferred in 68 percent of cases under military jurisdiction where sexual assault allegations were substantiated by investigation, up from 30 percent in FY07.⁴⁹⁰ Cases resolved through nonjudicial punishment dropped from 34 percent to 18 percent over the same year comparison, and 157 of the 158 cases resolved in FY12 through nonjudicial punishment were for non-penetrating crimes.⁴⁹¹ According to DoD SAPRO, the differences in case resolution data from FY07 to FY12 indicate a “large change in how commanders are choosing to address the sexual assault charges brought to them by criminal investigators.”⁴⁹²

E. SUBCOMMITTEE ASSESSMENT OF THE MILITARY JUSTICE ROLES OF COMMANDERS IN SEXUAL ASSAULT CASES

The Subcommittee heard many perspectives and reviewed considerable information about the commander’s role in the military justice system as the prosecutorial disposition authority for sexual assault allegations. Proponents advocating for system change and those defending the UCMJ’s current convening authority

484 FY12 SAPRO ANNUAL REPORT, *supra* NOTE 167, AT 57. DoD SAPRO’S SEXUAL ASSAULT REPORTING DATA DOES NOT NECESSARILY REFLECT THE NUMBER OF SEXUAL ASSAULTS THAT OCCURRED IN A FISCAL YEAR, SINCE A REPORT MAY BE MADE AT ANY TIME.

485 *Id.* AT 57-58. At the November 7, 2013, RSP public meeting, the DoD SAPRO Director provided initial estimates of Fiscal Year 2013 (FY13) reporting statistics. Preliminary data indicated receipt of more than 4,600 reports in FY13, a 46-percent increase over FY12. *Transcript of RSP Public Meeting* 37-38 (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

486 *Transcript of RSP RoC Subcommittee Meeting* 174-75 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO); *see also* Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, AT 6.

487 FY12 SAPRO REPORT, *supra* NOTE 167, AT 59.

488 *Id.* AT 58.

489 *Transcript of RSP RoC Subcommittee Meeting* 166 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); *see also* Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, AT 6.

490 *Transcript of RSP RoC Subcommittee Meeting* 177-78 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, AT 20. Substantiated allegations also included lesser offenses that were resolved through nonjudicial punishment, other administrative actions, or administrative discharge.

491 Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, AT 20.

492 *Transcript of RSP RoC Subcommittee Meeting* 178 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.).

framework offered differing opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what consequences, positive or negative, would result from substantially changing the UCMJ's convening authority framework. Accordingly, the Subcommittee believes caution is warranted, and systemic change is not advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening authority for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September RSP public meeting observed that it “assumes too much, that somehow a prosecutor is always going to be better at this than commanders.”⁴⁹³ 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. A recent White House report, describing the civilian sector, notes that “[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them.”⁴⁹⁴

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors.⁴⁹⁵ Often, prosecutors based charging decisions on whether “physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor’s character or behavior.”⁴⁹⁶ Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Many proponents of removing convening authority from commanders highlight the predicted impact on reporting rates and victims’ confidence as key reasons for making the change. Nevertheless, the evidence does not support the conclusion that removal of convening authority from commanders would increase reporting rates. Further, the totality of the information received by the Subcommittee does not support a conclusion that removing convening authority from commanders will reduce concerns that victims express about possible retaliation for making reports of sexual assault. Retaliation concerns raised by victims generally relate to peers or direct supervisors and rarely involve convening authorities. Under Section 1709 of the FY14 NDAA, such retaliation will now constitute a criminal offense. Commanders must remain involved, exercising oversight of the treatment of victims after they report and taking action when victims suffer retaliation. Commanders must be held accountable when they fail to do so.

Although the Subcommittee recommends against modification of convening authority responsibilities for sexual assault offenses, it may be appropriate to consider other changes to authorities currently assigned to commanders and convening authorities under the UCMJ. In particular, the Subcommittee believes that expanding the role of military judges, who are independent from the chain of command, may improve case

493 *Transcript of RSP Public Meeting 91* (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).

494 WHITE HOUSE REPORT, *supra* NOTE 126, at 5.

495 *Id.* at 17 (“One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted [their] desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.”) (footnote omitted).

496 *Id.*

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processing and enhance perceptions of the fairness and independence of courts-martial proceedings. The Subcommittee believes further study is necessary to fully assess what positive and negative impacts would result from changing pretrial or trial responsibilities of commanders. In particular, the Subcommittee believes discovery oversight, court-martial panel member selection, search authorization and other magistrate duties, appointment and funding of expert witnesses, and procurement of witnesses are responsibilities that are currently assigned in whole or in part to commanders that should be considered and fully assessed.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of potential changes to senior commander authority in the military justice system, commanders and leaders at all levels must enhance their efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility.

F. PART VII SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

Recommendation 19: Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses.

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.

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 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.

VIII. ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Perspectives differ about the role commanders should have in military justice processing for sexual assault crimes, but there is near universal agreement that military commanders and their subordinate leaders are essential to establishing and maintaining an organizational climate that reduces and eliminates sexual assault crimes and responds appropriately to incidents when they occur. Senator Carl Levin (D-MI) observed that “[o]nly the chain of command has the authority needed to [address] any problems with command climate that foster or tolerate sexual assaults. Only the chain of command can protect victims of sexual assaults by ensuring that they are appropriately separated from the alleged perpetrators during the investigation and prosecution of a case. And only the chain of command can be held accountable if it fails to change an unacceptable military culture.”⁴⁹⁷ Senator Kirsten Gillibrand (D-NY) agreed, noting that “[o]nly commanders are responsible for setting command climate. Only commanders are responsible for good order and discipline.”⁴⁹⁸ General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, stated that “[c]ommanders are accountable for all that goes on in a unit, and ultimately, they are responsible for the success of the missions assigned to them. Of course, commanders and leaders of every rank must earn that trust and, therefore, to engender trust in their units.”⁴⁹⁹

A. ASSESSMENT METHODS

The Department of Defense and the Services use a variety of tools and methods to assess institutional and command effectiveness in preventing sexual assault and responding appropriately to sexual assault reports. Institutional assessment measures include metrics based on sexual assault case report information in the Defense Sexual Assault Incident Database (DSOID). DoD SAPRO currently monitors DoD and Service performance on six metrics, including trends in overall reports of sexual assault and number and certification of full-time sexual assault prevention and response personnel, and fifteen additional metrics are in development.⁵⁰⁰ DoD SAPRO and the Services also use information from the Workplace and Gender Relations Surveys, which are conducted biannually by the Defense Manpower Data Center (DMDC), and the Defense Equal Opportunity Management Institute (DEOMI) Equal Opportunity Climate Surveys (DEOCS) to assess DoD and Service effectiveness in sexual assault prevention and response.⁵⁰¹

497 *Transcript of SASC Hearing 4* (June 4, 2013) (opening statement of Senator Carl Levin).

498 *Transcript of RSP Public Meeting 311* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

499 *Transcript of SASC Hearing 8-9* (June 4, 2013) (testimony of General Martin E. Dempsey, U.S. Army).

500 *Transcript of RSP Public Meeting 26-29* (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO); see also DoD SAPRO, “DoD Sexual Assault Prevention and Response Metrics” at 6-14 (Nov. 7, 2013) (PowerPoint Presentation to RSP [hereinafter Nov. 2013 SAPRO PowerPoint Presentation]).

501 *Transcript of RSP Public Meeting 27-28* (Nov. 7, 2013) (testimony of Major General Gary S. Patton); see also SAPRO Nov. 2013 PowerPoint Presentation at 3.

The Services assess the effectiveness of individual commands in sexual assault prevention and response in a variety of ways. All of the Services use command climate surveys as a primary information source to assess the SAPR climate within commands, requiring units to conduct surveys when a new commander assumes responsibility for the organization and annually thereafter. Additionally, a variety of other assessment methods, including individual incident reports, SAPR office feedback from training course evaluations and Case Management Group and Sexual Assault Response Team meetings, DoD and Service inspectors general inspections, SAPR program compliance inspections, 360-degree and other leadership assessments, and local personnel surveys, are used to obtain information about the climate in a command.

B. COMMAND CLIMATE SURVEYS

DEOMI conducts command climate surveys for DoD organizations. DEOMI was established in 1971 as the Defense Race Relations Institute (DRRI), responsible for race relations education for all members of the Armed Forces. DRRI became DEOMI in 1979, and its training mission expanded to include military and civilian equal opportunity and organizational management practices. In the 1990s, DEOMI developed an organizational assessment questionnaire designed to provide organization leaders information about the equal opportunity climate perceptions of assigned personnel. This survey, now called the DEOCS, has since been expanded to address a wide variety of human relations issues, including sexual assault, sexual harassment, hazing, and bullying.⁵⁰²

Initially, DEOCS was a voluntary tool available to commanders to assess perceptions within their organizations. The Services also had internal climate survey instruments, and commanders used surveys in conjunction with focus groups, interviews, and other local information gathering methods to assess their command's organizational climate. As the DEOCS evolved, it became the primary assessment survey for all military commanders at all levels of command. DEOCS became DoD's exclusive command climate survey instrument to assess perceptions within an organization on January 1, 2014.⁵⁰³ DEOMI administered more than 1.8 million DEOCS surveys to DoD personnel in 2013, up from 154,381 surveys in 2005.⁵⁰⁴

The DEOCS survey asks respondents questions related to specific factors that impact command and organizational climate. DEOCS Version 3.3.5, which DEOMI implemented in March 2012, assessed fourteen workplace climate factors, including sexual harassment and discrimination; differential command behavior; positive equal opportunity behavior; racist behaviors; age, religious, and disability discrimination; organizational commitment and trust; work group effectiveness and cohesion; leadership cohesion; job satisfaction; and leadership support for sexual assault prevention and response. Version 3.3.5 was the first version of the DEOCS to include SAPR climate questions as a core component of the survey.⁵⁰⁵ Survey

502 *Transcript of RSP RoC Subcommittee Meeting 77-80* (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director, Military Equal Opportunity and Defense Equal Opportunity and Management Institute (DEOMI) Liaison, DoD Office of Diversity Management and Equal Opportunity).

503 *Id.* at 83-85 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI). Dr. McDonald said DEOCS assessments have increased from ten to 15 assessments per week in 2005 to 250 per week currently, reaching approximately 50,000 personnel with a 53-percent return rate on surveys. *Id.* at 84-85.

504 DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SAPR CLIMATE REPORT: DEPARTMENT OF DEFENSE AND RESERVE COMPONENT RESULTS 2 (MAR. 2014) [HEREINAFTER DEOMI SAPR CLIMATE REPORT].

505 Prior to transitioning to the DEOCS on January 1, 2014, the Air Force used the Air Force Unit Climate Assessment for its climate assessment surveys. The six SAPR questions incorporated into DEOCS Version 3.3.5 were also included in the Air Force's Unit Climate Assessment starting May 31, 2012. See DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) CLIMATE REPORT: DoD-WIDE ANALYSES AND RESULTS I, 1 (OCT. 2013).

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respondents answered six questions and sub-parts that assessed four dimensions of the SAPR climate within the command:

- Perceptions of leadership support for SAPR
- Perceptions of barriers to reporting sexual assault
- Bystander intervention climate
- Knowledge of sexual assault reporting options⁵⁰⁶

To provide leaders with a more comprehensive snapshot of the climate within their commands, DEOMI developed and released DEOCS Version 4.0 in January 2014. Version 4.0 includes 95 questions with sub-parts that assess 23 workplace climate factors. SAPR questions in DEOCS Version 4.0 were significantly revised and expanded, in part to meet the requirement in Section 572(a)(3) of the FY13 NDAA to assess the command “for purposes of preventing and responding to sexual assaults.” SAPR climate factors assessed through nine questions with sub-parts on DEOCS Version 4.0 include:

- Perceptions of safety
- Chain of command support
- Publicity of SAPR information
- Unit reporting climate
- Perceived barriers to reporting
- Unit prevention climate/bystander intervention
- Restricted reporting knowledge⁵⁰⁷

In addition, commanders may incorporate up to ten locally developed questions and five short-answer questions into the DEOCS to provide more information on specific topics of interest or focus to the commander. DEOMI provides commanders with examples of locally developed questions and works with commanders to ensure additional questions are valid for survey purposes.

C. FREQUENCY, USE, AND REPORTING OF COMMAND CLIMATE SURVEYS

Prior to 2013, the Services had individual policies for frequency and use of command climate surveys. Section 572(a)(3) of the FY13 NDAA established a common command climate assessment standard, mandating that all military commanders must conduct a climate assessment of the command within 120 days after assuming command and at least annually thereafter.⁵⁰⁸ In July 2013, the Under Secretary of Defense for Personnel and Readiness required the Secretaries of the Military Departments to establish procedures to ensure commanders of all units of 50 or more persons conduct climate assessments in accordance with the FY13 NDAA requirement. Section 587(b) of the FY14 NDAA required performance evaluations for all commanders to include a statement whether required climate assessments were conducted, and Section 587(c) directed that failure to conduct required assessments must be noted in a commander’s performance evaluation.⁵⁰⁹

⁵⁰⁶ See *id.* at i.

⁵⁰⁷ DEOMI SAPR CLIMATE REPORT, *supra* note 504, at i–iii. In JANUARY AND FEBRUARY 2014, DEOMI ADMINISTERED 2,582 CLIMATE SURVEYS FOR DoD AND COAST GUARD UNITS, WHICH RESULTED IN 122,003 RESPONSES FROM PERSONNEL. *Id.* at 16.

⁵⁰⁸ FY13 NDAA, PUB. L. NO. 112-239, § 572(A)(3), 126 STAT. 1632 (2013). SECTION 1721 OF THE FY14 NDAA SUBSEQUENTLY AMENDED SECTION 572 OF THE FY13 NDAA TO ADD A REQUIREMENT THAT THE SECRETARY OF DEFENSE DIRECT THE SECRETARIES OF THE MILITARY DEPARTMENTS TO VERIFY AND TRACK COMPLIANCE OF COMMANDING OFFICERS IN CONDUCTING ORGANIZATIONAL CLIMATE ASSESSMENTS. FY14 NDAA, PUB. L. NO. 113-66, § 1721, 127 STAT. 672 (2013).

⁵⁰⁹ FY14 NDAA, PUB. L. NO. 113-66, § 587(B),(C), 127 STAT. 672 (2013).

In addition, DoD's July 2013 policy mandated that the commander at the next level in the chain of command also receive survey results and analysis within 30 days after the requesting commander received the survey results.⁵¹⁰ This policy took effect prior to passage of Section 587(a) of the FY14 NDAA, which mandated that results of command climate assessments must go to the individual commander and the next higher level of command. The Services have since established policies in accordance with DoD's guidance for survey frequency and result reporting requirements.⁵¹¹

According to DEOMI, administering a survey does not complete assessment of a command's climate, because the results obtained from a DEOCS are only the "starting point" that may "highlight issues."⁵¹² The results of climate surveys are compared against the normal distribution of the respective Service, and commands receive grades of "below average," "average," or "above average" on each survey factor.⁵¹³ If results for a particular survey factor indicate below-average assessment, such as leadership cohesion, the survey alone will not distinguish if the problem lies with the commander or subordinate leaders in the organization. Based on survey results, DEOMI provides additional recommendations for assessment tools, such as focus groups, interviews, or records reviews, that a commander may use to better diagnose areas of concern. Additionally, DEOMI provides training tools and other resources for commanders to improve command performance in specific focus areas that are assessed through the DEOCS.⁵¹⁴

With the additional mandate requiring superior commanders to receive command climate survey results for their subordinate units, DEOMI expects "the accountability level is going to go up" on command climate survey results.⁵¹⁵ Since July 2013, commanders requesting a DEOCS must provide the email address of their superior commander, and that commander is able to access survey results at the same time as the requesting commander.⁵¹⁶ In addition to receiving access to results through DEOMI, each of the Services has established policies requiring commanders to brief survey results to their superior commanding officer within 30 days. In September 2013, the Marine Corps implemented a policy requiring commanders to develop an action plan that addresses concerns identified in a DEOCS report and identifies periodic evaluations for assessing the plan's effectiveness. Marine Corps commanders must brief the survey results, analysis, and action plan to the

510 U.S. Dep't of Def., Memorandum from the Under Secretary of Defense for Personnel and Readiness on Command Climate Assessments (July 25, 2013).

511 All Service policies comply with the frequency and reporting requirements of the FY13 NDAA mandate, but the Service policies differ in terms of the required frequency for completing command climate surveys and how survey results are shared or conveyed to the next echelon commander. See Marine Corps Administrative Message 464/13, "Command Climate Assessments" (Sept. 17, 2013) [hereinafter MARADMIN 464/13]; Army Directive 2013-29, "Army Command Climate Assessments" (Dec. 23, 2013) [hereinafter Army Dir. 2013-29]; Navy Personnel Command, "Command Climate Assessment Process," at http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx; Dep't of the Air Force, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).

512 *Transcript of RSP RoC Subcommittee Meeting* 108 (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director, Military Equal Opportunity and DEOMI Liaison, DoD Office of Diversity Management and Equal Opportunity).

513 *Id.* at 106 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI).

514 *Id.* at 104-05.

515 *Id.* at 101. Additionally, DoD Directive 1350.2 requires the Service Secretaries to ensure commanders are held accountable for the equal opportunity climates within their commands. U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM ¶ 6.2.2 (Nov. 21, 2003).

516 *Transcript of RSP RoC Subcommittee Meeting* 120-21 (Nov. 20, 2013) (testimony of Lieutenant Colonel Kay Emerson, Chief, Equal Opportunity Program and Policy, U.S. Army Resiliency Directorate).

next higher-level commander, who must approve the plan prior to implementation.⁵¹⁷ Other Services recently implemented similar policies for climate assessment action plans and reporting.⁵¹⁸

In addition to unit-level report results, DEOMI aggregates SAPR climate data from DEOCS and provides summary reports to DoD SAPRO and the Services. Monthly reports provided to DoD SAPRO include unit-level and demographic subgroup summaries of the previous four months of data collected across the DoD, and quarterly reports provide trend analyses of survey results. DEOMI prepares similar quarterly summaries for the Army, Navy, Air Force, Marine Corps, National Guard, Reserve Component, and Joint Commands.⁵¹⁹

D. SUBCOMMITTEE ASSESSMENT OF COMMAND CLIMATE ASSESSMENT INITIATIVES

DoD and the Services have developed tools for individual commanders and senior leaders to assess the climate within commands for sexual assault and response. Mandates from Congress, DoD, and the Services establish baseline requirements for conducting and reporting climate assessments that seek to ensure commanders are attuned to and accountable for the SAPR climate within their unit. However, surveys alone do not provide a comprehensive assessment of the climate in an organization, and DoD and the Services must develop and implement other means to assess and measure organizational culture and culture change for sexual assault prevention and response. A command climate survey may not identify issues in an organization that warrant attention from leadership, and commanders must seek information from a variety of sources to fully assess the climate within their unit.

In addition to personnel surveys, DoD, the Services, and commanders should identify other resources for feedback on SAPR programs and local command climate. Chaplains, social services providers, military judges, inspectors general, and officers and enlisted personnel participating in professional military education courses may be underutilized resources for obtaining accurate, specific, and unvarnished information about institutional and local climate. Victim satisfaction interviews may provide direct insight into climate factors and feedback on installation services and organizational support.

Additionally, external evaluation of institutional and installation command climate is important to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness. DoD SAPRO serves as the Department's single point of accountability and oversight for developing and implementing SAPR programs and initiatives, and it is also responsible for assessing and monitoring the effectiveness of these efforts. External, independent reviews of SAPR efforts in DoD, no matter if they validate or disprove DoD's own internal assessments, would provide useful feedback to the Department and the public on SAPR programs and initiatives.

Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations. DEOMI stresses that command climate surveys are only a first step in organizational assessment. Additional interviews, targeted surveys, focus groups, audits, and records reviews are important follow-up tools to fully assess and understand indicators from survey results. Action plans developed by commanders following a climate survey, which are mandated by some Services but not by all, should first outline the steps the command will take to validate or expand upon survey information. Commanders should

517 See MARADMIN 464/13.

518 See Army Dir. 2013-29; Navy Personnel Command, "Command Climate Assessment Process," at http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx.

