REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

June 2014

RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL
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June 27, 2014

The Honorable Carl Levin
Chairman, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable James Inhofe
Ranking Member, Committee
on Armed Services
United States Senate
Washington, DC 20510

The Honorable Howard McKeon
Chairman, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

The Honorable Adam Smith
Ranking Member, Committee
on Armed Services
United States House of
Representatives
Washington, DC 20515

The Honorable Charles Hagel
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Chairmen, Ranking Members, and Mr. Secretary:

We are pleased to submit the report of the Response Systems to Adult Sexual Assault Crimes Panel (RSP), fulfilling the requirements of the National Defense Authorization Act for Fiscal Year 2013, Section 576. This report represents the culmination of our twelve-month review and assessment of the systems used to investigate, prosecute, and adjudicate adult sexual assault crimes in the military and our recommendations to improve the effectiveness of such systems.

In gathering the facts that form the basis for this report, the RSP held 14 days of public meetings and the RSP and its three subcommittees held an additional 65 subcommittee meetings and preparatory sessions, as well as site visits to several military installations and civilian agencies. During these meetings and site visits, we heard from military leaders, both officer and enlisted, active duty and retired; foreign military leaders; sexual assault survivors; sexual assault advocacy groups; DoD and civilian victim services personnel; military and civilian prosecutors and defense counsel; military and civilian victim counsel; academics and subject matter experts; Senators; and private citizens. We also received thousands of pages of documents from the Department of Defense, the Military Services, and civilian victim advocacy organizations in response to our requests for information.

We make a total of 132 recommendations in the areas of victim services; victim rights; the role of the commander in the military justice process; and the investigation, prosecution, and adjudication of sexual assault. Some of our recommendations represent relatively minor

adjustments to already existing programs, but some recommendations represent fundamentally different approaches to current programs and processes. The wealth of evidence we have gathered over the course of the last year gives us a high degree of confidence in our conclusions and recommendations. In drafting our report and recommendations, we have been mindful to balance the need to increase victim confidence in the system and victim rights with the rights of those accused of sexual assault.

The RSP expresses sincere appreciation to everyone who contributed to this report. We especially want to thank the sexual assault survivors who participated in our meetings, provided public comment, and willingly told their very personal stories in an effort to help others.

Respectfully submitted,

Honorable Barbara S. Jones, Chair

Honorable Elizabeth Holtzman

James W. Houck

Elizabeth L. Hillman

Harvey Bryant

Malinda E. Dunn

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EXECUTIVE SUMMARY

RESPONSIBILITY OF THE RESPONSE SYSTEMS PANEL

Congress directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel ("Response Systems Panel" or "Panel") to conduct a twelve-month independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses for the purpose of developing recommendations regarding how to improve the effectiveness of such systems. The Secretary of Defense appointed five members to the Response Systems Panel, and the Chairperson and Ranking Members of the Committees on Armed Services of the Senate and House of Representatives each appointed one member. The Honorable Barbara S. Jones (Retired) served as the Panel's chair. The nine-member Panel held its first public meeting on June 27, 2013.

Congress directed the Panel to address fifteen objectives; the Acting General Counsel for the Department of Defense requested the Panel address one additional objective:

- Using criteria the panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the Uniform Code of the Military Justice (UCMJ), and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period 2007 through 2011;

- A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims and the identification of civilian best practices that may be incorporated into any phase of the military system;

- An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial;

- An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems;

- An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences;

- An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault;

- An assessment of the strengths and weakness of 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 crime;

- An assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by Section 3771 of Title 18, United States Code, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2;

- 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 regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense;

- An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ the right afforded a crime victim in civilian criminal legal proceedings under subsection 17 (a)(4) of Section 3771 of Title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section;

- An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected searchable database accessible only to military criminal investigators, sexual assault response coordinators, or other appropriate personnel only for the purposes of identifying individuals who are subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report of sexual assault in those cases in order to facilitate increased prosecutions, particularly of serial offenders;

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

- 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 for 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;

- Study the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy and assess the possible collateral consequences of such mandatory minimum sentences including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates; and

- Such other matters and materials the panel considers appropriate.