519 See DEOMI Responses to Requests for Information 33c, 33e (Nov. 21, 2013).

also be accountable for developing a plan for assessing and monitoring the organization's SAPR climate through means other than periodic surveys.

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 other officers, enlisted leaders, supervisors, and noncommissioned officers. Most issues and concerns expressed by victims are with lower-level leaders, not senior commanders or convening authorities. Assessment of command climate must accurately assess and evaluate the effectiveness of subordinate organizational leaders in addition to commanders. Commanders must pay particular attention to the critical role played by noncommissioned officers and subordinate leaders and 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.

The dramatic increase and large volume of surveys administered by DEOMI last year raises concern about survey fatigue. Surveys administered by DEOMI have increased substantially, and it appears this trend will continue based on new statutory and policy climate survey requirements. Although a climate survey can be a valuable tool for assessment, accurate and thoughtful feedback from unit members is essential to ensuring meaningful survey information. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide meaningful input. DoD and the Services must be mindful of survey fatigue, and they should monitor and assess what impact increased survey requirements have on survey response rates and survey results.

Section 3(d) of the Victims Protection Act of 2014 proposes to further expand climate assessment mandates by requiring climate assessments for the commands of the accused and the victim following an incident involving a covered sexual offense. The results of these climate assessments must be provided to the MCIO investigating the offense concerned and next higher level commander of the command. While information about a unit's culture or climate may prove helpful or relevant in some criminal investigations, it is not clear how organizational climate surveys would be effective following each report of a sexual assault offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements increase concerns about survey fatigue and the accuracy of the information collected.

E. PART VIII SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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.

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.

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.

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.

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.

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.

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.

IX. COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

As part of their statutory responsibility of exemplary conduct,⁵²⁰ commanders at all levels are responsible for maintaining good order and discipline within their unit and caring for those in their charge. A retired general officer testified before the panel and spoke of the responsibility: “[W]e are charged with maintaining good order and discipline, and that means we’re responsible for setting the climate, a climate of mutual respect and trust, and everybody must know what our commander’s intent is.”⁵²¹ As commanders are responsible for unit climate and direct day-to-day unit operations, they are responsible and directly accountable for the implementation and support of SAPR initiatives.

Enhancing commander accountability therefore extends beyond evaluating the quasi-judicial authority and function of the convening authority or how a commander responds to an allegation of sexual assault. Both proponents and opponents of allowing commanders to exercise convening authority agree that all military commanders — whether they exercise court-martial convening authority or not — are responsible for the climate of their commands, and should be held accountable when that climate is assessed as contributing to incidents of sexual violence committed by or against subordinates. As emphasized by a retired U.S. Marine who also served in Congress and as a senior Department of Defense official, “[c]ompany commanders never had convening authority but they were still held accountable and responsible for all aspects, everything that went on in their company.”⁵²²

Defining, assessing, and improving command accountability for incidents of sexual violence is central to reducing sexual assault and sex-related offenses. The Subcommittee received overwhelming evidence that indicates the climate established by commanders has a direct causal relationship to increasing reporting of sexual assaults when they occur and to the legally appropriate, timely, and compassionate response to reported sexual assaults. The Services seek to select commanders who possess the highest standards of professional competence and character to discharge their responsibilities effectively. The effort to ensure only the very best are selected for command increases proportionally according to the level of command, with the process becoming more centralized and deliberate for levels of command that are also vested with special and general court-martial convening authority.

To enhance confidence that commanders will establish command climates that contribute to the reduction of sexual violence, the DoD and Congress have sought to ensure those selected for command are appropriately

520 See 10 U.S.C. § 3583 (requiring exemplary conduct for Army commanding officers); 10 U.S.C. § 5947 (requiring exemplary conduct for commanding officers in Navy and Marine Corps); 10 U.S.C. § 8583 (requiring exemplary conduct for Air Force officers).

521 *Transcript of RSP RoC Subcommittee Meeting* 219 (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

522 *Transcript of RSP Public Meeting* 31 (Jan. 30, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense for Homeland Defense and U.S. Representative).

trained in their role in preventing and responding to sex-related offenses and, as climate assessment tools continue to develop, are held accountable when the climate within their commands undermines this effort. Determining and standardizing methods and mechanisms by which commanders are held accountable, however, is not a simple task. Command climate survey data provides limited information for fully understanding and assessing climate, and surveys cannot be the sole basis on which command climate, and in turn commanders, are evaluated.

A. TRAINING AND SELECTION OF COMMANDERS

Military commanders are a select group, comprising approximately 1.0 percent of the active military service.⁵²³ Professional development to prepare officers for this responsibility often begins before commissioning and continues through the junior officer grades as military officers are groomed for command positions.⁵²⁴ From the earliest opportunity to command, normally at the company or platoon level, commanders receive training and guidance on command and leadership expectations and the weight of the responsibility they hold in their positions. As officers become more senior in grade, command selection becomes more competitive and more rigorous. The Deputy Chief of DoD SAPRO outlined the deliberate nature of the command selection screening process to the Subcommittee:

[T]hrough your development as a junior officer, you are singled out as somebody that could compete for command. And if you don't have a record that supports even competing for command and getting on a command list, you're not going to be there. Then you have to be competitively selected to be on the command list, and then you have to be hired because usually there's two to three times as many people qualified for command as those that get hired.⁵²⁵

To be considered for more senior command billets, an officer's record must reflect certain developmental training, key positions, high marks in performance evaluations, and demonstrated increases in leadership responsibility. Command selection boards are vetted by senior leaders who understand and can identify the quality of a military officer and whether he or she is an appropriate selection for command.⁵²⁶

Throughout their career professional development, military officers receive continual training and education. Each Service has a command and staff college where a command-tracked officer spends "an entire year learning about and studying command."⁵²⁷ As officers develop and are groomed for command, they attend additional training courses and leadership schools, with each Service offering instruction in legal roles and responsibilities.⁵²⁸ Once selected for command, officers receive tailored pre-command training and other Service-specific courses based on the level of command and nature of the unit. Commanders, who are paired with an assigned senior enlisted leader, often attend pre-command training course as a team.⁵²⁹

523 See *supra* Part II, Section B.

524 See Army Response to RSP Request for Information 1c (Nov. 1, 2013).

525 *Transcript of RSP RoC Subcommittee Meeting 151-52* (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Chief, DoD SAPRO).

526 See *id.* at 152.

527 *Id.* The courses of study for the command and staff colleges each last about ten months.

528 See Services' Responses to RSP Request for Information 1c (Nov. 1, 2013).

529 See *id.*

For senior commanders, the Naval Justice School (NJS) and the Army Judge Advocate General's Legal Center and School (TJAGLCS) provide commander-focused courses in military law, including the commander's role in the military justice process.⁵³⁰ TJAGLCS courses are offered as resident courses in Charlottesville, Virginia, while the NJS courses are offered through on-site training at various Navy installations. Formal Air Force legal training for senior commanders is less robust and is incorporated into group and wing commander courses hosted by Air University at Maxwell Air Force Base, Alabama.⁵³¹

In January 2012, the Secretary of Defense directed a DoD-wide evaluation of pre-command SAPR training.⁵³² DoD SAPRO led the evaluation, after "multiple internal and external reviews of SAPR training in the Military Services have identified such training lacks standardized content, is delivered inconsistently, and is missing an evaluation of effectiveness."⁵³³ In May 2012, DoD SAPRO completed its final evaluation, with 13 recommendations to sustain and improve pre-command SAPR training.⁵³⁴ Notable among DoD SAPRO's improvement recommendations was the proposal to create a standardized SAPR curriculum across the Services, expand training time for quality instruction time, and assess training participants to ensure mastery of key SAPR concepts.⁵³⁵ In a January 2013 report to the Secretary of Defense, the Under Secretary of Defense for Personnel and Readiness noted that pre-command SAPR training enhancements across the Services included standardized core competencies, learning objectives, and methods for assessing training effectiveness to be implemented across the Services for both pre-command and senior enlisted leader training.⁵³⁶

B. DOD INITIATIVES TO ENHANCE ACCOUNTABILITY AND ASSESS COMMANDER PERFORMANCE IN SEXUAL ASSAULT PREVENTION AND RESPONSE

With standardized training objectives and core competencies in sexual assault prevention and response, the DoD has attempted to develop methods to evaluate commanders and ensure accountability. One retired general officer told the Subcommittee that "[c]ommand without accountability is a failed model. It absolutely will not work."⁵³⁷ Requirements in the FY13 NDAA, several of which were incorporated by the Undersecretary of Defense for Personnel and Readiness into mandates for pre-command SAPR training, provided additional measures to improve commander accountability by requiring a SAPR module in training for new or prospective commanders and requiring commanders to conduct regular climate assessments.⁵³⁸

On May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan. He also announced several additional measures to address sexual

530 See *id.*

531 See *id.*

532 Because the evaluation was directed by the Secretary of Defense, Coast Guard sexual assault prevention and response training was not evaluated.

533 DEP'T OF DEF., SAPRO, EVALUATION OF PRE-COMMAND SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING 5 (May 2012).

534 *Id.* at 3-4.

535 *Id.*

536 DEP'T OF DEF., SAPRO, ENHANCEMENTS TO PRE-COMMAND AND SENIOR ENLISTED LEADER SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING (Jan. 2013).

537 *Transcript of RSP RoC Subcommittee Meeting 236* (Jan. 8, 2014) (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps).

538 FY13 NDAA, Pub. L. No. 112-239, §§ 572(a)(3), 574, 126 Stat. 1632 (2012).

assault in the military, two of which focused on commander accountability.⁵³⁹ He directed the Services to develop methods to hold military commanders accountable for command climate, and he required the next-superior commander to receive copies of annual command climate surveys from subordinate commanders.⁵⁴⁰ Command climate surveys are a principal method used by the Department of Defense to evaluate climate factors and assess a commander's performance in sustaining an appropriate unit climate. However, at the unit level, these surveys are only one source of information within the totality of information that senior commanders utilize to oversee and mentor subordinate commanders. Thus, insight from surveys provides senior commanders an opportunity to detect and intervene when command climate issues exist in a subordinate unit, and the information also provides a method for superior commanders to assess how effectively subordinate commanders execute their important responsibility to contribute to the reduction of sexual violence in the Armed Forces. However, commanders at all levels must be continuously engaged with subordinate commanders and their units to assess subordinate command climate.

The Secretary of Defense also directed the Services to report on implementation of DoD's 2013 SAPR Strategic Plan. Consistent with the plan, he required each Service to develop methods and metrics for enhancing commander accountability, tailored to Service needs and structure.⁵⁴¹ As described below, each of the Services reported back on their initiatives. The Secretary of Defense meets weekly with senior Service leadership to review SAPR efforts and progress to ensure full implementation of all initiatives.⁵⁴²

Each of the Services reported modification of performance evaluations as a primary initiative. Performance appraisals in each Service directly impact promotion potential and future assignments, including command selection. The Navy, Army, and Air Force issued Service-wide, direct guidance on performance evaluations that now requires specific consideration of command climate and SAPR issues in officer and noncommissioned officer performance appraisals. However, the evaluation scope and level of detail required vary among the Services:

- Army evaluation reporting now requires raters to assess how the rated officer or noncommissioned officer supported Army Sexual Harassment and Assault Response and Prevention (SHARP) programs. It also requires commentary if the rated soldier was the subject of a substantiated sexual harassment or sexual assault allegation, failed to report an incident of sexual harassment or assault, or failed to respond to a reported incident or retaliated against the reporting individual.⁵⁴³
- Air Force officers and noncommissioned officers are evaluated on what they did to ensure a "healthy unit climate."⁵⁴⁴ In particular, Air Force commanders are evaluated on their ability to

539 Dep't of Def., News Transcript, Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy From the Pentagon (May 7, 2013); see also U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013). For additional discussion on the DoD SAPRO Strategic Plan and the commander's role in prevention, see Part IV, *supra*.

540 *Id.* Section 587 of the FY14 NDAA codified this requirement and provided that failure to conduct required climate assessments must be noted in a commander's performance evaluation. FY14 NDAA, Pub. L. No. 113-66, § 587, 127 Stat. 672 (2013).

541 See U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013).

542 U.S. Dep't of Def., News Release, Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013).

543 U.S. Dep't of the Army, Memorandum from the Secretary of the Army on Sexual Assault Prevention and Response (SAPR) – Enhancing Commander Accountability (Nov. 1, 2013).

544 U.S. Dep't of the Air Force, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and

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ensure a “healthy climate in their command,” specifically in light of their “special responsibility and authority” to ensure good order and discipline.⁵⁴⁵ An Air Force representative told the Subcommittee it is updating its evaluation forms to specifically address organizational climate and support of SAPR initiatives.⁵⁴⁶

- Marine Corps officer fitness reports, which have not been revised, include a leadership assessment section, which includes five sub-category evaluations in how well the officer leads subordinates, develops subordinates, sets the example, ensures well-being of subordinates, and communication skills.⁵⁴⁷ One presenter said he felt new command climate mandates gave “teeth” to the fitness report’s evaluation for developing subordinates.⁵⁴⁸ The Marine Corps indicated they are “reviewing [their] performance evaluation system to ensure it promotes command climate accountability.”⁵⁴⁹
- Navy evaluation and fitness reports now require all sailors to demonstrate how they have “cultivated or maintained a positive command climate” where “improper discrimination of any kind, sexual harassment, sexual assault, hazing, and other inappropriate conduct [are] not tolerated.”⁵⁵⁰

Commander effectiveness in sexual assault prevention and response to allegations is now a part of evaluation reporting systems.⁵⁵¹ The Deputy Chief of DoD SAPRO expressed optimism about recent Service changes adding SAPR support to performance appraisals: “My personal feeling is when you start measuring on somebody’s evaluation report, it starts to change leaders’ attitudes and behaviors, and they pay attention to it. So I think it will have a profound effect.”⁵⁵²

Section 3(c) of the Victims Protection Act of 2014 (VPA)⁵⁵³ would further expand assessment of SAPR support on all performance appraisals, and it would statutorily require assessment of a commander’s sexual assault response efforts. Section 3(c) provides:

The Secretaries of the military departments shall ensure that the performance appraisals of commanding officers . . . indicate the extent to which each such commanding officer has or has not established a command climate in which (A) allegations of sexual assault are properly managed and fairly evaluated; and (B) a victim can report criminal activity, including

Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).

545 *Id.*

546 *Transcript of RSP RoC Subcommittee Meeting* 189-92 (Nov. 20, 2013) (testimony of Brigadier General Gina M. Grosso, Director of Force Management Policy, U.S. Air Force).

547 *Id.* at 234-35 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters & Service Battalion Quantico, U.S. Marine Corps).

548 *Id.* at 148-49 (testimony of Colonel T.V. Johnson, Diversity & Equal Opportunity Office, U.S. Marine Corps).

549 U.S. Marine Corps, Memorandum from the Deputy Commandant for Manpower and Reserve Affairs on Enhancing Commander Accountability (Sept. 19, 2013).

550 U.S. Dep’t of the Navy, Memorandum from the Secretary of the Navy on Report on Enhancing Commander Accountability (Oct. 28, 2013); Navy Administrative Message, 216/13, Navy Performance Evaluation Changes (Aug. 2013) [hereinafter NAVADMIN 216/13].

551 *See Transcript of RSP RoC Subcommittee Meeting* 153 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Chief, DoD SAPRO).

552 *Id.* at 95.

553 For further discussion on the Victims Protection Act of 2014, see Part III, *supra*.

sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command.⁵⁵⁴

This provision would require assessment of the ability of commanders to foster a safe climate for crime reporting and adequately respond to allegations of sexual assault, but it would not require performance appraisals to specifically address how a commander performs his or her sexual assault prevention responsibilities.⁵⁵⁵

Section 3(c) of the VPA mirrors Section 1751 of the FY14 NDAA, which expresses the sense of Congress on a commanding officer's responsibility for a command climate free of retaliation and the responsibility for senior officers to evaluate subordinate commanding officers on their performance in these areas.⁵⁵⁶ Section 1751 further specifies the sense of the Congress that commander evaluations should be maintained for use in personnel assignment decisions as well as promotion and command selection boards.⁵⁵⁷

A commander may shape the climate in a command, but subordinate leaders and supervisors engaged in day-to-day interactions with unit personnel are also principal contributors to command climate. A former director of DoD SAPRO observed that accountability is essential at all levels, including “commanders, junior officers, and NCOs, because I have heard many times from victims that it’s not the commander who’s the problem but the supervisors in between the victim and the commander.”⁵⁵⁸

As described, Service requirements vary for documenting subordinate leader and Service member support of SAPR programs in performance evaluation reports. If performance evaluation assessment increases attention to and support of SAPR programs, these differences may result in uneven support and attention among subordinate leaders and personnel. Section 3(c) of the VPA would extend evaluation requirements to all Service members by mandating that the Service Secretaries “ensure that the written performance appraisals of members of the Armed Forces . . . include an assessment of the extent to which each such member supports the sexual assault prevention and response program of the Armed Force concerned.”⁵⁵⁹

In addition to performance evaluation mandates, the Air Force and Navy reported additional enhancements to commander accountability, including training mandates for improving the treatment of victims by their peers, co-workers, and chains of command. The Air Force transitioned from an Air Force-specific Unit Climate Survey to the DEOCS administered by DEOMI and indicated increased frequency and use of climate assessments. The Air Force also indicated improved SAPR training that includes enhanced sensitivity training for all Air Force members, to “improve victim care and trust in the chain of command,” and to “improve understanding of victim trauma and care.”⁵⁶⁰

554 Victims Protection Act of 2014, S. 1917, § 3(c)(2), 113th Cong. (2014).

555 See *id.* at § 3(c).

556 See FY14 NDAA, PUB. L. NO. 113-66, § 1751, 127 Stat. 672 (2013).

557 See *id.*

558 *Transcript of RSP RoC Subcommittee Meeting 223* (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

559 Victims Protection Act of 2014, S. 1917, § 3(c)(1), 113th Cong. (2014).

560 U.S. Dep't of the Navy, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).

The Navy reported it adopted a definition for “positive command climate” that extends beyond sexual assault prevention to also include professionalism, dignity and respect, and efforts to oppose improper discrimination, sexual harassment, hazing, and other inappropriate conduct.⁵⁶¹ The Navy provided tailored and specific guidance on implementation of Navy SAPR program initiatives to the entire fleet, including programs, directives, and expectations focused on “improving the safety of our Sailors and reducing incidents of sexual assault” for immediate implementation by Navy commanders.⁵⁶²

C. METHODS OF ACCOUNTABILITY

The most fundamental way a commander may be held accountable for any failure in his or her responsibilities is relief from command. Commanders serve at the discretion of their superior commanders and leaders, and a retired senior Air Force commander explained to the RSP that “[t]here is no process in our society that is easier to execute than removing a commander. That person’s superior only has to say: ‘I have lost confidence in your ability to command this organization.’ That’s it.”⁵⁶³ A Marine commander explained to the Subcommittee that commander reliability and accountability go hand-in-hand: “We can be relied on by our seniors . . . so we can be relieved by our seniors, and we can relieve our subordinates, too.”⁵⁶⁴ In addition to requiring senior officers to evaluate subordinate commanders on their performance in establishing a healthy command climate, Section 1751 of the FY14 NDAA provides the sense of Congress that “the failure of commanding officers to maintain such a command climate is an appropriate basis for relief from their command positions.”⁵⁶⁵

In addition to relief from command, other provisions of law and policy provide accountability mechanisms for commanders who fail to meet their SAPR obligations. Section 1701(b)(2)(E) of the FY14 NDAA authorizes disciplinary sanctions against members who willfully or wantonly fail to comply with victim rights requirements under the revised Article 6b of the UCMJ.⁵⁶⁶ Punitive sanctions may also be imposed for illegal conduct during an investigation or trial, particularly if a substantial right of the accused or the victim was impacted. Article 92 of the UCMJ criminalizes failure to obey a lawful order, as well as willful or negligent dereliction of duty, which includes failure to obey the statutory obligations related to the reporting and resolution of sexual assault reports. Article 98 of the UCMJ criminalizes noncompliance with procedural rules in the UCMJ. Article 133 and 134 are more general in nature, and they may apply to other illegal conduct which is unbecoming of an officer or which may be prejudicial to good order and discipline or of a nature to bring discredit upon the Armed Forces, including obstruction of justice or interference with administrative proceedings.⁵⁶⁷

561 NAVADMIN 216/13.

562 Navy Administrative Message, 181/13, Implementation of Navy Sexual Assault Prevention and Response Program Initiatives (July 2013) [hereinafter NAVADMIN 181/13].

563 *Transcript of RSP Public Meeting* 105 (Jan. 30, 2013) (testimony of General (Retired) Roger A. Brady, U.S. Air Force); see also *Transcript of RSP RoC Subcommittee Meeting* 211 (Nov. 20, 2013) (testimony of Lieutenant General Howard B. Bromberg, Deputy Chief of Staff for Personnel, U.S. Army, noting Army’s standard for relief for cause of commander is loss of trust and confidence in subordinate’s ability to perform his or her job).

564 *Id.* at 235 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters & Service Battalion Quantico, U.S. Marine Corps).

565 See FY14 NDAA, Pub. L. No. 113-66, § 1751, 127 Stat. 672 (2013).

566 *Id.* at § 1701(b)(2)(E).

567 10 U.S.C. §§ 892, 898, 933, 934 (UCMJ arts. 92, 98, 133, 134).

Relief from command and punitive or criminal sanctions are severe options when a commander fails in his or her fundamental responsibilities, but lesser means are also available to hold commanders accountable for SAPR performance. Commanders may receive administrative correction from their superiors, such as a letter of reprimand or admonishment. As described above, poor performance may be documented on the commander's evaluation and fitness report. An officer who has been selected for promotion to the next higher grade may be recommended for a promotion delay or removal from the promotion list, which elevates review of the officer's capacity to serve in the higher grade to the Service Secretary. Officer promotions and selection for higher command are extremely competitive, and any indicators in an officer's record that reflect negatively on his or her performance in command will undoubtedly impact the officer's prospect for future promotion or command selection.

D. SUBCOMMITTEE ASSESSMENT OF COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

It is important to continue to leverage accountability mechanisms that focus on encouraging commanders to set a positive command climate that contributes to sexual assault prevention and appropriate response to sexual assault allegations. Commanders should be consistently held accountable in three primary instances: (1) when they are personally involved in misconduct, (2) when they fail to act in a legally or ethically proper manner in response to an incident, or (3) when a superior commander determines that there are poor climate indicators demonstrating inadequate prevention or response efforts within the organization. While ineffective or inadequate commanders should be relieved, accountability must also include positive reinforcement that will strengthen good commanders. DoD and the Services must pay particular attention to developing leaders who are well suited for command at every level, selecting the best among this pool for positions of command, and training them in effective leadership and oversight of SAPR issues.

The consequences of rank in the military are profound, and there is a persistent perception of immunity and/or protection for high-ranking officers—both for wrongful or criminal behavior and for oversight and response. Regardless of whether these perceptions are accurate or inaccurate, failure to take appropriate action on misconduct or improper action by senior leaders leads to a perception that high-ranking members are impervious to disciplinary action for wrongdoing, which results in an erosion of trust among the force. The opposite is also possible: taking inappropriate action in an attempt to demonstrate “zero tolerance” or to “do something” in response to problematic allegations can backfire and lead to further erosion of trust. As with all other adverse actions, any response to allegations against any Service member, regardless of rank, must be individually tailored based on the facts and law, with both due process of law and the presumption of innocence intact.

Transparency is important in commander accountability, and lack of transparency may contribute to a perception of favorable treatment based on rank. The Subcommittee noted that the Services have different perspectives on Privacy Act⁵⁶⁸ implications of administrative actions that hold commanders accountable, because Service policies for releasing or publicizing instances where commanders are relieved differ substantially. For example, the Navy publicizes when and why a commander is relieved for cause, while the Air Force and Army generally release information only if the commander is a general officer or the incident receives substantial public interest.

568 Privacy Act of 1974, 5 U.S.C. § 552a.

IX. COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Assessment of a commander's performance does not necessarily culminate when the commander relinquishes the position and departs the unit. Most command assignments are relatively short, with officers serving in a command position for only two years, and problems related to a commander's tenure may not be known until after a commander departs. Command climate surveys conducted by new commanders shortly after assuming command will likely provide insight into the effectiveness of previous unit leadership. This insight should be appropriately assessed and fully validated, but the Services must ensure post-command feedback on a commander's service is considered and appropriately documented, even if the commander has moved on to other duties.

E. PART IX SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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.

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.

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.

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.

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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.⁵⁶⁹

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.

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.

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.

569 See, e.g., NAVADMIN 181/13.

X. STATEMENT OF SUBCOMMITTEE MEMBER ELIZABETH L. HILLMAN

I join the parts of the Role of the Commander Subcommittee Report that address the importance of broad-gauge efforts to reduce the incidence of rape and sexual assault. Such efforts include researching and implementing proven strategies to prevent assaults and enhance public confidence in the military justice system. I also concur with the Report's recommendation that widespread confusion about "restricted" reporting, an option available to victims of sexual assault who are active-duty service members, should be corrected with clarification and education. The recommendations that accompany those sections of the Report are likely to complement existing efforts and improve the military's response to sexual assault.¹

I have already written, in a separate statement appended below, about why I believe requiring convening authorities to exercise prosecutorial discretion violates basic procedural fairness and undermines the legitimacy of military justice. By recommending that the authority to prosecute remain within the command structure, the Subcommittee rejects the premise that independent and impartial prosecutors should decide on the charges filed at courts-martial, as they do in U.S. state and federal criminal courts, in our allies' national military justice systems, and in international criminal courts.

I write now to explain why I decline to join most of the Subcommittee's final report. Commanders play a powerful and distinctive role in the armed forces, a role not fully acknowledged in the Subcommittee Report. The command structure of the armed forces enforces obedience, rewards sacrifice, and prioritizes the mission, each of which can discourage reporting of sexual assaults. Likewise, the distinctive demographics of the armed forces, which tilt toward youth, are 85% male, and until very recently included only those lesbian and gay service members who were willing to serve in fear of criminal prosecution and social ostracism, make military sexual assault different from sexual assault in civilian workplaces and institutions.² When the dust settles after this most recent round of criticism and reform, commanders will—again—be left to solve a set of problems that they cannot manage alone, however deep their commitment and integrity.

1 In particular, I concur in Recommendations 4 through 12, 14, 21, 24, 27, and 30. See REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, Abstract of Subcommittee Recommendations and Findings (May 2014) [hereinafter SUBCOMMITTEE REPORT].

2 OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY COMMUNITY AND FAMILY POLICY, 2012 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 19, 36 (Exhibits 2.08. Gender of Active Duty Members, 2.36. Age of Active Duty Members), available at http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf; Defense Manpower Data Center, "Active Duty Military Personnel by Service Rank/Grade: December 2013 (Women Only)" ("Table of Active Duty Females by Rank/Grade and Service"), at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>; see also DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, Vol. I, at 81–89 (May 2013) (Exhibit 18: Age of Victims in Completed Investigations of Unrestricted Reports, FY12; Exhibit 28: Age of Victims Making Restricted Reports, FY12; and Exhibit 21: Age of Subjects in Completed Investigations of Unrestricted Reports, FY12), available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

History tells us that commanders do not always “drive cultural change in the military.”³ Racial minorities, women, and lesbians and gay men entered the ranks of the military only after overcoming extreme resistance from military leaders and winning protracted civil rights battles. Attorneys like the late Robert L. Carter, a veteran, civil rights leader, and U.S. District Court judge, would be surprised at the assertion that racial integration was led, not resisted, by commanding officers. While working for the NAACP Legal Defense and Education Fund, Judge Carter argued *Burns v. Wilson*, a 1953 Supreme Court case rejecting the habeas corpus petitions of African American soldiers sentenced to death at court-martial for rape and murder. Military justice was marked by racial disparities long after President Truman’s 1948 order mandating equality of treatment for all races.⁴

When I was a first lieutenant in the Air Force in the spring of 1993, I listened to General Merrill A. McPeak, then the Air Force Chief of Staff, respond to a question about female pilots flying combat missions by stating that he was personally opposed to service women flying bombers or fighters but would reluctantly follow the law if it changed.⁵ His comment implied that informal resistance to formal equality was acceptable, even expected, among Air Force leaders. Likewise, the actions of many commanding officers before, during, and after “don’t ask/don’t tell,” the legal regime that banned service by gays and lesbians who failed to hide their sexual orientation from 1993 until 2011, do not reveal a corps of senior leaders eager to embrace equal opportunity.⁶ Social and cultural change within the U.S. armed forces is a complex historical phenomenon that has not been driven primarily by command.

The Subcommittee Report’s description of the measures that each branch of service takes to ensure commanders are qualified (referred to as “grooming”), and can be removed if necessary, does not resolve the problem created by placing excessive legal authority in the chain of command.⁷ No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders.⁸ Giving commanders authority over criminal prosecution and an extensive “quasi-judicial” role, in addition to their many other mission-related responsibilities, exacerbates the impact of inevitable failures of command.⁹

3 SUBCOMMITTEE REPORT, Part II, Section A.

4 *Burns v. Wilson*, 346 U.S. 137 (1953); see also JAMES E. WESTHEIDER, *FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR* (1997); BERNARD C. NALTY, *STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY* (1989); MORRIS J. MACGREGOR, *INTEGRATION OF THE ARMED FORCES 1940-1965* (1981). Racism in military justice was a primary challenge of civil rights leaders throughout the 1950s, '60s, and '70s.

5 See Eric Schmitt, *Women Ready to Fly for Navy, or Flee It*, N.Y. Times (Apr. 23, 1993); see also Evelyn Monahan, *A Few Good Women: America's Military Women from World War I to the Wars in Iraq and Afghanistan* (2010); The Women's Research & Education Institute (WREI), “Women in the Military & Women Veterans,” at <http://www.wrei.org/WomeninMilitary.htm>.

6 AARON BELKIN, *HOW WE WON: PROGRESSIVE LESSONS FROM THE REPEAL OF “DON’T ASK, DON’T TELL”* (2011); RANDY SHILTS, *CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY* (1994).

7 SUBCOMMITTEE REPORT, Part VIII, Section A; see also *id.* at n.1 (collecting statutes requiring “exemplary conduct” of commanding officers).

8 Two examples in just the last few weeks reveal that screening and training is not enough to forestall conduct that makes high-level commanders seem entirely unprepared to adjudicate sexual assault cases fairly. See Craig Whitlock, *Disgraced Army General, Jeffrey A. Sinclair, Gets \$20,000 Fine, No Jail Time*, WASH. POST (Mar. 20, 2014) (reporting on sentence following conviction at court-martial for sex offenses of brigadier general who had been deemed an up-and-coming star), available at http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b_story.html; Craig Whitlock, *Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment*, WASH. POST (Apr. 23, 2014) (reporting on complaint that former commander of elite naval aviation squadron and president of Tailhook Association created permissive environment in which pornography, lewd behavior, and hazing were common), available at http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be42211e-cb0f-11e3-95f7-7ecdde72d2ea_story.html.

9 SUBCOMMITTEE REPORT, Part II, Section B.

The Subcommittee Report narrates a history of modern military justice that elides the contested nature of that history and overstates the degree of consensus about the origins and progress of reform in military justice, and in military institutions overall.¹⁰ The Subcommittee was not asked to write a history of military justice and heard almost no testimony about it.¹¹ Legal reform within the military justice system has frequently provoked resistance and backlash, as has social change.¹² The report's review of Supreme Court cases under the UCMJ omits key precedents¹³ and dismisses as mere coincidence the fact that nearly every case it cites involves military sexual assault or domestic violence.¹⁴ A selective history of military justice does not help to illuminate the impact of the military's command structure on rape and sexual assault in the contemporary armed forces.

Sexual assault is a different problem in the military than in civilian life in part because the coercive nature of command makes sexual exploitation both easier to commit and easier to hide. Service members are introduced to a culture of obedience and hierarchy from the start of their military service, a culture enforced by law and custom that defines their speech, their dress, their pay—even who can serve as a member of court-martial panel.¹⁵ This deference to authority undermines the autonomy of service members, who often live and work in close proximity, creating more opportunity for sexual harassment and assault. Service members who wish to be “good soldiers” and support their commands may find it more difficult to resist pressure for unwanted sexual acts from peers, be less willing to come forward if their harassers or rapists are superior officers, and be disinclined to report if disclosure might embarrass or impair the effectiveness of their units.¹⁶ The far-reaching legal authority of commanding officers, presented as a solution to military sexual assault in the Subcommittee Report, is also a problem, for commanders and victims alike. Fear of exercising unlawful command influence may deter commanders from making forceful statements about the wrongfulness of sexual harassment and assault. Deference to authority may make victims less likely to report superiors for misconduct and more likely to sacrifice their own well-being in favor of protecting the reputations of their peers and branches of service.

Yet the Subcommittee Report states that “sexual violence in the military is no different” than among civilians.¹⁷ This simply cannot be true. Only service members can be tried for crimes if they fail to obey the order of

10 For a half-dozen of the many alternative views on this history, see, e.g., WILLIAM T. GENEROUS, *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* (1973); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* (1974); EUGENE R. FIDELL & DWIGHT H. SULLIVAN, EDS., *EVOLVING MILITARY JUSTICE* (2002); ANDREW J. BACEVICH, *THE NEW MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR* (2005); 140:3 *DAEDALUS* (Summer 2011: The Military Issue); and THOMAS E. RICKS, *THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY* (2012).

11 Before the Subcommittee was formed, the RSP heard from Colonel (Retired) Fred Borch. See generally Transcript of RSP Public Meeting 187-221 (June 27, 2013).

12 See, e.g., JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980* (2001); JONATHAN LURIE, *PURSuing MILITARY JUSTICE: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980* (1992).

13 See, e.g., *Reid v. Covert*, 345 U.S. 1 (1957), a hard-fought case in which the Air Force lost its effort to exert military jurisdiction over the dependent wife of a service member for a domestic murder committed overseas. For an alternate reading of service connection cases and Supreme Court review of military cases, see DIANE H. MAZUR, *A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER* (2010).

14 Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 *Pol. & Soc'y* (2009) (explicitly addressing significance of so many court-martial appeals involving cases of intimate partner and sexual violence for evolution of military justice and capacity of military justice system to address sexual assault), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

15 10 U.S.C. § 825 (UCMJ art. 25).

16 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, Vol. II, Annex A, at 101-25 (May 2013), available at http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf.

17 *Id.* at second sentence of Part IV.

a superior, skip a day of work, or speak out against a superior.¹⁸ Only service members can be prosecuted for disobeying an order not to drink alcohol in the barracks if they report a sexual assault that occurs in the midst of such drinking.¹⁹ Civilians who suffer a sexual assault can often leave behind a job, supervisor, or even apartment or house, while service members in comparable situations could face severe consequences for abandoning a post or military quarters. Civilians are rarely in situations as vulnerable to authority and abuse as are military recruits in training, or cadets at the service academies, both of whom have too often been the target of sexual assaults.²⁰ Prescriptions for reducing and responding to military sexual assault must not sidestep these relevant differences.

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- 18 See 10 U.S.C. §§ 892, 885, 889, (UCMJ arts. 92, 86, 89) (defining, respectively, offenses of failure to obey order or regulation, absence without leave, and disrespect toward superior commissioned officer); see *also* 10 U.S.C. § 891 (UCMJ art. 91) (defining offense of insubordinate conduct as including when any warrant officer or enlisted member “treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office”).
 - 19 The impact of criminal liability for “collateral misconduct” is a major concern addressed by all three Subcommittees of the RSP. See SUBCOMMITTEE REPORT, Part VI, Section D; Part VII, Section B; see *generally* REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014); REPORT OF THE VICTIM SERVICES SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014).
 - 20 See U.S. AIR FORCE AIR EDUCATION AND TRAINING COMMAND, AETC COMMANDER’S REPORT TO THE SECRETARY OF THE AIR FORCE: REVIEW OF MAJOR GENERAL WOODWARD’S COMMANDER DIRECTED INVESTIGATION (Nov. 2012) (describing, *inter alia*, measures taken to hold commanders accountable following sexual assault investigation of military training instructors at Joint Base San Antonio-Lackland), *available at* <http://www.afpc.af.mil/shared/media/document/AFD-121114-029.pdf>; U.S. AIR FORCE, DEVELOPING AMERICA’S AIRMEN: A REVIEW OF AIR FORCE ENLISTED TRAINING (Aug. 2012) (report of General Woodward’s commander directed investigation at Joint Base San Antonio-Lackland), *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/20_Woodward_CDIREport.pdf; see *also* Fred L. Borch, *Military Law and the Treatment of Women Soldiers: Sexual Harassment and Fraternization in the US Army*, in GERARD J. DeGROOT AND CORINNA PENISTON-BIRD, EDS., *A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY* (2001) (describing, *inter alia*, command response to 1996-97 training environment misconduct at Aberdeen Proving Ground). For DoD SAPRO’s annual reports on sexual harassment and violence at the Military Service Academies, see <http://www.sapr.mil/index.php/annual-reports>; see *also* REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES (June 2005), *available at* http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf; REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (Sept. 2003), *available at* <http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf>.

SEPARATE STATEMENT DISSENTING FROM THE INTERIM REPORT OF THE
ROLE OF THE COMMANDER SUBCOMMITTEE

January 30, 2014

I write separately to explain why I stand apart from my colleagues on the issue of whether convening authorities should retain prosecutorial discretion. I believe we should vest discretionary authority to prosecute rape and sexual assault in the same people on whom federal, state, and many respected military criminal justice systems rely: trained, experienced prosecutors.

For decades, military sexual assault scandals have been a regular source of national embarrassment.¹ Senior military officers testified repeatedly, and convincingly, before our Panel and Subcommittees about the imperative to “get to the left of the problem,” not to wait until the next incident to respond but instead make immediate changes to break the cycle of scandal, apology, response, and recurrence.² They, and many other witnesses, asserted that the only way to prevent military sexual assault is to attend to the “big picture” factors—cultural, social, demographic, environmental—that enable it to occur.³ We heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault.⁴ We did, however, see proof that rape and sexual assault continue to occur at too high a frequency in the armed forces, despite distinctive elements of military service that should curb their prevalence. These elements include the elevation of honor and sacrifice above personal gain, the greater degree of surveillance in military life, the higher ethical standards that service members must embrace, and the military’s ability to select its members from among those who are eligible to serve.

Rape and sexual assault pose distinctive challenges in the U.S. military, which remains predominantly male and marked by imbalances of power among the individuals who serve.⁵ We entrust our military with the legitimate use of force to support and defend our country and Constitution against all enemies, a duty it bears in part by drawing on a history of war and military successes in which sexual violence has unfortunately been commonplace.⁶ Commanders must overcome this by leading a cultural shift toward greater respect for gender

1 See, e.g., U.S. COMMISSION ON CIV. RTS., *SEXUAL ASSAULT IN THE MILITARY: 2013 STATUTORY ENFORCEMENT REP.* 2 (Sept. 2013), available at http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf; CENTER FOR AM. PROGRESS, *TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY’S SEXUAL ASSAULT PROBLEM* 7–10 (Nov. 2013), available at <http://www.americanprogress.org/wpcontent/uploads/2013/11/MilitarySexualAssaults.pdf>.

2 See, e.g., *Transcript of RSP Public Meeting* 34–35, 50 (Sept. 25, 2013) (testimony of Major General Steven Busby, U.S. Marine Corps).