To assist the Panel in accomplishing these tasks, the Secretary of Defense, at the request of the Chair, established three subcommittees that helped to assess different aspects of the Panel's charter: Comparative Systems, Role of the Commander, and Victim Services. The Panel and subcommittees held 79 days of meetings, heard from more than 600 witnesses, and reviewed thousands of pages of documents and submissions. The subcommittees presented their reports and recommendations to the Panel for its consideration in May 2014, and the Panel deliberated, arriving at 132 recommendations.

OVERVIEW OF PANEL RECOMMENDATIONS

Based on a year-long comprehensive review and assessment of both military and civilian response systems to adult sexual assault, the Panel's recommendations fall into seven major areas:

1. Measuring the Scope of Sexual Assault in the Military and Civilian Communities;
2. Assessing the Role of the Commander: Commander Responsibility and Accountability, Sexual Assault Prevention, and the Commander as Convening Authority;
3. Strengthening the Special Victim Counsel Program, Victim Rights, Support, and Services;
4. Ensuring Fairness and Due Process to those Suspected or Accused of Sexual Assault;
5. Improving Military Justice Procedures;
6. Sustaining and Adequately Funding Promising Department of Defense Programs and Initiatives; and
7. Conducting Independent Audits and Assessments.

MEASURING THE SCOPE OF SEXUAL ASSAULT IN THE MILITARY AND CIVILIAN COMMUNITIES

Article 120 of the UCMJ sets forth the major criminal sexual violence offenses proscribed by military law, which Congress substantially overhauled twice since 2006. The major criminal sexual violence offenses in the current version of Article 120 include the penetrative offenses of rape and sexual assault and the non-penetrative contact offenses of aggravated sexual contact and abusive sexual contact. In addition, Article 125 of the UCMJ prohibits forcible sodomy, and Article 80 of the UCMJ proscribes attempts to commit these offenses.

Measuring the Scope of Sexual Assault in the Military

Before determining the most effective legal and policy responses to sexual assault in the military, it is crucial to understand the scope of the problem. Currently, the Department of Defense (DoD) and Congress rely on the Workplace and Gender Relations Survey of Active Duty Members (WGRA) to estimate the prevalence—the number of individuals who have been victimized at least once—of sexual assault within the military.

This biannual survey collects a large amount of data that is useful public health information. If used correctly, this data can aid leaders in better evaluating readiness, assessing the health of the force, identifying patterns and trends in behavior, directing efforts in prevention of and response to sexual assault and sexual harassment across the force, and assessing victim satisfaction.

However, this survey is not meant to—and does not—accurately reflect the number of sexual assault incidents that occur in a given year, nor can it be used to extrapolate crime victimization data. For example, the definition of unwanted sexual contact used in the survey covers a wide range of conduct that may not rise to the level of a crime.

To more accurately assess the actual number of unreported sexual assault crimes in the military, the Panel recommends the DoD develop and implement a military crime victimization survey, in coordination with the Bureau of Justice Statistics, that relies on the best available research methods. Such a survey would adopt a criminal justice approach and would seek to account for unreported incidents of criminal sexual misconduct and measure the scope of unreported sexual offenses. This type of survey would provide data that can be more readily compared to other crime victimization surveys and potentially aid in the comparison of military and civilian crime statistics. Importantly, if implemented, the Secretary of Defense should direct that military crime victimization surveys use the UCMJ definitions of current penetrative sexual assault offenses, including rape, sexual assault, forcible sodomy, and attempts to commit these acts.

Civilian Communities

As noted above, Congress tasked the Response Systems Panel to compare civilian and military conviction rates of sexual assault cases. This proved difficult for several reasons. First, the offenses that fall within Article 120 of the UCMJ span a wide range of conduct, whereas many civilian jurisdictions use data that account for only felony-level crimes such as rape. Second, few civilian jurisdictions maintain or publish prosecution data on reported sexual assaults, and differences in disposition data make comparison difficult. The DoD data do not reflect disposition by specific offenses. For example, prosecution of a sexual assault offense may result in conviction of a non-sexual assault offense, and current data do not distinguish between the two. Third, procedures used to account for and resolve cases vary in the civilian sector and among the Services, so data is not truly comparable. The Panel learned that in some civilian jurisdictions, responding police officers or detectives can determine an allegation is "unfounded," that is, false or baseless, and close a case before a prosecutor ever receives it. In such instances, the case closed as "unfounded" is not accounted for in civilian prosecution rates.