3 See, e.g., *Transcript of RSP Public Meeting* 30–31 (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, Department of Defense Sexual Assault Prevention and Response Office, noting recent initiatives “aimed at advancing culture change, which we see as a necessary condition to reducing sexual assault in the military”); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 3 (Jan. 23, 2013), available at <http://docs.house.gov/meetings/AS/AS00/20130123/100231/HHRG-113-AS00-Wstate-WelshG-20130123.pdf> (describing recent training and personnel initiatives motivated by need for cultural change); *Transcript of RSP Public Meeting* 183–84 (Sept. 24, 2013) (testimony of Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command, describing policies implemented to effect behavioral change).

4 The report of the Comparative Systems Subcommittee will elaborate on these issues.

5 DEF. MIL. DATA CENTER, 2012 *WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: TABULATIONS OF RESPONSES* 18, available at http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/WGRA1201_TabVolume.pdf.

6 Written Statement of Elizabeth L. Hillman to the U.S. Commission on Civil Rights at 5 (Jan. 11, 2013) (quoting Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 *Pol. & Soc’y* 101 (2009)), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

equality and legitimate avenues for sexual expression, away from a norm that celebrates only aggressive male sexuality. This shift is no slight change in course. It is a sea change, albeit one that is underway.⁷

If commanders remain focused on implementing this change, they will continue to improve the confidence of survivors of rape and sexual assault in the military's ability to respond. Survivors, and their families and communities, will be able to trust that assailants with stellar military records or mission-essential skills will not be protected from legitimate prosecution.⁸ They will realize that reprisals from fellow service members are not an inevitable consequence of reporting a sexual assault. And all service members will know that attitudes that denigrate women and gay men will not be tolerated—both because they violate regulations and because they create conditions in which sexual assault is more likely.

Although commanders must lead the way in changing military culture, they are neither essential nor well-suited for their current role in the legal process of criminal prosecution. Command authority in military justice has already been reduced significantly over time.⁹ It will be further limited through recently enacted changes.¹⁰ Yet the Uniform Code of Military Justice continues to require that convening authorities exercise prosecutorial discretion. This mixture of roles, in which a convening authority must both protect the overall well-being of a unit and ensure that unit's mission is accomplished as well as decide whether a specific factual context warrants prosecution, creates a conflict that cuts in different directions, all unhealthy. For example, commanders who speak out assertively on the importance of prosecuting sexual assaults risk undermining the legitimacy of any later court-martial convictions by exerting unlawful command influence, "the mortal enemy of military justice."¹¹ Or consider, in light of the heightened attention now directed toward military sexual assault, defense counsel's well-founded concern that convening authorities under pressure to demonstrate high rates of prosecution

7 See, e.g., *Transcript of RSP Public Meeting* 31–32, 50 (Nov. 7, 2013) (testimony of Major General Patton, noting recent Service directives that commands with more than 50 members be assessed on command climate, including sexual assault prevention and response, within 120 days of assumption of command, and annually thereafter); *Transcript of Role of the Commander Subcommittee Meeting* 209–20 (Nov. 20, 2013) (testimony of Lieutenant General Howard Bromberg, U.S. Army, as to new requirements of reviews of command climate survey results and of sexual assault criteria on Officer Evaluation Reports); H.R. 3304, § 1721, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (requiring tracking of compliance of commanding officers in conducting organizational climate surveys); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 2 (Jan. 23, 2013) (discussing discipline of commanders at Joint Base San Antonio-Lackland following recent leadership failures). *But see* Craig Whitlock, *Behavior by Brass Vexes Military*, WASH. POST, Jan. 27, 2014, at A1.

8 The report of the Victim Services Subcommittee will help us assess the best ways to address these issues.

9 See, e.g., Press Release, "Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) (announcing elevation of convening authority in sexual assault cases), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013>; *Transcript of RSP Public Meeting* 194–97 (June 27, 2013) (testimony of testimony of Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps, describing judicialization of military justice system); *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) (extending prohibition of unlawful command influence of Article 37, UCMJ, to anyone acting with "mantle of command authority").

10 See, e.g., H.R. 3304, § 1702, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (precluding convening authorities from dismissing or modifying convictions for sexual assault offenses and requiring them to explain in writing any sentence modification); *id.* at § 1705 (requiring discharge or dismissal for certain sex offenses and trial for such offenses by general court-martial), *id.* at § 1708 (eliminating character and military service of accused as factor relevant to initial disposition of offenses), *id.* at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial contrary to recommendation of staff judge advocate).

11 *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); see also *Transcript of RSP Public Meeting* 294 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service) ("Increasingly, defense counsel must also confront and overcome instances of unlawful command influence in sexual assault cases. There is tremendous pressure on senior leaders to articulate zero tolerance policies and pass judgment on those merely accused of sexual assault. Even if command actions do not rise to the level of unlawful command influence, it contributes to an environment that unfairly prejudices an accused's right to a fair trial."); *id.* at 336–38 (testimony of Mr. Jack Zimmermann of Lavine, Zimmermann & Sampson, P.C., explaining how claims of unlawful command influence have arisen from recent training on sexual assault prevention and response).

will order courts-martial to go forward regardless of the strength of the evidence.¹² Removing the convening authority from the charging process would address these concerns while freeing commanders to zero in on the changes in culture that are our best hope for sustainable improvement in sexual assault prevention and response.

The decision to prosecute is among the heaviest burdens we place on attorneys in public service; the ethics of the prosecutor are among the most powerful and most studied in the legal profession.¹³ Whether there is sufficient evidence to support a criminal prosecution is a question of law and discretion. Senior judge advocates, licensed by the same authorities that license civilian attorneys and subject to the professional ethics codes of both civilian and military authorities, are every bit as capable of exercising that discretion as their civilian counterparts.

When some of our allies adopted legal reforms to replace convening authorities with experienced and trained prosecutors, opponents voiced concerns about the deterioration of command and disengagement from the problem of sexual assault that were very similar to those now raised by many U.S. military leaders.¹⁴ Yet no country with independent prosecutors has reported any such dire consequences.¹⁵ I see no reason to defer to predictions about the impact of this change over the pleas of survivors of sexual assault, many of whom consider an independent prosecutorial authority the cornerstone of any effective response to military sexual assault.¹⁶ Likewise, U.S. service members who face courts-martial deserve no fewer safeguards of an impartial and independent tribunal than service members of other countries with whom they often serve.¹⁷ The United Kingdom, Canada, Australia, and most other countries with well-regarded military justice systems have already ended command control of courts-martial to protect the rights of service members.¹⁸ That goal is consistent

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- 12 See, e.g., *Transcript of RSP Public Meeting* 276-77 (Sept. 25, 2013) (testimony of Major General Vaughn Ary, U.S. Marine Corps); *id.* at 277-78 (testimony of Rear Admiral Frederick Kenney, U.S. Coast Guard).
 - 13 See, e.g., *Transcript of RSP Public Meeting* 117-25 (Sept. 25, 2013) (testimony of senior staff judge advocates describing ethics rules to which staff judge advocates are bound and on which they are trained); see also Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).
 - 14 See *Transcript of RSP Public Meeting* 41 (Sept. 24, 2013) (testimony of Lord Martin Thomas of Gresford, QC, describing opposition of British commanders prior to reforms); *id.* at 240-41 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service, describing sense of uncertainty prior to reforms among Australian commanders).
 - 15 See *Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Thomas); *id.* at 73-74 (testimony of Professor Michel Drapeau); *id.* at 181-82 (testimony of Major General Blaise Cathcart, Judge Advocate General of Canadian Armed Forces); *id.* at 226-28, 236 (testimony of Air Commodore Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).
 - 16 See, e.g., *Transcript of RSP Public Meeting* 19 (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis, Protect Our Defenders) ("[P]ossibly the biggest hurdle facing survivors of military sexual trauma is the continued involvement of the chain of command in prosecuting these crimes."); *id.* at 52-54 (testimony of Ms. Sarah Plummer that "when you're raped by a fellow service member, it's like being raped by your brother and having your father decide the case"); see also *id.* at 44 (testimony of Ms. Ayana Harrell); *Transcript of RSP Public Meeting* 324 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders); *id.* at 333-36, 407-08 (testimony of Mr. Greg Jacob, Policy Director, Service Women's Action Network); *Transcript of RSP Public Meeting* 346-50 (Sept. 25, 2013) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders).
 - 17 *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997); see also *Cooper v. United Kingdom*, 39 Eur. Ct. H.R. 8 (2003); *Martin v. United Kingdom*, 44 Eur. Ct. H.R. 31 (2006); DEF. L. POL'Y BD., REP. OF THE SUBCOMM. ON MIL. J. IN COMBAT ZONES 187 ((separate statement of Board Member Eugene R. Fidell).
 - 18 See L. LIBR. OF CONG., MIL. J.: ADJUDICATION OF SEXUAL OFFENSES 4-5, 55-58 (July 2013); *Transcript of RSP Public Meeting* 38-42 (testimony of Lord Thomas); *id.* at 223 (testimony of Air Commodore Cronan); *id.* at 156-58 (testimony of Major General Cathcart), see also L. LIBR. OF CONG., *supra*, at 42-43 (noting that Israel adopted Military Justice Law in 1955, which vested prosecutorial discretion in independent Military Advocate General). Many other countries subject to the European Court of Human Rights have either

with the procedural fairness that both victims and alleged perpetrators of rape and sexual assault deserve from U.S. military justice.

Our Panel and Subcommittees heard, again and again, that the sexual assault problem in the military has given service members reason to pause when young people turn to them for advice about whether they should join the U.S. armed forces.¹⁹ That reluctance to allow our daughters and sons to embrace a life of service to our country is the real threat to U.S. military effectiveness at stake in this debate. An impartial and independent military justice system that operates beyond the grasp of command control would help restore faith that military service remains an honorable, viable choice for all.

eliminated convening authorities or radically reduced military jurisdiction, much like countries subject to the Inter-American Commission on Human Rights (IACHR), which has limited military jurisdiction to address human rights abuses. For but two very recent examples of this accelerating trend, see the IACHR response to Colombia's attempt to expand military jurisdiction and Taiwan's abolition of military justice entirely, both in January 2014. See Inter-American Commission on Human Rights Press Release, "IACHR Expresses Concern over Constitutional Reform in Colombia" (Jan. 4, 2013), *available at* https://www.oas.org/en/iachr/media_center/PReleases/2013/004.asp; Amnesty International Public Statement, "Taiwan government must ensure the reform of military criminal procedure legislation lives up to its promise of greater accountability" (Jan. 13, 2014), *available at* <http://www.amnesty.org/en/library/asset/ASA38/001/2014/en/5c6a95be-d90c-4378-8a6c-d941c2a83cb4/asa380012014en.pdf>.

- 19 See, e.g., *Transcript of Role of the Commander Subcommittee Meeting* 41 (Jan. 8, 2014) (testimony of Rear Admiral (ret.) Marty Evans, U.S. Navy); *id.* at 71-76 (testimony of Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG and former Chief Counsel, U.S. Maritime Administration); *Transcript of RSP Public Meeting* 72-75 (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, former U.S. Air Force staff sergeant); *id.* at 348 (testimony of Mr. Zimmermann); *compare with*, *Transcript of RSP Public Meeting* 56 (Sept. 24, 2013) ("The fact that our system is predicated on the JAG making the decision in the context of minimizing command influence, I think, enables us as parents, at least in Israel, to sleep more soundly at night."); *id.* at 96-97 (testimony of Professor Drapeau, noting "increased sense of confidence that those who become victims of crimes, many of them our sons and daughters serving in uniform" have in Canadian military justice system after removal of convening authority from commanders); *id.* at 46 (testimony of Lord Thomas) ("[T]he public has the right to expect for their sons and daughters who enlist the same standards of fairness in the military system of justice as would be their entitlement in civilian life.").

Appendix A:

TERMS OF REFERENCE

These terms of reference establish the Secretary of Defense (SecDef) objectives for an independent subcommittee review of the role of the commander in the investigation, prosecution, and adjudication of adult sexual assault crimes. At SecDef direction, the Role of the Commander Subcommittee (“the Subcommittee”) has been established under the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) to conduct this assessment.

Mission Statement: Assess the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

Issue Statement: Section 576(d)(1) of the FY 2013 National Defense Authorization Act provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). This includes an assessment of the role of the commander in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses. In addition, the Subcommittee should identify systems or methods for strengthening the effectiveness of military systems. Additionally, Section 1731 of the FY 2014 National Defense Authorization Act establishes additional tasks for the Response Systems Panel.

Objectives and Scope: The Subcommittee will address the following specific 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, 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.

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

Methodology:

1. The Subcommittee assessment will be conducted in compliance with the Federal Advisory Committee Act (FACA).
2. The Subcommittee is authorized to access, consistent with law, documents and records from the Department of Defense and military departments, which the Subcommittee deems necessary, and DoD personnel the Subcommittee determines necessary to complete its task. Subcommittee participants may be required to execute a non-disclosure agreement, consistent with FACA.
3. The Subcommittee may conduct interviews as appropriate.
4. As appropriate, the Subcommittee may seek input from other sources with pertinent knowledge or experience.

Deliverable:

The Subcommittee will complete its work and report to the Response Systems Panel in a public forum for full deliberation and discussion. The Response Systems Panel will then report to the Secretary of Defense.

Support:

1. The DoD Office of the General Counsel and the Washington Headquarters Services will provide any necessary administrative and logistical support for the Subcommittee.
2. The DoD, through the DoD Office of the General Counsel, the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, will support the Subcommittee's review by providing personnel, policies, and procedures required to conduct a thorough review of civilian and military systems used to investigate, prosecute, and adjudicate adult sexual assault crimes.

Appendix B:

SUBCOMMITTEE MEMBERS AND STAFF

HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at Zuckerman Spaeder, LLP (law firm). She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering and terrorism. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an assistant U.S. Attorney, as chief of the General Crimes Unit and chief of the Organized Crime Unit in the Southern District of New York.

FORMER REP. ELIZABETH HOLTZMAN

Rep. Holtzman is counsel with Herrick Feinstein, LLP, (law firm). Rep. Holtzman served for eight years as a U.S. Congresswoman (D-NY, 1973-81) and while in office she authored the Rape Privacy Act. She subsequently served for eight years as the Kings County, New York (Brooklyn) District Attorney (the 4th largest DA's office in the country) from 1981-89, where she helped change rape laws, improved standards and methods for prosecution, and developed programs to train police and medical personnel. Rep. Holtzman was also elected Comptroller of New York City, the only woman to be elected to this position. Rep. Holtzman graduated from Radcliffe College, magna cum laude, and received her law degree from Harvard Law School.

VICE ADMIRAL JAMES HOUCK, U.S. NAVY (RETIRED)

Vice Admiral (Retired) Houck joined the Penn State University Dickinson School of Law faculty as Distinguished Scholar in Residence after retiring as the 41st Judge Advocate General (JAG) of the U.S. Navy. As the Judge Advocate General, Admiral Houck served as the principal military legal counsel to the Secretary of the Navy and Chief of Naval Operations and led more than 2,000 attorneys, enlisted legal staff, and civilian employees of the worldwide Navy JAG Corps. He also oversaw the Department of the Navy's military justice system.

PROFESSOR ELIZABETH L. HILLMAN, HASTINGS LAW SCHOOL

Elizabeth Hillman is Professor of Law, University of California Hastings College of the Law. Her current research concerns the law and politics of aerial bombing and military sexual violence. Professor Hillman has published two books, *Military Justice Cases and Materials* (2d ed. 2012, LexisNexis, with Eugene R. Fidell and Dwight H. Sullivan) and *Defending America: Military Culture and the Cold War Court-Martial* (Princeton University Press, 2005), and many articles, including “Sexual Violence in State Militaries” in *Prosecuting International Sex Crimes* (Forum for International Criminal and Humanitarian Law, 2012). She has testified before Congress, served as an expert at trial, and commented frequently in the media about military law, history, and culture. Professor Hillman is president of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide. Professor Hillman attended Duke University on an Air Force ROTC scholarship, earned a degree in electrical engineering, and served as a space operations officer and orbital analyst in Cheyenne Mountain Air Force Base, Colorado Springs.

MAJOR GENERAL JOHN D. ALTENBURG, JR., U.S. ARMY (RETIRED)

Major General (Retired) Altenburg is counsel for Greenberg Traurig, LLP (law firm). Previously, General Altenburg served 28 years as a lawyer in the Army, where he represented the Army before state and local governments, in court in the United States and Germany and before Congressional committees on Military Justice. He served as the Deputy Judge Advocate General for the Department of the Army from 1997 to 2001, and was the principal legal advisor to senior national security leaders on Military Justice, including high profile sex assault cases. In December 2003, General Altenburg was named as the appointing authority for military commissions covering detainees at Guantanamo, an appointment he held until November 2006.

GENERAL CARTER F. HAM, U.S. ARMY (RETIRED)

General (Retired) Ham served 37 years in the U.S. Army before he retired in June 2013. General Ham served in a variety of command positions throughout his distinguished military career, to include Commander, United States Africa Command; Commanding General, United States Army Europe and Seventh Army; Commanding General, 1st Infantry Division and Fort Riley; Commander, Multi-National Brigade Northwest, OPERATION IRAQI FREEDOM; Commander, Infantry Training Support Brigade (29th Infantry Regiment), United States

Army Infantry School; and Commander, 1st Battalion, 6th Infantry, 3d Infantry Division, United States Army Europe and Seventh Army, and OPERATION ABLE SENTRY, Macedonia.

COLONEL LISA L. TURNER, U.S. AIR FORCE

Colonel Turner is currently assigned as Staff Judge Advocate, Headquarters Air Mobility Command (AMC), Scott AFB, IL. Colonel Turner has been a judge advocate in the U.S. Air Force for 23 years. Her previous assignments include Staff Judge Advocate for Headquarters Air Education and Training Command, Staff Judge Advocate for North American Aerospace Defense Command and United States Northern Command, Chief of The Judge Advocate General's Action Group, Chief of the General Law Branch, Administrative Law Division and assignments as a circuit trial counsel, area defense counsel and as an instructor in the Military Justice Division of the Air Force JAG School.

PROFESSOR GEOFFREY CORN, SOUTH TEXAS COLLEGE OF LAW (LIEUTENANT COLONEL, U.S. ARMY (RETIRED))

Geoffrey Corn is Presidential Research Professor of Law at the South Texas College of Law. He has been a professor with the South Texas College of Law since 2005. Previously, Professor Corn served 20 years in the U.S. Army, including 12 years as a judge advocate. As a judge advocate, Lieutenant Colonel (Retired) Corn held assignments as a Legal Assistance Attorney, the Chief of Criminal Law and Senior Criminal Trial Attorney, Regional Defense Counsel, Professor of Law at the Army JAG School, and Chief of the International Law and Operations Divisions. After retiring from the Army, he served as Special Assistant to the Judge Advocate General for Law of War Matters and Chief of the Law of War Branch. Professor Corn has authored a number of books and articles in the areas of armed conflict, military law, and the law of war. He's also served as an expert consultant and witness in military cases and testified before the Senate Armed Service Committee and Senate Judiciary Committee.

JOYE E. FROST, DIRECTOR OF THE OFFICE FOR VICTIMS OF CRIME, DEPARTMENT OF JUSTICE

Ms. Joye E. Frost was appointed as the Director of the Office for Victims of Crime (OVC) on June 14, 2013. During her previous tenure as OVC's Acting Director and Principal Deputy Director, she launched the Vision 21: Transforming Victim Services initiative to expand the reach and impact of the victim assistance field. She was instrumental in the development of OVC's Sexual Assault Nurse Examiner and Sexual Assault Response Team Training and Technical Assistance initiatives and spearheaded a number of OVC projects to identify and serve victims of crime with disabilities. She also implemented and oversees a discretionary grant program to fund comprehensive services to victims of human trafficking. Ms. Frost began her career as a Child Protective Services caseworker in South Texas and worked in the victim assistance, healthcare, and disability advocacy fields for more than 35 years in the United States and Europe. During this time she spent several years working at both the community and headquarters level for the Department of Army.

SUBCOMMITTEE STAFF

Lieutenant Colonel Kyle Green, U.S. Air Force – Supervising Attorney

Mr. Doug Nelson – Attorney

Major Ranae Doser-Pascual, U.S. Air Force – Attorney

Ms. Joanne Gordon – Attorney

Ms. Laurel Prucha Moran – Graphic Designer

Appendix C:

GLOSSARY OF ACRONYMS AND TERMS

ACRONYMS:

CAAF	Court of Appeals for the Armed Forces	DoDI	Department of Defense Instruction
CAPE	Cost Assessment and Program Evaluation	DTM	Directive-Type Memorandum
CDC	Centers for Disease Control and Prevention	DTF-SAMS	Defense Task Force on Sexual Assault in the Military Services
CMA	Court of Military Appeals	FY	fiscal year
DACOWITS	Defense Advisory Committee on Women in the Services	GCMCA	general court-martial convening authority
DEOCS	Defense Equal Opportunity Climate Survey	IDF	Israeli Defense Forces
DEOMI	Defense Equal Opportunity Management Institute	JAG	judge advocate general
DRRI	Defense Race Relations Institute	JSC	Joint Service Committee on Military Justice
DSAID	Defense Sexual Assault Incident Database	MARADMIN	Marine Corps Administrative Message
DMDC	Defense Manpower Data Center	MCIO	military criminal investigative organization
DoD	Department of Defense	MCM	Manual for Courts-Martial
DoDD	Department of Defense Directive	MJIA	Military Justice Improvement Act of 2013
		MVP	Mentors in Violence Prevention

ROLE OF THE COMMANDER SUBCOMMITTEE

MRE	Military Rules of Evidence	SCMCA	summary court-martial convening authority
NAVADMIN	Navy Administrative Message	SHARP	Sexual Harassment and Assault Response and Prevention
NCIPC	National Center for Injury Prevention and Control	SJA	staff judge advocate
NCMR	Navy Court of Military Review	SOFA	status-of-forces agreement
NCO	noncommissioned officer	SPCMCA	special court-martial convening authority
NDAA	National Defense Authorization Act	STOP Act	Sexual Assault Training Oversight and Prevention Act
NJS	Naval Justice School	SVC	special victims' counsel
NSVRC	National Sexual Violence Resource Center	SWAN	Service Women's Action Network
PME	professional military education	TJAGLCS	The [Army] Judge Advocate General's Legal Center and School
POD	Protect Our Defenders	UCI	unlawful command influence
RAINN	Rape, Abuse and Incest National Network	UCMJ	Uniform Code of Military Justice
RCM	Rule for Courts-Martial	UK	United Kingdom
RFI	request for information	USC	United States Code
RoC	Role of the Commander	USCCR	United States Commission on Civil Rights
RSP	Response Systems to Adult Sexual Assault Crimes Panel	VA	victim advocate
SAPR	sexual assault prevention and response	VPA	Victims Protection Act of 2014
SAPRO	Sexual Assault Prevention and Response Office	WGRA	Workplace and Gender Relations Survey of Active Duty Members
SARC	sexual assault response coordinator		
SASC	Senate Armed Services Committee		

TERMS: ¹

Accessions training: Training that a Service member receives upon initial entry into military service through basic military training.

Armed Forces of the United States: A term used to denote collectively all components of the Army, Marine Corps, Navy, Air Force, and Coast Guard (when mobilized under Title 10, United States Code, to augment the Navy).

Base: An area or locality containing installations which provide logistic or other support.

Chain of command: The succession of commanding officers from a superior to a subordinate through which command is exercised.

Command: (1) The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment; (2) an order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action; or (3) a unit (or units), an organization, or an area under the command of one individual.

Commander: A commissioned officer or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a DoD organization or prescribed territorial area.

Convening authority: Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. See Rule for Courts-Martial 504(b) and discussion.

Flag officer: An officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.

General officer: An officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

Grade: A step or degree, in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

Healthcare provider: Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a military treatment facility, or who provide such care at a deployed location or otherwise in an official capacity.

Installation: A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard,

¹ Unless otherwise noted, term definitions are taken from 10 U.S.C. § 101 and 10 U.S.C. § 801; MANUAL FOR COURTS-MARTIAL (2012; DoD JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (NOV. 8, 2010, AMENDED THROUGH MAR. 15, 2014) AND OTHER GOVERNING DoD DIRECTIVE-TYPE MEMORANDA, DIRECTIVES, AND INSTRUCTIONS.

including any leased facility. It does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard.

Judge advocate: An officer of the Judge Advocate General's Corps of the Army, Air Force, Marine Corps, Navy, and the United States Coast Guard who is designated as a judge advocate.

Judge Advocates General: Severally, the Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

Law enforcement: Includes all DoD law enforcement units, security forces, and military criminal investigative organizations.

Military criminal investigative organization (MCIO): U.S. Army Criminal Investigative Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

Military Department: One of the departments within the Department of Defense created by the National Security Act of 1947, which are the Department of the Army, the Department of the Navy, and the Department of the Air Force.

Military judge: The presiding officer of a general or special court-martial detailed in accordance with Article 26 of the UCMJ to the court-martial to which charges in a case have been referred for trial.

Preferral: Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the UCMJ. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. See Rule for Courts-Martial 307.

Rank: The order of precedence among members of the Armed Forces.

Referral: The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorized to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. See Rule for Court-Martial 601(a) and discussion.

Reprisal: Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication.

Restricted reporting: Reporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an official investigation. The victim's report to specified individuals will not be reported to law enforcement or to the command to initiate the official investigative process unless the victim consents or an established exception applied. Restricted reporting applies to Service members and their military dependents 18 years of age or older.

Re-victimization: A pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse of a child. The latter pattern is particularly notable in cases of sexual abuse.

Service Secretaries: The Secretary of the Army, with respect to matters concerning the Army; the Secretary of the Navy, with respect to matters concerning the Navy, Marine Corps, and the Coast Guard when it is operating as a service in the Navy; the Secretary of the Air Force, with respect to matters concerning the Air Force; The Secretary of the Army, with respect to matters concerning the Army; The Secretary of Homeland Security, with respect to matters concerning the Coast Guard, when it is not operating as a service in the Navy.

Sexual assault prevention and response (SAPR) program: A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault.

Sexual Assault Prevention and Response Office (DoD SAPRO): Serves as the DoD's single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.

SAPR victim advocate (VA): A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. Provides liaison assistance with other organizations on victim care matters and reports directly to the SARC when performing victim advocate duties.

Sexual assault response coordinator (SARC): The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Service: A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard.

Special victim capabilities: A distinct, recognizable group of appropriately skilled professionals, consisting of specially trained and selected MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel who work collaboratively to investigate allegations of adult sexual assault, domestic violence involving sexual assault, and/or aggravated assault with grievous bodily harm, and child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm; and provide support for victims of these offenses.

Staff judge advocate (SJA): A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy, Coast Guard, or joint force command who is a judge advocate.

Status-of-forces agreement: A bilateral or multilateral agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state.

Subordinate command: A command consisting of the commander and all those individuals, units, detachments, organizations, or installations that have been placed under the command by the authority establishing the subordinate command.

Unit: Any military element whose structure is prescribed by competent authority or an organization title of a subdivision of a group in a task force.

Unrestricted reporting: A process that a Service member uses to disclose, without requesting confidentiality or restricted reporting, that he or she is the victim of a sexual assault. Under these circumstances, the victim's report may be used to initiate the official investigative process.

Appendix D:

PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

JUNE 27, 2013 Public Meeting of the RSP

U.S. District Court for the District of Columbia, Washington, D.C.

- Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society
- Ms. Delilah Rumburg, Pennsylvania Coalition Against Rape
- Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)
- Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO.
- Mr. Fred Borch, Army JAG Corps Regimental Historian
- Captain Robert Crow, Joint Service Committee Representative

AUG. 1, 2013 Preparatory Session of the RSP

One Liberty Center, Arlington, VA

- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office
- Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program
- Major Jaclyn Grieser, Army Special Victim Prosecutor
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program
- Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch
- Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command
- Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations

ROLE OF THE COMMANDER SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

- Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service
- Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director
- Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager
- Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

AUG. 5, 2013

Preparatory Session of the RSP One Liberty Center, Arlington, VA

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army (telephonic)
- Major General William Mayville, Jr., U.S. Army
- Colonel Dan Brookhart, U.S. Army
- Colonel Jeannie Leavitt, U.S. Air Force
- Lieutenant Colonel Debra Luker, U.S. Air Force
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral William Baumgartner, U.S. Coast Guard
- Captain P.J. McGuire, U.S. Coast Guard
- Air Commodore Cronan, Director General, Australia Defence Force Legal Service (telephonic)

AUG. 6, 2013

Preparatory Session of the RSP One Liberty Center, Arlington, VA

- Lieutenant Colonel Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
- Dr. David Lisak, Professor, University of Massachusetts-Boston (telephonic)
- Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice
- Dr. Jim Lynch, former Director of the Bureau of Justice Statistics and current Chair, Department of Criminology and Criminal Justice, University of Maryland

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

SEPT. 24, 2013 Public Meeting of the RSP

U.S. District Court for the District of Columbia, Washington, D.C.

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Lord Martin Thomas of Gresford QC, Chair, Association of Military Advocates (UK)
- Professor Amos Guiora, University of Utah College of Law
- Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces
- Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command
- Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service
- Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom
- Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army
- Senator Kirsten Gillibrand (New York)
- Senator Claire McCaskill (Missouri)

SEPT. 25, 2013 Public Meeting of the RSP

U.S. District Court for the District of Columbia, Washington, D.C.

- Lieutenant General Michael Linnington, U.S. Army
- Colonel Corey Bradley, U.S. Army
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- General Edward Rice, U.S. Air Force
- Colonel Polly S. Kenny, U.S. Air Force
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral Thomas Ostebo, U.S. Coast Guard
- Commander William Dwyer, U.S. Coast Guard
- Brigadier General Richard C. Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff
- Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army
- Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy
- Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force
- Major General Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps
- Rear Admiral Frederick J. Kenney, Judge Advocate General and Chief Counsel, U.S. Coast Guard

ROLE OF THE COMMANDER SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

OCT. 23, 2013

Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, VA

- Colonel Alan Metzler, Deputy Chief, DoD SAPRO
- Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO
- Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center

NOV. 7, 2013

Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.

- Major General Gary S. Patton, Director, DoD SAPRO
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force SAPR Office
- Rear Admiral Maura Dollymore, Director of Health, Safety and Work-Life, U.S. Coast Guard
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Dr. Christine Altendorf, Director, U.S. Army Sexual Harassment/ Assault Response & Prevention Office
- Master Sergeant Carol Chapman, SHARP Program Manager, 7th Infantry Division, U.S. Army
- Ms. Christa Thompson, Victim Witness Liaison, Fort Carson, Colorado
- Dr. Kimberly Dickman, Sexual Assault Response Coordinator, National Capitol Region, U.S. Air Force
- Master Sergeant Stacia Rountree, Victim Advocate, National Capitol Region, U.S. Air Force
- Ms. Liz Blanc, U.S. Navy Sexual Assault Response Coordinator, National Capitol Region
- Ms. Torie Camp, Deputy Director, Texas Association Against Sex Assault
- Ms. Gail Reid, Director of Victim Advocacy Services, Baltimore, Maryland
- Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County & City of Falls Church, Virginia
- Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia
- Ms. Nancy Parrish, President, Protect our Defenders
- Ms. Miranda Peterson, Program and Policy Director, Protect our Defenders
- Mr. Greg Jacob, Policy Director, Service Women's Action Network
- Mr. Scott Berkowitz, President, Rape, Assault, and Incest Network
- Dr. Will Marling, Executive Director, National Organization for Victim Assistance
- Ms. Donna Adams (Public Comment)

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NOV. 8, 2013

Public Meeting of the RSP

U.S. District Court for the District of Columbia, Washington, D.C.

- Mr. Brian Lewis
- Ms. BriGette McCoy
- Ms. Ayana Harrell
- Ms. Sarah Plummer
- Ms. Marti Ribeiro
- Command Sergeant Major Julie Guerra, U.S. Army
- Colonel James McKee, Special Victims' Advocate Program, U.S. Army
- Colonel Carol Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps
- Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel, U.S. Navy
- Captain Sloan Tyler, Director, Office of Special Victims' Counsel, U.S. Coast Guard
- Colonel Dawn Hankins, Chief, Special Victims' Counsel Division, U.S. Air Force
- Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C.
- Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia
- Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York
- Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona
- Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center
- Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service
- Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization
- Captain Charles Purnell, US. Navy Defense Service Office
- Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force
- Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard
- Mr. David Court of Court and Carpenter, Stuttgart, Germany
- Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas
- Ms. Bridget Wilson, Attorney, San Diego, California

NOV. 13, 2013

Role of the Commander Subcommittee Meeting

One Liberty Center, Arlington, VA

- Brigadier General Charles Pede, U.S. Army
- Senator Claire McCaskill (Missouri)

ROLE OF THE COMMANDER SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

NOV. 20, 2013 Role of the Commander Subcommittee Meeting

One Liberty Center, Arlington, VA

- Professor Eugene Fidell, Yale Law School (*telephonic*)
- Mr. James Love, Acting Director, Military Equal Opportunity & DEOMI Liaison, DoD Office of Diversity Management & Equal Opportunity
- Dr. Dan McDonald, Defense Equal Opportunity Management Institute
- Lieutenant Colonel Kay Emerson, U.S. Army, Office of Diversity & Leadership (MEO)
- Mr. George Bradshaw, U.S. Navy, 21st Century Sailor Office (MEO)
- Colonel T.V. Johnson, U.S. Marine Corps, Diversity & Equal Opportunity Office
- Master Gunnery Sergeant Lester Poole, U.S. Marine Corps, Diversity & Equal Opportunity Office
- Mr. Cyrus Salazar, U.S. Air Force Equal Opportunity Program
- Mr. James Ellison, U.S. Coast Guard, Civil Rights Directorate
- Lieutenant General Howard Bromberg, U.S. Army, Deputy Chief of Staff, G1
- Captain Steve Deal, Deputy Director, U.S. Navy 21st Century Sailor Division
- Colonel Robin Gallant, Commanding Officer, U.S. Marine Corps, Headquarters & Services Battalion
- Brigadier General Gina Grosso, U.S. Air Force, Director of Force Management Policy, AF/A1
- Rear Admiral Daniel Neptun, U.S. Coast Guard, Assistant Commandant for Human Resources

DEC. 10, 2013 Site Visit Role of the Commander Subcommittee Fort Hood, TX

- General Courts-Martial Convening Authorities
- Special Courts-Martial Convening Authorities and Subordinate Commanders
- Senior Enlisted Leaders
- Defense Counsel

DEC. 11, 2013 Public Meeting of the RSP University of Texas – Austin, Austin, TX

- Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School
- Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness)
- Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs)
- Captain Jason Brown, Military Justice Branch, Judge Advocate Division, U.S. Marine Corps
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force

APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

- Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General
- Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service
- Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service
- Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation
- Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command
- Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau
- Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit
- Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police
- Sergeant Jason Staniszewski, Austin Police Department, Sex Crimes Unit
- Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations
- Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research
- Dr. Kim Lonsway, Director of Research for End Violence Against Women International
- Major Melissa Brown, Texas National Guard (Public Comment)
- Mr. Daniel Ross, Attorney, Chairman of the Advisory Committee, Institute on Domestic Violence and Sexual Assault (Public Comment)

DEC. 12, 2013

Public Meeting of the RSP

University of Texas – Austin, Austin, TX

- Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office
- Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
- Captain Jason Brown, Military Justice Branch (JAM), Judge Advocate Division, Headquarters U.S. Marine Corps
- Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia
- Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
- Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
- Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, Army Trial Defense Service, U.S. Army
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force

ROLE OF THE COMMANDER SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

- Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
- Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
- Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
- Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Anne Munch, Owner, Anne Munch Consulting, Inc.
- Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
- Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office
- Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
- Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program, U.S. Navy
- Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
- Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
- Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
- James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
- Lieutenant Colonel Devin Winklosky, U.S. Marine Corps, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School

DEC. 13, 2013

Site Visit

Role of the Commander Subcommittee

Joint Base San Antonio - Lackland, TX

- Basic Military Training Commanders and Training Instructors
- Basic Military Training Trainees
- Special Courts-Martial Convening Authorities and Subordinate Commanders
- Senior Enlisted Leaders
- Defense Counsel

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

JAN. 8, 2014

Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, VA

- Lieutenant General (Retired) Claudia Kennedy, U.S. Army (*telephonic*)
- Major General (Retired) Martha Rainville, U.S. Air Force
- Brigadier General (Retired) Loree Sutton, U.S. Army
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Rear Admiral (Retired) Marty Evans, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps
- Captain (Retired) Lory Manning, U.S. Navy
- Honorable Patrick Murphy, former congressman and U.S. Army JAG
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration
- General (Retired) Fred Franks, U.S. Army (*telephonic*)
- General (Retired) Roger Brady, U.S. Air Force (*telephonic*)
- Lieutenant General (Retired) Mike Gould, U.S. Air Force
- Lieutenant General (Retired) Tom Metz, U.S. Army
- Lieutenant General (Retired) John Sattler, U.S. Marine Corps
- Vice Admiral (Retired) Scott Van Buskirk, U.S. Navy
- Major General (Retired) K.C. McClain, U.S. Air Force (*telephonic*)
- Major General (Retired) Mary Kay Hertog, U.S. Air Force (*telephonic*)

JAN 30, 2014

Public Meeting of the RSP The George Washington University Law School, Washington, D.C.

- Major General (Retired) Martha Rainville, U.S. Air Force (*telephonic*)
- Brigadier General (Retired) Pat Foote, U.S. Army
- Rear Admiral (Retired) Marty Evans, U.S. Navy (*telephonic*)
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Captain (Retired) Lory Manning, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps (*telephonic*)
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration
- General (Retired) Ann Dunwoody, U.S. Army
- General (Retired) Roger Brady, U.S. Air Force
- Vice Admiral (Retired) Mike Vitale, U.S. Navy (*telephonic*)
- Lieutenant General (Retired) James Campbell, U.S. Army
- Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force (*telephonic*)
- Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard

ROLE OF THE COMMANDER SUBCOMMITTEE

Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>

FEB. 12, 2014 **Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, VA**

- Dr. Andra Tharp, Center for Disease Control and Prevention (*telephonic*)
- Dr. Kathleen Basile, Center for Disease Control and Prevention (*telephonic*)
- Dr. Sarah DeGue, Center for Disease Control and Prevention (*telephonic*)
- Ms. Beth Reimels, Center for Disease Control and Prevention (*telephonic*)
- Ms. Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault
- Mr. Benje Douglas, Project Manager, National Sexual Violence Resource Center
- Dr. Victoria Banyard, Co-director, Prevention Innovations and Professor of Psychology, University of New Hampshire
- Dr. Sharyn Potter, Co-director, Prevention Innovations and Associate Professor of Sociology, University of New Hampshire
- Dr. Jackson Katz, Co-founder, Mentors in Violence Prevention Program (*telephonic*)
- Colonel Alan Metzler, Deputy Director, DoD SAPRO
- Colonel Litonya Wilson, Chief of Prevention, DoD SAPRO
- Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO
- Colonel Karen Gibson, U.S. Army
- Colonel David Maxwell, U.S. Marine Corps
- Colonel Trent Edwards, U.S. Air Force
- Captain Steven Andersen, U.S. Coast Guard
- Captain Peter Nette, U.S. Navy
- Command Sergeant Major Pamela Williams, U.S. Army
- Sergeant Major Mark Byrd, U.S. Marine Corps
- Command Master Chief Marilyn Kennard, U.S. Navy
- Senior Master Sergeant Patricia Granan, U.S. Air Force

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- Colonel (Retired) Denise K. Vowell, Former Chief Trial Judge of the Army
- Mr. Robert Reed, former DoD Assoc. Dep. General Counsel (Military Justice and Personnel Policy)

Appendix E:

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Transcript of RSP Public Meeting (Nov. 7, 2013)

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Transcript of RSP Public Meeting (Dec. 11, 2013)

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¹ Except where indicated, the materials pertaining to the meetings of the Response Systems Panel and its Subcommittees are currently available at <http://responsesystemspanel.whs.mil/index.php/meetings>.