In contrast, the Services track every reported sexual assault from report through disposition, including reports to authorized officials who are not affiliated with law enforcement agencies. In addition, the Services measure prosecution rates differently and follow different procedures for closing cases at the investigation stage. Because the military collects much more detailed data on every reported sexual assault than civilian jurisdictions, attempting to compare military and civilian prosecution rates for sexual assaults is difficult at best, and misleading at worst.

Congress and the Secretary of Defense should not measure success solely by comparing military and civilian prosecution and conviction rates. Based on its review, the Panel concludes the military's performance in addressing sexual assault crimes cannot be addressed solely by relying on military prosecution and conviction rates, or by comparing them to civilian prosecution and conviction rates. For a number of reasons, prosecuting a reported sexual assault may not be in the best interest of a particular victim or serve the ends of justice and good order and discipline.

However, to enable data comparison among the Services, and potentially with civilian jurisdictions, the Services should use a single, standardized methodology to track the number and rates of judicial or other dispositions in sexual assault cases, and to calculate prosecution and conviction rates across all the Services. Additionally, the Services should standardize the process for determining if a case is "unfounded" at the investigation stage. Only those reports of sexual assault that are determined to be false or baseless should be unfounded, and the Services should standardize the authority and processes for making those determinations.

ASSESSING THE ROLE OF THE COMMANDER: COMMANDER RESPONSIBILITY AND ACCOUNTABILITY, SEXUAL ASSAULT PREVENTION, AND THE COMMANDER AS CONVENING AUTHORITY

Commander Responsibility and Accountability

Military commanders are essential to the prevention of sexual assault. Commanders lead their units and organizations in war and peace, and are responsible for ensuring mission readiness, including maintaining good order and discipline within their units. Commanders must establish organizational climates that are intolerant of the behaviors and beliefs that contribute to sexual assaults. When a sexual assault does occur, military commanders must lead decisive response efforts and ensure care for victims. They must also take appropriate administrative and criminal action against those determined to be offenders while respecting the due process rights of those suspected or accused of sexual assault. A commander's success or failure in fulfilling these responsibilities should be considered in his or her performance evaluation, as it directly reflects on the quality of a commander's leadership and effectiveness. It should also be weighed in promotion decisions and the officer's ability to advance in the Armed Services. The Department of Defense, the Services, and senior leaders must ensure all commanders understand their responsibilities, are held accountable, and fairly evaluated on their execution of these critical tasks.

Commanders must take the lead in implementing and overseeing DoD's prevention programs and strategies. But it is also important for all subordinate leaders, noncommissioned officers, and civilian supervisors to be held accountable and fairly evaluated on how they execute these critical duties. The Panel heard testimony from a number of victims that it was often subordinate leaders who perpetrated the sexual assault itself, ignored it when it was reported, or engaged in retaliation towards the victim afterwards. Training and accountability for these leaders is imperative. Experts and leaders agree that preventing sexual assaults and changing the attitudes and behaviors that contribute to these crimes is a primary responsibility for all leaders throughout the DoD.

Sexual Assault Prevention

Sexual assault prevention policies and requirements the DoD adopted since 2012 reflect its work with leading national experts and resources, including the Centers for Disease Control and Prevention (CDC). Installation-level initiatives reflect prevention best practices.

The Department of Defense should continue to work with the CDC and other appropriate agencies to continue to improve its current efforts and to develop new and effective prevention strategies and programs. Specific focus areas for prevention strategies and programs should include the following:

- *Male-on-Male Sexual Assault*. 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 are not tolerated and may constitute punishable offenses.
    - DoD SAPRO should fund research and 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.