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**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
ROLE OF THE COMMANDER SUBCOMMITTEE**
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995

November 6, 2013

MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes

A Term of Reference established for this Subcommittee by the Secretary of Defense is to “assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes. . .” One focus of the Subcommittee’s work has been the authority assigned to designated senior commanders to refer criminal offenses for trial by courts-martial. A specific focus of our inquiry is assessing whether removing the commander as convening authority will increase the confidence of sexual assault victims in the military justice system and thereby increase reporting of sexual assault offenses, which are underreported when compared to reporting statistics for other serious crimes.

To examine the impact on reporting of sexual assault crimes in the militaries of our Allies, the Subcommittee reviewed extensive materials regarding the justice systems for military personnel and sexual assault reporting in other nations. The Subcommittee reviewed presentations to the Response Systems Panel by experts on Allied military justice systems and senior military representatives from Australia, Canada, Israel, and the United Kingdom. These representatives and experts provided overviews of their current military justice systems, described the evolution of their systems and the reasons that the systems were changed, provided statistics and information about sexual assault reporting and sexual assault response, and provided their opinions as to what if any effect the structure of their military justice systems had on sexual assault reporting. The Subcommittee also reviewed background materials provided by presenters and outside reports and hearing presentations referencing foreign military justice systems.

This information was provided to the Role of the Commander Subcommittee for consideration. On October 23, 2013, members of the Subcommittee met to review and discuss the materials and testimony on Allied systems. The following represents the findings and assessments of the Subcommittee regarding the information and materials reviewed:

Overview:

The changes our Allies have made to their military justice systems have occurred at different times and none of them was made in order to improve sexual assault reporting or prosecution.¹ Israel adopted the Military Justice Law in 1955, which vested prosecutorial discretion in an Independent Military Advocate General, and the adjudication system for

¹ *Public Session, Response Systems to Adult Sexual Assault Crimes Panel* 152 (Sept. 24, 2013); *Id.* at 181 (testimony of Major General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces); *Id.* at 244-45 (testimony of Commodore Andrei Spence, Commodore, Naval Legal Services and Senior Legal Officer, British Royal Navy); *Id.* at 238 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service).

members of the Israel Defense Forces (IDF) has remained largely the same since that date.² Canada removed the chain of command from the prosecutorial decision for serious criminal offenses and created a director of military prosecutions through the 1999 amendments to the National Defence Act.³ Changes to the Canadian military justice system were made subsequent to fundamental changes in the Canadian Charter of Rights and Freedoms which necessitated these changes and reflected general societal concern for the rights of the accused.⁴ In 2006, the Australian Parliament enacted legislation to establish the Director of Military Prosecutions as the convening authority to convene courts-martial under the Defence Force Discipline Act (DFDA).⁵ This legislation was also enacted out of concern that the public perceived the system as unfair to defendants.⁶ In the United Kingdom, the Armed Forces Act of 2006 became effective on November 1, 2009, thereby removing authority for prosecution of serious offenses from the chain of command and placing such authority in a new, independent Director of Service Prosecutions.⁷ These changes were also made out of a concern for the rights of defendants raised both within the United Kingdom and before the European Court of Human Rights – the rulings of which the United Kingdom is bound by treaty to follow.⁸

Sexual Assault Reporting, Investigation, and Prosecution Statistics:

Allied military partners provided statistics for the reporting, investigation, and prosecution of sexual assault crimes within their military services. The nature of the offenses described within the reported statistics varies by country based on the systems available for tracking sexual assault data and the specific statutory offenses encompassed within each country's definition of sexual assault. For example, sexual assault under the DFDA in Australia refers only to rape and attempted rape,⁹ while sexual offense reporting data provided by the IDF includes the offenses of rape and attempted rape, indecent assault, physical and/or verbal sexual harassment, and peeping.¹⁰ Likewise, the timeframes for reported information also varied. Data from Canada was provided for 2007 to 2010,¹¹ while the United Kingdom provided data from 2005 to 2012.¹² The variations in tracking methods, offenses reflected, and reporting periods make comparisons of the data of different countries difficult.

² L. LIBR. OF CONG., MILITARY JUSTICE: ADJUDICATION OF SEXUAL OFFENSES, 42-43 (July 2013).

³ *Public Session*, *supra* note 1, at 158 (statement of Major General Cathcart).

⁴ *Id.* at 156-57.

⁵ L. LIBR. OF CONG., *supra* note 2, at 4-5.

⁶ *Public Session*, *supra* note 1, at 223 (testimony of Air Commodore Cronan).

⁷ L. LIBR. OF CONG., *supra* note 2, at 55, 58 (citing Armed Forces Act 2006, c. 52, § 364).

⁸ *Public Session*, *supra* note 1, at 38-42 (statement of Lord Martin Thomas of Gresford QC); *see also* Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997).

⁹ *Public Session*, *supra* note 1, at 216 (statement of Air Commodore Cronan).

¹⁰ Email from Col. Eli Bar-On to COL Patricia Ham, Staff Director, Response Systems Panel, Statistical Tables relating to Sexual Assault within the IDF: 2007 – 2012 (Aug. 11, 2013) (on file with the Response Systems Panel).

¹¹ CANADIAN FORCES PROVOST MARSHAL 2010 ANNUAL REPORT 8 (2010); ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER OF NATIONAL DEFENCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE CANADIAN FORCES, A REVIEW FROM 1 APRIL 2007 TO 31 MARCH 2008 at 132 (2008); ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER OF NATIONAL DEFENCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE CANADIAN FORCES, A REVIEW FROM 1 APRIL 2008 TO 31 MARCH 2009 at 130-31 (2009); ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER OF NATIONAL DEFENCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE CANADIAN FORCES, A REVIEW FROM 1 APRIL 2009 TO 31 MARCH 2010 at 100-01.

¹² Letter from Deputy Chief of Defence Staff (Personnel) Secretariat, Investigations into Sex Offences 2005-2010 (Oct. 12, 2013) (on file with the Response Systems Panel); Letter from Brigadier (ret.) Anthony Paphiti, Updated Stats in Response to Dean Schenck's Fact Sheet (Sept. 19, 2013) (on file with the Response Systems Panel).

However, it is possible to consider general tracking and reporting trends within each country and to assess the framework established by each nation's military organization for sexual assault reporting and response.

Effect of System Changes on Sexual Assault Reporting:

Current and former military officials from our Allied partners were asked to assess whether the structural changes that removed the commander from the prosecution of cases, implemented in their military justice systems, had a connection to reporting trends for sexual assault offenses. None of the representatives made this connection.¹³

The Deputy Military Advocate General for the IDF noted an increase in sexual assault complaints in the IDF between 2007 and 2011¹⁴ but attributed no specific reason for the increase.¹⁵ Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue.¹⁶ The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010.¹⁷ The Canadians were unable to present statistics addressing whether the change in the military justice system affected sex crime reporting.¹⁸ The Commodore of Naval Legal Services for Britain's Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had "no discernible" effect on the reporting of sexual assault offenses.¹⁹ The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and 2006 reforms.²⁰ He acknowledged, however, that the Australian Defence Force estimates that between 2008 and 2011, 80% of

¹³ Additional assessment by the Legal Counsel to the Chairman of the Joint Chiefs of Staff further reinforces the perspectives of the Allied military officials who provided information to the Response Systems Panel. In his discussions with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany, he learned that none of the nations changed their military justice systems in response to sexual assault prosecution or reporting. Further, none could correlate system changes to increased or decreased sexual assault reporting, and there was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims' willingness to report crimes. *Public Session, supra* note 1, at 207-09 (statement of Brigadier General Richard Gross, Legal Advisor to the Chairman of the Joint Chiefs of Staff).

¹⁴ Professor Amos Guiora, a former judge advocate in the IDF, also commented on this increase in sexual assault reporting in a letter to the SASC in advance of its June hearing. This letter stated in part: "There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers' confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the 'chain of command.'" Letter from Prof. Amos Guiora, Professor, Univ. of Utah, to Senate Armed Services Committee (undated) (on file with the Response Systems Panel).

¹⁵ Email from Col. Eli Bar-On, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Public Session, supra* note 1, at 163-64 (testimony of Major General Cathcart).

¹⁸ *Id.* at 181-82 (testimony of Major General Cathcart).

¹⁹ *Id.* at 282-83 (testimony of Commodore Andrei Spence).

²⁰ *Id.* at 238-39 (statement of Air Commodore Cronan).

sexual assaults in their armed forces were unreported even though, by that time, sex offenses had been removed from the criminal jurisdiction of their defense forces.²¹

Conclusion:

The Subcommittee has completed its examination of the military justice systems of Israel, the United Kingdom, Australia, and Canada from the point of view of determining the impact of the role of the commander on the reporting of sexual assaults. We make no suggestions or recommendations to the panel at this point as to whether the commander should or should not be removed as the convening authority for sexual assaults and other serious crimes in our military justice system. We do find that none of the military justice systems of our Allies was changed or set up to deal with the problem of sexual assault and none of them can attribute any changes in the reporting of sexual assault as a result of changing the role of the commander. In other words, we have seen no indication that the removal of the commander from the decision making process has resulted in an increase in reporting and there is nothing in the experiences of our foreign Allies that suggests adopting their systems as a model will have any impact on the reporting of sexual assaults.



Barbara S. Jones
Chair
Role of the Commander Subcommittee

²¹ Lisa M. Schenck, Fact Sheet on Australian Military Justice 4-5 (Sept. 18, 2013) (unpublished submission, on file with the Response Systems Panel).



**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
ROLE OF THE COMMANDER SUBCOMMITTEE
875 N. RANDOLPH STREET
ARLINGTON, VA 22203-1995**

January 29, 2014

MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL

SUBJECT: Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial

The Role of the Commander Subcommittee is conducting a comprehensive review of the role of the commander in the military justice system. The Subcommittee has focused particular attention thus far on the question of whether senior commanders serving as convening authorities should retain the authority to refer sexual assaults offenses to court-martial.

Based on all information considered to this point, a strong majority of Subcommittee members agrees 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. Nor does the evidence indicate it will improve the quality of investigations and prosecutions or increase the conviction rate in these cases. Further, the evidence does not support a conclusion that removing such authority will increase confidence among victims of sexual assault about the fairness of the military justice system or reduce their concerns about possible reprisal for making reports of sexual assault. As a result, the Subcommittee's assessment at this time is that the authority vested in senior commanders to convene courts-martial under the Uniform Code of Military Justice (UCMJ) for sexual assault offenses should not be changed. In reaching this conclusion, the Subcommittee makes the following findings:

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.
2. Under current law and practice, the authority to refer a sexual assault allegation for trial by court-martial is reserved to a level of commander who will normally be removed from any personal knowledge of the accused or victim. If a convening authority has an interest in a particular case other than an official interest, the convening authority is required to recuse himself or herself.
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.
4. There is no evidentiary basis at this time supporting a conclusion that removing senior commanders as convening authority will reduce the incidence of sexual assault or increase sexual assault reporting.
5. 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

organization 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.

6. Under current law and practice, sexual assault allegations 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.
7. Under current law and practice, the authority to resolve sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.
8. 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.
9. 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.
10. Congress has recently enacted significant reforms addressing sexual assault in the military, and the Department of Defense has implemented numerous changes to policies and programs to improve oversight and response. These reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.
11. Prosecution of sexual misconduct contributes to the overall effort to address this problem. Commanders must play a central role in preventing sexual assault by establishing command climates that ensure subordinates are trained in and embrace their moral and legal obligations, and by emphasizing the role of accountability at all levels of the organization.

The full report of the Subcommittee will provide additional information and analysis on this issue, but the following represents our initial assessment.



Barbara S. Jones

Chair

Role of the Commander Subcommittee

1. Subcommittee Assessment
2. Separate Statement of Subcommittee Member Elizabeth L. Hillman

ROLE OF THE COMMANDER SUBCOMMITTEE**Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial****I. ASSESSMENT SUMMARY**

The issue of sexual assault crimes in the U.S. military has been the subject of significant public, legislative, and administrative scrutiny. Some individuals and groups assert commanders should lose the authority to convene courts-martial for sexual assault offenses. Accordingly, they propose amending the Uniform Code of Military Justice (UCMJ) to strip convening authority from commanders and vest authority in legal officers whose function will be independent of the military command in which the alleged misconduct occurs. Others contend senior military commanders are essential to resolving the pernicious issues of sexual assault in military organizations and divesting senior commanders of their role as courts-martial convening authorities will dilute their capacity to lead and impair their ability to maintain good order and discipline, resulting in damage to the efficiency and effectiveness of the Armed Forces.

Over the past three years, Congress made significant changes to the UCMJ and enacted substantial mandates on the Department of Defense (DoD) to address the issue of sexual assault in the military. Additionally, DoD implemented considerable changes to its processes and systems for preventing, assessing, and responding to sexual assault crimes. Reporting of alleged sexual assaults, including assaults that occurred before the person entered the military, significantly increased during Fiscal Year 2013, suggesting increased confidence of sexual assault victims in the sympathetic and effective response they could receive from the military.

a. Responsibility of the Subcommittee

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.”¹ In order to assist the RSP in accomplishing, in twelve months, the many areas Congress directed it to assess, the RSP Chair directed the establishment of three subcommittees—Role of the Commander, Comparative Systems, and Victim Services.

On September 23, 2013, the Secretary of Defense established the RSP subcommittees and appointed nine members to the Role of the Commander Subcommittee, including four members of the RSP. The Secretary of Defense established three objectives for the Role of the Commander Subcommittee (Subcommittee), including a requirement to “assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.” The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) adds the requirement to assess “the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under . . . the Uniform Code of Military Justice would have on overall reporting and prosecution of sexual assault cases.”²

¹ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632 (2013).

² National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(a)(1)(A), 127 Stat. 672 (2013).

b. Methodology of Subcommittee Review

Since June 2013, RSP and Subcommittee members have held and attended 16 days of hearings—including public meetings, subcommittee meetings, preparatory sessions, and site visits—with more than 170 different presenters. Presenters included surviving sexual assault victims; current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims' counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocates General from each of the Services; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners and emergency physicians; first responders; chaplains; and currently serving United States Senators.

In addition, the Subcommittee considered publicly available information and documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. The RSP sent specific requests for information (RFIs) to DoD and each of the Services. The RFIs focused on the role of the commander, comparing military and civilian investigative and prosecution systems, and victim services. To date, DoD and the Services have submitted more than 400 pages of narrative responses and more than 750 attached documents. The RSP also sent letters to eighteen victim advocacy organizations around the country soliciting input from those organizations to assist the Panel in its review. Advocacy organizations providing information to the RSP have included those working specifically in military sexual assault, including: Protect Our Defenders; Service Women's Action Network; Rape, Abuse, and Incest National Network; the National Organization for Victim Assistance; and the National Alliance to End Sexual Violence.

II. THE ROLES OF COMMANDERS AND CONVENING AUTHORITIES

a. Commander Authority and Responsibility

The term “commander” has a unique and specific meaning within military organizations. It indicates a position of seniority, authority, and responsibility within a particular military organization. By definition, the Rules for Courts-Martial distinguish “commander” from “convening authority,” and the two roles, while overlapping, are not interchangeable.³ Military officers at all ranks and experience levels may serve in command positions.

The commander serves as the head of a military organization and is primarily responsible for ensuring mission readiness, to include the maintenance of good order and discipline within a unit. The importance of the commander's disciplinary responsibility is reflected in the preamble to the Manual for Courts-Martial: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”⁴

The importance of the commander's role in maintaining good order and discipline in military organizations has also been reflected in times of cultural change in the Armed Forces. Historically, commanders have proved essential in leading the organizational response during periods of military cultural transition, especially since enactment of the UCMJ. Beginning with racial integration and continuing toward greater inclusion of women and, most recently, the repeal of

³ See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(5) and R.C.M. 103(6) (2012) [hereinafter MCM].

⁴ MCM, *supra* note 3, pt. I, ¶ 3.

“Don’t Ask, Don’t Tell,”⁵ the Services relied on commanders to set the appropriate tone and effect change among subordinates under their command.⁶

A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command⁷ in achieving change in the attitudes and behaviors of service members.⁸ As Senator Carl Levin, Chair of the Senate Armed Services Committee, observed, the chain of command has been “[t]he key to cultural change in the military.”⁹ Stated directly, commanders—the leaders of military organizations—set and enforce standards and drive cultural change in the military.¹⁰

b. Distinction between Commanders and Convening Authorities

While all commanders have disciplinary responsibility for subordinates, the authority under the UCMJ to convene courts-martial is legally distinct from command authority. Convening authority for general, special, and summary courts-martial is established by Articles 22, 23, and 24 of the UCMJ, respectively.¹¹ Under these articles, convening authority is a specific, statutory authority that attaches to individual officers serving in certain positions and designations.

Since 1775, the power to convene courts-martial has been vested in U.S. commanders as a necessary tool for maintaining discipline in commands. In fact, until the UCMJ was adopted in 1950, commanders enjoyed virtually unfettered discretion in determining whether to try soldiers and sailors by court-martial.¹² The UCMJ vested commanders with the authority to convene courts-martial, but a number of important restrictions in the new code served as checks on this authority.¹³ Enactment of the UCMJ, as well as its significant amendments in 1968 and 1983,

⁵ 10 U.S.C. § 654 (repealed Dec. 22, 2010).

⁶ *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* 12 (June 4, 2013) (testimony of General Raymond T. Odierno, Chief of Staff, U.S. Army); *Transcript of RSP Public Meeting* 214 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army) (“Past progress and institutional change, whether racial or gender integration, or, more recently, Don’t Ask, Don’t Tell, have been successful because of the focus and authority of commanders, not because of lawyers. And so it should be in addressing sexual assault.”).

⁷ While often used as an all-encompassing term for military superiors, the term “chain of command” refers only to a distinct organizational chain of commanders, from superior to subordinate, who hold the authority to execute the responsibilities of command over an individual. Supervisory or “technical chains” are not part of a service member’s chain of command, and they lack the responsibility and authority unique to military commanders and chains of command.

⁸ *Transcript of RSP Role of the Commander Subcommittee Meeting* 40 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy) (noting that he had “witnessed the chain of command’s ability to effect change in the military culture on racial discrimination”); *accord id.* at 299-301 (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps); *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 115-17 (Nov. 20, 2013) (testimony of Mr. James Love, Acting Director for Military Equal Opportunity, Department of Defense Office of Diversity Management and Equal Opportunity) (describing significance of military leaders in achieving cultural and climate change in race relations).

⁹ *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* 4 (June 4, 2013).

¹⁰ *See, e.g., Transcript of RSP Public Meeting* 213 (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino) (“It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders, not lawyers.”).

¹¹ 10 U.S.C. §§ 822-824 (UCMJ arts. 22-24).

¹² *Transcript of RSP Public Meeting* 190-91 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General’s Corps).

¹³ For example, the UCMJ prohibited convening authorities from preferring charges until they are first examined for legal sufficiency by his staff judge advocate, *see* 10 U.S.C. § 834 (UCMJ art. 34(a)); the staff judge advocate was authorized to directly communicate with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General, *see* 10 U.S.C. § 806(b) (UCMJ art. 6(b)); and convening authorities, as well as all commanding officers, were prohibited from unlawfully influencing the law officer, counsel, and panel members of courts-martial, *see* 10 U.S.C. § 837 (UCMJ art. 37).

reflects a continual effort by Congress, in response to the experience of the military justice system in practice, to enhance the balance between the needs for command discipline and a system that dispenses justice fairly. For its part, the Supreme Court has largely left undisturbed—and periodically endorsed—the commander-centered framework of the UCMJ.¹⁴

With limited statutory exceptions,¹⁵ convening authorities must be commanders. However, not all commanders are convening authorities. An officer in command does not become a convening authority until he or she is selected for a specific command or level of command meeting the statutory requirement. Stated simply, while nearly all convening authorities are commanders, few commanders possess the authority to convene special courts-martial, and fewer still possess the authority to convene general courts-martial.

Officers serving in positions with special courts-martial convening authority (SPCMCA) or general courts-martial convening authority (GCMCA) are senior officers with considerable years of service and experience. A senior officer assuming a command position with convening authority also receives military justice training in pre-command courses, as well as specific legal training conducted by judge advocate instructors.¹⁶ In addition to requisite training, each Service allocates dedicated judge advocate support to senior commanders with convening authority.

An officer will not typically serve in a command position with SPCMCA until he or she is promoted to the grade of O-6 (i.e., colonel or Navy/Coast Guard captain). Officers serving as SPCMCA generally have at least 20 years of service and have been selected for this level of command through a rigorous and highly competitive Service-level process. An officer's leadership ability, career service record, and previous performance in lower levels of command are central to selection for command positions at the grade of O-6 and above.

Officers serving as GCMCA have long records of service, with distinguished performance and substantial command experience. In general, an officer serving as a GCMCA has also “had 25 years of experience in a quasi-judicial role, either reviewing misconduct and referring it to the commander who has the authority or [taking] corrective actions on his own with the powers that he or she has.”¹⁷ GCMCA are normally two-star flag officers and higher.

The law officer was replaced in 1968, when Congress created the office of military judge and greatly enhanced his judicial powers. See *Transcript of RSP Public Meeting 194-96* (June 27, 2013) (testimony of Mr. Borch) (discussing Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335).

¹⁴ In *Relford v. Commandant*, 401 U.S. 355, 367 (1971), for example, the Supreme Court “stress[ed] . . . [t]he responsibility of the military commander for maintenance of order in his command.” Although the High Court in *O’Callahan v. Parker*, 395 U.S. 258, 272-73 (1969), had held that court-martial jurisdiction does not exist unless the charged offense is “service-connected,” less than two years later in *Relford* the Court upheld court-martial jurisdiction over a soldier’s on-base rapes of a military dependent and a fellow service member’s relative. See *Relford*, 401 U.S. at 367 (emphasizing “[t]he impact and adverse effect that a crime committed against a person or property on a military base . . . has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission”). The Court ultimately overruled *O’Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987), in which it held that the mere military status of an accused is sufficient to support court-martial jurisdiction. See *id.* at 447 (noting that “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military”); see also *Transcript of RSP Public Meeting 198-200* (June 27, 2013) (testimony of Mr. Borch).

¹⁵ The only convening authorities who are not military commanders are the President, the Secretary of Defense, and Service Secretaries. See 10 U.S.C. § 822(a)(1, 2, and 4) (UCMJ art. 22(a)(1, 2, and 4)).

¹⁶ Army commanders selected for SPCMCA positions attend Senior Officer Legal Orientation; Air Force Commanders receive legal training at the Wing Commanders Course; Navy Executive Officers, Commanders, and Officers in Charge, as well as Marine Corps Commanders, attend the Senior Officer Course. See DoD and Service responses to Request for Information 1(c), dated Nov. 21, 2013.

¹⁷ *Transcript of RSP Public Meeting 270-71* (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino).

The following chart illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCAs and even smaller number of GCMCAs:¹⁸

	Active Duty Personnel	Commanders	SPCMCAs	SPCMCAs who convened 1 or more court-martial in FY13	GCMCAs	GCMCAs who convened 1 or more court-martial in FY13
Army	528,527	7,000 (approx.)	424	Not tracked	85	70
Navy	323,251	1,422	1,080	94	200	17
Marine Corps	194,561	2,182	451	106	50	29
Air Force	329,452	3,943	97	70	58	23
Coast Guard	40,962	677	350	12	18	9

III. ARGUMENTS FOR REMOVAL OF CONVENING AUTHORITY FROM COMMANDERS

The Subcommittee considered proposals and supporting materials advocating the removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Many proponents for change asserted that the current role played by commanders as convening authorities discourages service members from reporting sexual assaults and fosters apprehension among victims about retaliation and retribution. In addition to personal retaliation from friends and family, advocates for removing convening authority from commanders asserted victims have experienced, and in the future will experience, professional retaliation from their chain of command, including administrative consequences and discipline for collateral misconduct.

Proponents for change also asserted the U.S. military justice system lacks fairness and objectivity. They argued the existing system engenders inherent conflicts of interest that may cloud the judgment of commanders and impair the objectivity and credibility of their prosecutorial decision-making. Most notably, they highlighted what they believe is a risk that commanders will be improperly influenced in discipline decisions, either by the desire to protect well-known or valuable subordinates or to avoid addressing criminal allegations that could “reflect poorly on the command climate” or “affect the commander’s career.”¹⁹ Further, they expressed concern that commanders may be unduly influenced²⁰ to pursue unwarranted prosecutions because of perceived pressure from higher levels of command. A convening system of judge advocates independent of the chain of command, they believe, would eliminate these inherent conflicts of interest, remove any perceptions of undue command influence, and mitigate concerns about prosecutorial objectivity and impartiality.

Advocates also stressed the need for more system transparency, where allegations cannot be disregarded without thorough, independent, and full consideration. Some asserted that unlike an independent legal officer, commanders are not properly trained or prepared to make informed

¹⁸ Active duty personnel figures reflect Nov. 2013 data. Defense Manpower Data Center, Service Totals – current month, DMDC Military Personnel Reports, available at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>. Commander and convening authority data provided by Services in response to RSP Request for Information (Jan. 14, 2014) (on file with RSP). The number of Coast Guard commanders includes 272 senior enlisted personnel who serve in officer-in-charge positions.

¹⁹ *Transcript of Role of the Commander Subcommittee Meeting 52* (Jan. 8, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense and U.S. Representative).

²⁰ See MCM, *supra* note 3, R.C.M. 104(a)(2) (“No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority’s judicial acts.”) (emphasis added).

judgments in criminal matters, particularly those involving complex felony-level offenses. Proponents of change also said removing commanders from military justice roles would remove an unwanted or unnecessary burden, allowing them to focus on the warfighting function of accomplishing their primary missions with little or no dilution of their authority to foster a healthy command climate.

Some proponents of change referenced military justice systems of Allied nations, where convening authority formerly analogous to that vested in U.S. commanders has been shifted from commanders to legal officers. These examples were cited to indicate that similar change in the U.S. system will not harm good order and discipline and will improve system confidence among sexual assault victims and increase reporting of sexual assault offenses.²¹

Many proponents described the significant expectations of victims and survivors and the optimism they express that change will build trust with victims. A retired Army general officer called the proposed shift from commanders to legal officers at the core of the Military Justice Improvement Act “a proxy for what might have made it different in their situation.”²² At a November RSP public meeting, the Panel received accounts, in person and through written public comment, from survivors who support removing disposition authority for sexual assault cases from the chain of command.²³

IV. ARGUMENTS FOR COMMANDERS TO RETAIN CONVENING AUTHORITY

In contrast, the Subcommittee also considered proposals and supporting materials from those who believe divesting military commanders of their existing convening authority role is both unjustified and counter-productive. A consistent theme among these proponents is that UCMJ authority is essential and integral to the leadership authority, responsibility, and function of those in command. This authority is, according to these proponents, integral to the command function of setting and enforcing standards by holding accountable those who fail to meet standards, which in turn contributes to good order and discipline in their organizations necessary for the Armed Forces to accomplish its mission. Removing convening authority from senior commanders, supporters of retaining that authority assert, would not only limit the ability of commanders to address sexual

²¹ Professor Amos Guiora, a former judge advocate in the Israel Defense Forces, commented on an increase in sexual assault reporting in Israel between 2007 and 2011 in a June letter to the Senate Armed Services Committee. This letter stated in part: “There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces [IDF] soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers’ confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the ‘chain of command.’” Letter from Professor Amos Guiora, S.J. Quinney College of Law, Univ. of Utah, to S. Armed Services Comm. (undated), currently available at http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/Guiora/Prof_Guiora_Statement_to_Senate_Armed%20Services_Committee.pdf. The Deputy Military Advocate General for the IDF, Colonel Eli Bar-On, noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increased reporting. While IDF reports increased, sexual offense indictments declined each year between 2007 and 2011, and Colonel Bar-On observed that many reported incidents do not warrant a criminal indictment and are referred to disciplinary adjudication. Email from Colonel Eli Bar-On to Colonel Patricia Ham, Staff Director, RSP, *Statistical Tables Relating to Sexual Assault Within the IDF: 2007 – 2012* (Aug. 11, 2013), currently available at http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/israel-mj-sys/01_Email_To_RSP_from_COL_Eli_Bar_On_Israeli_Defence_Forces.pdf.

²² *Transcript of RSP Role of the Commander Subcommittee Meeting* 147 (Jan. 8, 2014) (testimony of Brigadier General (Retired) Loree Sutton, U.S. Army).

²³ *Transcript of RSP Public Meeting* 7-75 (Nov. 8, 2013); *id.* at 19-20 (testimony of BL); *id.* at 44 (testimony of AH); *id.* at 54 (testimony of SP); see also Public Comment from HP and TY provided by Protect Our Defenders, currently available at <http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08/fm-nov-16>.

assault issues in their organizations effectively, it would fundamentally impair operational readiness and effectiveness in military organizations.

Numerous presenters emphasized the overall size, larger caseload, and transportability of the U.S. military justice system, which is controlled by commanders and deployable to any location where U.S. Forces operate. Commanders expressed their belief that the U.S. system is more effective than the systems of those Allied nations that have removed convening authority from commanders. U.S. commanders stated that those Allied systems were “inefficient, costly, and less effective” for “dealing with these unique cases.”²⁴ Moreover, the Legal Counsel to the Chairman of the Joint Chiefs of Staff said legal advisors from Allied nations where the commander was removed from military justice decisions could not correlate system changes to increased or decreased sexual assault reporting. He indicated, as this Subcommittee and the RSP have already concluded, there was no statistical or anecdotal evidence among U.S. Allies that removing commanders from the charging decision had any effect on victims’ willingness to report crimes.²⁵

Those recommending commanders retain convening authority also highlighted the importance and nature of the relationship between a convening authority and his or her staff judge advocate, the senior legal counsel to command. Presenters described a high level of confidence and communication between commanders and their legal advisors. Senior commanders described seeking and receiving unvarnished legal advice when making military justice decisions. Legal advisors indicated they felt comfortable and well trained to provide independent advice, and noted their authority under Article 6 of the UCMJ, to take an issue up the chain of command where necessary to ensure the right decision for the organization, an authority they said they had exercised in certain cases. These witnesses also expressed a belief that the close and common interaction with the legal advisor in relation to military justice issues enhanced the commander/legal advisor relationship, thereby strengthening the staff judge advocate’s advice across a broad spectrum of topics other than military justice, including operational, contract and fiscal, environmental, and international law.

Senior command and legal officials from the Services said any proposals for change to the U.S. military justice system must be considered carefully in the context of changes already made and functionality of the overall system. Presenters described recent reporting and prosecution increases that have resulted from substantial legal and policy changes and DoD initiatives. They warned against implementing systemic change before there is adequate time to assess the effects of current initiatives, and in the absence of any evidence that change would achieve the objectives those advocating removal of convening authority seek.

Finally, the Subcommittee considered views of some survivors of sexual assault who did not advocate removing the commander from the process and from those who expressed satisfaction at the manner in which their cases were handled in the military justice system.²⁶

²⁴ *Transcript of RSP Public Meeting 11* (Sept. 25, 2013) (testimony of Lieutenant General Michael Linnington, U.S. Army).

²⁵ *Id.* at 207-09 (testimony of Brigadier General Richard Gross, U.S. Army).

²⁶ *Transcript of RSP Public Meeting 411-22* (Nov. 7, 2013) (public comment of DA); *Transcript of RSP Public Meeting 8-17* (Nov. 8, 2013) (testimony of Command Sergeant Major JG, U.S. Army); *Transcript of RSP Public Meeting*, 496-505 (Dec. 11, 2013) (testimony of Major MB, Texas National Guard); *Letter with Enclosures from Lieutenant General Flora Darpino to Judge Jones and RSP* (Nov. 6, 2013), currently available at <http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08/fm-nov-16>.

V. REPORTING AND RESPONSE TO SEXUAL ASSAULT ALLEGATIONS

Crimes of sexual violence are a national concern, and efforts to improve sexual assault prevention and response in the military are influenced by many of the same factors and barriers that exist throughout American society. Studies indicate that the risk for “contact sexual violence” for women in the military is comparable to the risk for women in the civilian sector.²⁷ Sexual assault, however, is chronically underreported in both the military and the civilian sector when compared to reporting rates for other forms of violent crime.²⁸ As a result, significant effort within DoD and the Services has been focused on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and . . . a bridge to accountability where offenders can be held appropriately accountable.”²⁹

a. Reporting Channels for Victims of Sexual Assault

When a service member believes he or she has been sexually assaulted, there are numerous options available for reporting the assault. A victim is never required to report the offense to his or her commander or any other military commander, and the commander does not investigate the report or decide whether it merits investigation.

This protection of a victim’s interests is reflected in DoD policy providing that sexual assault victims may choose to make a restricted or unrestricted report of the incident. In fact, DoD implemented restricted reporting “before [the option] was even an item of discussion” in civilian jurisdictions.³⁰ A restricted report remains confidential and will not result in notification of law enforcement or the victim’s chain of command.³¹ Restricted reports allow victims to report an assault confidentially in order to obtain the support of healthcare treatment and services of a Sexual Assault Response Coordinator (SARC) or Sexual Assault Prevention and Response Victim Advocate (SAPR VA) without being forced to initiate a criminal investigation. This option is intended to maximize the provision of support for such victims without requiring them to choose between obtaining support or retaining their privacy.

Only SARCs, SAPR VAs, and healthcare personnel are authorized to accept restricted reports.³² A SARC or SAPR VA is required to report the fact of the assault to the installation

²⁷ *Transcript of RSP Public Meeting 124-26* (June 27, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office (SAPRO)) (citing 2010 National Intimate Partner and Sexual Violence Survey conducted by Center for Disease Control and Prevention in 2013); see also slide 60 of accompanying presentation. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent.

²⁸ Studies indicate 65 percent of sexual assault crimes are not reported to law enforcement or other authorities, with similar reporting rates in the civilian sector and the military among females. *Transcript of RSP Public Meeting 26* (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University) (citing statistics from National Crime Victimization Survey and 2012 Workplace and Gender Relations Survey of Active Duty Personnel). Studies of military victims who reported their victimization indicate they did so because it was the right thing to do, to seek closure, or to protect themselves or others. In contrast, the most common reason cited by those who did not report was that they did not want anyone to know, felt uncomfortable making a report, or thought the report would not be kept confidential. *Transcript of RSP Role of the Commander Subcommittee Meeting 59-60* (Oct. 23, 2013) (testimony of Dr. Galbreath); see also slides 8 and 9 of accompanying presentation.

²⁹ *Transcript of RSP Public Meeting 108-09* (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

³⁰ *Transcript of RSP Public Meeting 421-22* (Dec. 11, 2013) (testimony of Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations).

³¹ U.S. DEPT OF DEF. INSTR. [hereinafter DoDI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 4, ¶ 1.b (Mar. 28, 2013).

³² *Id.*; see also Military Rape Crisis Center, <http://militaryrapecrisiscenter.org/for-active-duty/reporting-option/>.

commander,³³ but the report will not contain personally identifiable information and may not be used for investigative purposes.³⁴ Accordingly, the victim's identity remains confidential in a restricted report.³⁵ If a victim makes a report to someone not authorized to accept restricted reports—for example, someone in the chain of command or a law enforcement officer—an investigation may ensue, as all officials are required to report the alleged sex crime to the command and an investigative agency.³⁶

Victims can make unrestricted reports of sexual assault to SARCs, SAPR VAs, and healthcare personnel, as well as chaplains,³⁷ judge advocates, and military or civilian law enforcement personnel.³⁸ Victims may also report an assault to a supervisor or their chain of command, but they are not required to do so. Unrestricted reports of sexual assault will result in investigation of the allegation. Military personnel in the United States may always call civilian law enforcement or other civilian agencies to report a sexual assault if they are not comfortable notifying military authorities.

The following chart depicts the different reporting options available within DoD to victims of sexual assault:

Unrestricted Reporting Options	Restricted Reporting Options ³⁹
<ul style="list-style-type: none"> • Sexual Assault Response Coordinators (SARCs) • Victim Advocates (VAs) • Health Care Professionals or Personnel • <i>Chaplains</i> • <i>Legal Personnel</i> • <i>Chain of Command</i>⁴¹ • <i>Law Enforcement – Military Police or Military Criminal Investigative Organizations</i> 	<ul style="list-style-type: none"> • Sexual Assault Response Coordinators (SARCs) • Victim Advocates (VAs) • Health Care Professionals or Personnel • <i>Chaplains</i>⁴⁰ • <i>Legal Assistance Attorneys</i>

Reporting options are well and broadly publicized throughout the military. DoD policy requires that all military personnel must receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and

³³ In most cases, the installation commander is not the victim's immediate commander. The installation commander may or may not be in the victim's chain of command, depending on the organization to which the victim is assigned.

³⁴ DoDI 6495.02 encl. 4, ¶ 1.b.

³⁵ *Id.*

³⁶ DoDI 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (May 1, 2013). See *infra* note 39.

³⁷ If a report is made in the course of otherwise privileged communications, chaplains are not required to disclose they have received a report of a sexual assault. DoDI 6495.02 encl. 4, ¶ 1.b(3).

³⁸ Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. See *id.*

³⁹ See also DoDI 6495.02 encl. 4, ¶ 1.e(1) ("A victim's communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information (e.g., roommate, friend, family member) is in the victim's officer and non-commissioned officer chain of command or DoD law enforcement, there can be no Restricted Report.").

⁴⁰ Only the SARC, SAPR VA and healthcare personnel are designated as authorized to accept a restricted report. Victim outcry to chaplains and legal assistance attorneys is considered confidential, and does not result in an unrestricted report. DoDI 6495.02 encl. 4, ¶ 1.b(3).

⁴¹ Members of the chain of command and supervisory chain do not intake reports. Supervisors and leaders are trained to immediately contact their servicing SARC or VA, who will advise the victim of available services and options.

leadership development training, before and after deployments, and prior to filling a command position.⁴² Training must explain available restricted and unrestricted reporting options and the advantages and limitations of each option, and it must highlight that victims may seek help or report offenses outside their chain of command.⁴³

b. Investigation and Disposition of Sexual Assault Allegations

DoD policy mandates that investigations of unrestricted reports of sexual assault will be conducted by specially trained investigators from the military criminal investigative organizations (MCIOs), not the victim's immediate commander or chain of command. All unrestricted reports of sexual assault must be immediately reported to an MCIO, regardless of the severity of the crime alleged.⁴⁴ A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.⁴⁵ MCIOs are assigned to an independent chain of command from the accused and his or her SPCMCA and must independently report all sexual assault accusations to the Service Secretaries and Chiefs of Staff.⁴⁶

MCIOs must initiate investigations for all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports.⁴⁷ Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and access to services for the victim.⁴⁸

Allegations of sexual assault by a service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction and may accept investigative responsibility if the MCIO declines, or the investigation may be worked jointly by the MCIO and the civilian agency.⁴⁹ If a reported crime occurs off a military installation in a location under civilian jurisdiction, civilian law enforcement has primary jurisdiction over the investigation, and the MCIO will provide assistance as requested or deemed appropriate.⁵⁰

DoD policy also establishes the minimum level of command that may resolve an allegation of sexual assault. The first SPCMCA in the grade of O-6 or above in the chain of command of the

⁴² DoDI 6495.02 encl. 10, ¶ 3. Training must be specific to a service member's grade and commensurate with his or her level of responsibility. *Id.* at ¶ 2.d.

⁴³ *Id.* at ¶ 2.d(6, 11).

⁴⁴ DoDI 5505.18. Section 1742 of the FY14 NDAA codifies this requirement.

⁴⁵ DoD policy also requires SARCs to provide all unrestricted reports and notice of restricted reports to the installation commander within 24 hours of the report. See DoDI 6495.02 encl. 4, ¶ 4.

⁴⁶ *Transcript of RSP Public Meeting 222-23* (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

⁴⁷ DoDI 5505.18 encl. 2, ¶ 6.

⁴⁸ *Id.* at encl. 2, ¶ 1.

⁴⁹ *Id.* at ¶ 3.c(3).

⁵⁰ *Id.* Additionally, UCMJ jurisdiction over an accused service member does not deprive state courts of concurrent jurisdiction over that service member, and states may elect to charge and try military personnel for crimes that occurred in a civilian jurisdiction, regardless of whether the military prosecutes the accused. See *United States v. Delarosa*, 67 M.J. 318, 321 (C.A.A.F. 2009); see also *Heath v. Alabama*, 474 U.S. 82, 89 (1985) (holding that federal and state governments are treated as separate sovereigns, in which criminal proceedings by one sovereign do not preclude proceedings by the other). For offenses that occur on post, the local United States Attorney may also exercise jurisdiction as the Federal sovereign in place of the military.

accused serves as the “initial disposition authority” for all sexual assault allegations.⁵¹ Senior commanders with initial disposition authority often have no personal knowledge of either the accused or the victim.

When an investigation is complete, the initial disposition authority reviews the results of the investigation in consultation with a judge advocate and determines the appropriate disposition of the case.⁵² If a court-martial is warranted, charges alleging the offense(s) are preferred against the accused.⁵³ For any offense committed after June 24, 2014, the FY14 NDAA amends Article 18 of the UCMJ, to restrict jurisdiction for sexual assault offenses to general courts-martial.⁵⁴ In other words, if an offense warrants trial by court-martial, the case cannot be referred to a special court-martial. Instead, the offense may only be referred to a general court-martial. If a judge advocate disagrees with the SPCMCA’s disposition decision, that judge advocate may bring the issue to the attention of a higher authority.⁵⁵

When charges are preferred for a sexual offense and forwarded to the GCMCA with a recommendation that the case be tried by general court-martial, the GCMCA must comply with prerequisite requirements prior to referring the case to trial. The GCMCA must ensure a thorough and impartial investigation was conducted in accordance with Article 32 of the UCMJ,⁵⁶ and he or she must refer the charges to his or her staff judge advocate for advice and consideration.⁵⁷

A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command.⁵⁸ Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6.⁵⁹ Before the convening authority may refer charges to a general court-martial, the staff judge advocate must provide, in writing, his or her own personal legal opinion expressing whether the charges state an offense, there is probable cause to believe an offense was committed and the accused committed it, and there is jurisdiction over the person and offense; and a recommendation as to the disposition of the offenses.⁶⁰ Once the staff judge advocate has provided written advice and a disposition

⁵¹ DoDI 6495.02 encl. 5, ¶ 7.b (referring to Secretary of Defense Memorandum, “Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases” (Apr. 20, 2012) (hereinafter SecDef Withhold Memo), available at http://www.dod.gov/dodgc/images/withhold_authority.pdf).

⁵² SecDef Withhold Memo; see also *Transcript of RSP Public Meeting* 210-11 (June 27, 2013) (testimony of Mr. Borch that “commanders do not make decisions in a vacuum . . . and their [j]udge [a]dvocates are involved at every step of the way”). Disposition may include no action, non-judicial punishment, administrative action such as administrative separation from the service, referral to a summary or special court-martial, or directing a pretrial investigation pursuant to Article 32 of the UCMJ, if the disposition authority determines a general court-martial may be warranted. See MCM, *supra* note 3, R.C.M. 306.

⁵³ Any person subject to the UCMJ, including a service member who has been the victim of a sexual assault, may prefer charges. MCM, *supra* note 3, R.C.M. 307(a). Often, however, charges are preferred by unit-level commanders.

⁵⁴ As such, the SPCMCA will not have jurisdiction to refer any sexual assault offense to special court-martial, and any allegation warranting trial must be forwarded to the GCMCA for referral.

⁵⁵ See 10 U.S.C. § 806(b) (UCMJ art. 6(b)); see also *Transcript of RSP Public Meeting* 239 (Sept. 25, 2013) (testimony of Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force); *id.* at 271-72 (testimony of Flora D. Darpino, The Judge Advocate General, U.S. Army).

⁵⁶ 10 U.S.C. § 832; MCM, *supra* note 3, R.C.M. 405. The FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 27, 2014.

⁵⁷ 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 3, R.C.M. 406.

⁵⁸ MCM, *supra* note 3, R.C.M. 103(17).

⁵⁹ See *Transcript of RSP Public Meeting* 244 (June 27, 2013) (testimony of Captain Crow).

⁶⁰ 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 3, R.C.M. 406. Article 34 of the UCMJ, requires only written SJA advice for referral to general courts-martial, but written advice may be provided to the convening authority in referrals to lesser courts-martial as well.

recommendation, the GCMCA may decide whether to refer the case to court-martial or send it to a lesser forum for adjudication.

To ensure more rigorous scrutiny of the decision to or not to refer charges for court martial, Section 1744 of the FY14 NDAA newly requires review of any decision not to refer charges of sex-related offenses to trial by court-martial. If the staff judge advocate recommends charges be referred to trial by court-martial and the convening authority decides not refer the charges, the convening authority must forward the case file to the Service Secretary for review. If the staff judge advocate recommends that charges not be referred to trial by court-martial and the convening authority concurs, the convening authority must forward the case file to a superior commander authorized to exercise general court-martial convening authority for review.⁶¹

Information presented to the Subcommittee indicates that convening authorities and staff judge advocates agree on the appropriate disposition of an allegation in the overwhelming majority of cases, but, a staff judge advocate's recommendation is not binding on the convening authority's decision. The convening authority may refer charges to court-martial, contrary to the staff judge advocate's recommendation, or he or she may otherwise dispose of charges contrary to the staff judge advocate's recommendation to proceed to trial.⁶² The staff judge advocate may communicate directly with the staff judge advocate of the superior commander or with The Judge Advocate General of their Service if he or she disagrees with the convening authority's decision.⁶³ Superior convening authorities also have authority to withdraw a decision from a subordinate commander and make their own determination on appropriate action.

VI. ADDITIONAL LEGISLATIVE AND POLICY CHANGES

a. National Defense Authorization Acts for Fiscal Year 2012, 2013 and 2014

Increased scrutiny over the U.S. military's handling of sexual assault cases has been the impetus for numerous statutory changes to the role of the commander in sexual assault cases.

Section 582 of the National Defense Authorization Act for Fiscal Year 2012 included a provision requiring commanding officers to consider applications for change of station or unit transfer for members on active duty who are the victim of a sexual assault or a related offense.⁶⁴ This law codified the expedited transfer policy implemented by the Department of Defense in December 2011.⁶⁵ Notably, from policy implementation through the end of calendar year 2012, commanders approved 334 of 336 transfer requests.⁶⁶

⁶¹ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1744(c),(d), 127 Stat. 672 (2013).

⁶² A review of criminal cases between 1 January 2010 and 23 April 2013 showed that Air Force commanders and their staff judge advocates agreed on appropriate disposition in more than 99 percent of cases where the staff judge advocate recommended trial by court-martial. *Written Statement of Lieutenant General Richard C. Harding to the RSP* (Sept. 25, 2013). Retired officers who held GCMCA testified they had never personally disagreed or heard of a case where a GCMCA disagreed with a staff judge advocate's recommendation to refer charges to court-martial. *Transcript of RSP Role of the Commander Subcommittee Meeting* 278-79 (Jan. 8, 2014).

⁶³ See 10 U.S.C. § 806 (UCMJ art. 6).

⁶⁴ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 582, 125 Stat. 1298 (2011).

⁶⁵ U.S. DEP'T OF DEF. DIRECTIVE-TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF MILITARY SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT (Dec. 16, 2011), available at <http://www.afpc.af.mil/shared/media/document/AFD-130416-051.pdf>.

⁶⁶ U.S. Dep't of Def., DoD Sexual Assault Prevention and Response Initiatives as of April 2013, available at <http://www.defense.gov/news/DoDSexualAssaultPreventionandResponseInitiatives.pdf>.

Section 574 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) addressed the role of commanders by requiring sexual assault prevention and response training for new or prospective commanders at all levels of command.⁶⁷ Section 578 of the FY13 NDAA directed the Secretary of Defense to develop a policy to require general or flag officer review of circumstances and grounds for the proposed involuntary separation of any member of the Armed Forces who: made an unrestricted report of sexual assault; within one year after making the unrestricted report, is recommended for involuntary separation from the Armed Forces; and requests the review on the grounds that the member believes the recommendation for involuntary separation was initiated in retaliation for making the report.⁶⁸

Most recently, the FY14 NDAA modified Article 60 of the UCMJ, to preclude convening authorities from dismissing or modifying findings of a court-martial for sexual assault and rape offenses under Article 120, forcible sodomy offenses under Article 125, and attempts to commit such offenses under Article 80 of the UCMJ.⁶⁹ If a convening authority modifies the sentence of a court-martial, he or she must prepare a written explanation, which is made part of the trial record. Additionally, the convening authority may not reduce a sentence to less than a mandatory minimum, except on the recommendation of trial counsel due to the substantial assistance of the accused in the investigation or prosecution of another person who has committed an offense.⁷⁰ A number of other provisions in the FY14 NDAA also impact the role of the commander and courts-martial for sexual assault offenses.⁷¹

b. DoD Policies and Initiatives

In addition to statutory mandates, the Secretary of Defense has issued a number of policy changes affecting commanders' roles and responsibilities in sexual assault cases. Most notably, on April 20, 2012, the Secretary of Defense elevated the initial disposition authority for sexual assault offenses to a command level that is distanced from the accused and/or accuser and away from the local unit level.⁷² The policy withholds initial disposition authority for sexual assault and rape offenses under Article 120, forcible sodomy offenses under Article 125, and attempts to commit such offenses under Article 80 of the UCMJ, from all commanders who do not possess at least special court-martial convening authority and who are not in the grade of O-6 or higher.⁷³ The policy places responsibility on the initial disposition authority to determine whether court-martial, nonjudicial punishment, or adverse administrative action is appropriate, and it mandates consultation with a judge advocate prior to initial disposition decisions.⁷⁴

In addition to elevating initial disposition authority, the Secretary of Defense announced new initiatives on April 17, 2012, to include: the establishment of a special victim's unit within each Service; a requirement that commanders conduct annual organization climate assessments; and

⁶⁷ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013).

⁶⁸ *Id.* at § 578.

⁶⁹ FY14 NDAA, *supra* note 61, at § 1702(b).

⁷⁰ *Id.*

⁷¹ *Id.* at §§ 1702, 1705, 1708, 1713, 1721, 1742, 1744, 1751.

⁷² Press Release, Sec'y of Def. Leon E. Panetta (Apr. 17, 2012), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013>.

⁷³ SecDef Withhold Memo, *supra* note 51.

⁷⁴ *Id.*

enhanced training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters.⁷⁵

On September 25, 2012, DoD announced expanded sexual assault prevention efforts. The Secretary of Defense directed the Services to develop training core competencies and methods of assessment, requiring each service to: provide a two-hour block of instruction dedicated to Sexual Assault Prevention and Response (SAPR) training in all pre-command and senior enlisted leader training courses; provide commanders a SAPR “quick reference” program and information guide; assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts; and develop and implement refresher training for sustainment of SAPR skills and knowledge.⁷⁶ The initiative requires enhanced SAPR training for commanders and senior enlisted leaders.⁷⁷

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCMJ.⁷⁸ Following the review, Secretary Hagel directed the Office of General Counsel “to prepare legislation for Congress to amend Article 60 . . . [to] eliminate[e] the discretion for a convening authority to change the findings of a court-martial, except for certain minor offenses” and to “requir[e] the convening authority to explain in writing any changes made to court-martial sentences, as well as any changes to findings involving minor offenses.”⁷⁹

Two months later, on May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan; and announced eight additional measures to address sexual assault in the military. Two of the measures that directly impact commanders include developing methods to hold military commanders accountable for command climate and requiring commanders to receive copies of their subordinate commanders’ annual command climate surveys.⁸⁰

Three months later, on August 14, 2013, the Secretary of Defense ordered seven additional measures addressing sexual assault in the military. The two most sweeping initiatives required each service to create special counsel programs for sexual assault victims, and required JAG officers to preside at all Article 32 investigations for sexual assault-related charges.⁸¹

On December 20, 2013, the Secretary of Defense issued a statement underscoring the Department’s commitment to eliminating sexual assault in the military. He commended the

⁷⁵ Press Release, *supra* note 72; see also U.S. Dep’t of Def., Initiatives to Combat Sexual Assault in the Military (undated), available at <http://www.defense.gov/news/DoDSexualAssault.pdf>.

⁷⁶ U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Evaluation of Pre-Command Sexual Assault Prevention and Response Training (Sept. 25, 2012), available at http://www.sapr.mil/public/docs/news/Evaluation_of_Training.pdf.

⁷⁷ *Id.*

⁷⁸ Press Release, Secretary Chuck Hagel (Apr. 8, 2013), available at <http://www.defense.gov/releases/release.aspx?releaseid=15917>.

⁷⁹ *Id.* The FY14 NDAA codifies this requirement. See FY14 NDAA § 1702(b).

⁸⁰ U.S. Dep’t of Def., Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy From the Pentagon (May 7, 2013), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5233>; see also U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013), available at http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf.

⁸¹ U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (Aug. 14, 2013), available at http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf.

President and leaders in Congress for the initiatives included in the FY14 NDAA, and affirmed DoD's commitment to effectively implement those initiatives.⁸²

c. Proposed Additional Legislative Changes to Convening Authority

In addition to provisions enacted through the National Defense Authorization Acts addressing the issue of sexual assault in the military, some lawmakers believe that the military justice system requires more fundamental change, such as modifying or restricting the convening authority vested in certain senior military commanders.⁸³

Representative Jackie Speier (D-CA) introduced the Sexual Assault Training Oversight and Prevention Act (the STOP Act) on November 16, 2011, and again on April 17, 2013.⁸⁴ This proposal sought to remove disposition authority for only sex-related offenses from existing convening authorities and place disposition authority for such offenses under the jurisdiction of an autonomous Sexual Assault Oversight and Response Office comprised of civilian and military personnel.⁸⁵ While the STOP Act was not incorporated into law, the bill was supported by 148 co-sponsors during the 113th Congress.⁸⁶

Expanding the STOP Act, the Military Justice Improvement Act of 2013 (MJIA), first introduced by Senator Kirsten Gillibrand (D-NY) on May 16, 2013, would divest convening authority from commanders for most serious crimes, not just sexual assault crimes.⁸⁷ On November 18, 2013, Senator Gillibrand filed an amendment to the pending defense authorization bill. The amendment modified some aspects of her earlier bill but retained the bill's features modifying convening authority for most serious crimes.⁸⁸ On November 20, 2013, Senator Gillibrand filed a stand-alone version of this amendment, which is currently pending in the Senate.⁸⁹ Her amendment was not adopted as part of the FY14 NDAA.

Senator Claire McCaskill (D-MO), in contrast to Representative Speier and Senator Gillibrand, views the commander as central to the military justice process. On January 14, 2014, Senator McCaskill filed the Victims Protection Act of 2014, which seeks to address the challenge of sexual assault through additional enhancements to the sexual assault prevention and response activities of the Armed Forces.⁹⁰ The bill does not alter the role of the commander in referring sexual assault cases for prosecution.

⁸² U.S. Dep't of Def., Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), available at http://www.defense.gov/home/features/messages/secdef_hagel.aspx.

⁸³ See H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2011); H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevention Act (2013); S. 967, 113th Cong., Military Justice Improvement Act of 2013 (2013); S. 1197, § 552, amend. no. 2099 (2013); S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013).

⁸⁴ H.R. 3435, 112th Cong. (2011); H.R. 1593, 113th Cong. (2013).

⁸⁵ *Id.*

⁸⁶ H.R. 1593, 113th Cong. (2013).

⁸⁷ S. 967, 113th Cong. (2013).

⁸⁸ S. 1197, § 552, amend. no. 2099 (2013).

⁸⁹ S. 1752, 113th Cong. (2013).

⁹⁰ S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).

VII. RECENT SEXUAL ASSAULT REPORTING AND PROSECUTION TRENDS

The DoD Sexual Assault Prevention and Response Office (SAPRO) oversees DoD policy for the SAPR program and is responsible for oversight activities assessing SAPR program effectiveness. Pursuant to reporting requirements levied by Congress, DoD SAPRO maintains statistical data by fiscal year on restricted and unrestricted reports of sexual assault.

In Fiscal Year 2012 (FY12), DoD SAPRO reported the Services received 3,374 reports of sexual assault involving Service members as either victims or subjects.⁹¹ This number includes both restricted and unrestricted reports. The number of reports received in FY12 increased by 6 percent from Fiscal Year 2011 (FY11), and FY12 represented the highest number of reports received since DoD began tracking reports in 2004.⁹² FY12 reports increased for every Service,⁹³ and the number of service members making reports of sexual assault increased by 8 percent from FY11 and 33 percent compared to Fiscal Year 2007 (FY07).⁹⁴ Unrestricted reporting increased by 5 percent in FY12, and restricted reporting increased by 8 percent.⁹⁵ Restricted report conversions to unrestricted reports increased from 14.1 percent in FY11 to 16.8 percent in FY12.⁹⁶

In FY12, courts-martial charges were preferred in 68 percent of cases under military jurisdiction where sexual assault allegations were substantiated by investigation, up from 30 percent in FY07.⁹⁷ Cases resolved through nonjudicial punishment dropped from 34 percent to 18 percent over the same year comparison, and 157 of the 158 cases resolved in FY12 through nonjudicial punishment were for non-penetrating crimes.⁹⁸ According to DoD SAPRO, the differences in case resolution data from FY07 to FY12 indicate a “large change in how commanders are choosing to address the sexual assault charges brought to them by criminal investigators.”⁹⁹

VIII. INITIAL ASSESSMENT CONCLUSIONS

The Subcommittee heard many perspectives and reviewed considerable information about the commander's role in the military justice system as the prosecutorial disposition authority for sexual assault allegations. Proponents advocating for system change and those defending the UCMJ's current convening authority framework offered differing opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what

⁹¹ DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 at 57 (May 3, 2013) [hereinafter FY12 SAPRO REPORT]. DoD SAPRO's sexual assault reporting data does not necessarily reflect the number of sexual assaults that occurred in a fiscal year, since a report may be made at any time.

⁹² *Id.* at 57-58. At the November 7, 2013, RSP public meeting, the DoD SAPRO Director provided initial estimates of Fiscal Year 2013 (FY13) reporting statistics. Preliminary data indicated receipt of more than 4,600 reports in FY13, a 46-percent increase over FY12. *Transcript of RSP Public Meeting 37-38* (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

⁹³ *Transcript of RSP Role of the Commander Subcommittee Meeting 174-75* (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); *see also* slide 6 of accompanying presentation, currently available at http://response.systemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131023_ROC/03_DoD_SAPR_Ovrw_20131023.pdf.

⁹⁴ FY12 SAPRO REPORT, *supra* note 91, at 59.

⁹⁵ *Id.* at 58.

⁹⁶ *Transcript of RSP Role of the Commander Subcommittee Meeting 166* (Oct. 23, 2013) (testimony of Dr. Galbreath); *see also* slide 6 of accompanying presentation.

⁹⁷ *Id.* at 177-78; *see also* slide 20 of accompanying presentation. Substantiated allegations also included lesser offenses that were resolved through nonjudicial punishment, other administrative actions, or administrative discharge.

⁹⁸ *Id.*

⁹⁹ *Id.* at 178.

consequences, positive or negative, would result from substantially changing the UCMJ's convening authority framework. Accordingly, the Subcommittee believes caution is warranted, and systemic change may not be advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening decisions for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September RSP public meeting observed that it “assumes too much, that somehow a prosecutor is always going to be better at this than commanders.”¹⁰⁰ 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. A recent White House report, describing the civilian sector, notes that “[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them.”¹⁰¹

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors.¹⁰² Often, prosecutors based charging decisions on whether “physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor's character or behavior.”¹⁰³ Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of changes to senior commander authority in the military justice system, commanders and leaders at all levels must continue their focused efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility. The full report of the Subcommittee will provide additional information and analysis on this issue.

¹⁰⁰ *Transcript of RSP Public Meeting* 90 (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).

¹⁰¹ THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 5 (Jan. 2014).

¹⁰² *Id.* at 17 (“One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted her desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.”).

¹⁰³ *Id.*