- *Bystander Intervention.* According to the CDC and leading sexual assault prevention research experts and organizations, effective bystander intervention programs encourage peer groups to guard against attitudes, beliefs, and behaviors that contribute to a climate in which sexual violence is more likely to occur. This includes language and behaviors such as sexist comments, sexually objectifying jokes, and vulgar gestures. 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 the problems created by serial rapists and other sexual "predators" and should also emphasize encouraging Service member attention and vigilance toward seemingly harmless attitudes and behaviors that increase the potential for sexual assault.

- *Alcohol Mitigation.* The Secretary of Defense should direct appropriate DoD authorities to work 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 SAPRO to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.

- *Prior Victimization.* 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 work with researchers to determine to what extent prior sexual victimization increases Service members' risk for sexual assault in the military to develop effective programs to protect against re-victimization. In addition, the Secretary of Defense should direct DoD SAPRO to consult with the CDC and other appropriate agencies to develop and expand services for military members who experienced sexual abuse prior to joining the military, this should include developing strategies to encourage utilization of these services to protect survivors from further victimization and to help them to develop or maintain skills necessary to fully engage in military activities and requirements.

The Commander as Convening Authority

Significant attention in the public and policy debate about the military's sexual assault response efforts has focused on the role of commanders under the UCMJ, and more specifically on the authority assigned to designated senior commanders to convene courts-martial and refer criminal offenses for trial. Legislative proposals were made that Congress should dissolve the authority vested in senior commanders to convene courts-martial for sexual assault offenses, and in the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Congress enacted several provisions limiting convening authority discretion. For example, Congress substantially reduced convening authorities' formerly unlimited discretion to grant clemency to Service members convicted of crimes under the UCMJ.

The Panel determined and concluded (with two members dissenting) that Congress should not further limit the authority of convening authorities under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and DoD policy. After reviewing the practices of Allied militaries and available civilian statistics, and hearing from many witnesses, the Panel determined the evidence does not support a conclusion that removing convening authority from senior commanders will reduce the incidence of sexual assault, increase reporting of sexual assaults, or improve the quality of investigations and prosecutions of sexual assault cases in the Armed Forces. In addition, proposals for systemic changes to the military justice system should be considered carefully in the context of the many changes that have recently been made to the form and function of the military justice system. The numerous and substantive changes recently enacted require time to be implemented and then assessed prior to enacting additional reforms.

At the same time, the Panel recommends Congress repeal Section 1744 of the FY14 NDAA, and Congress not enact Section 2 of the Victims Protection Act of 2014, both of which require higher-level review of a convening authority's decision not to refer certain sexual assault cases to trial. The Panel believes these sections may cause undue pressure on convening authorities and their legal advisors to refer cases to trial in situations where referral does not serve the interests of victims or justice. Even if convening authorities are not affected by these provisions, they create the perception that decisions not to refer such cases are not favored.

STRENGTHENING THE SPECIAL VICTIM COUNSEL PROGRAM, VICTIM RIGHTS, SUPPORT, AND SERVICES

Special Victim Counsel

Victim rights, support, and services are essential components to addressing sexual assault in the military and throughout society. Congress directed the Panel to assess the adequacy of military systems and procedures to support and protect sexual assault victims and to compare military and civilian systems for victim support. Having done this, the Panel finds that the military uses best practices in its support of victims and that these systems compare favorably with the civilian systems. Most notably, the Services' Special Victim Counsel Programs, begun in 2013, offer an attorney free of charge to every Service member who is a victim of sexual assault to represent him or her throughout the process. This program goes far beyond any currently found in civilian jurisdictions, state or federal.

Special victim counsel will be especially important in advising sexual assault victims of their rights under the newly adopted Article 6b of the UCMJ, which affords military crime victims many of the same rights as those afforded to victims in civilian criminal proceedings under the Crime Victims' Rights Act (CVRA). The Panel fully endorses the program, and encourages improving and expanding it, including the following recommendations:

First, the Secretary of Defense should direct the Services to extend the opportunity for special victim counsel representation to a victim so long as a right of the victim exists and is at issue, even if it is not necessarily the same special victim counsel. Second, the Judicial Proceedings Panel and the Joint Service Committee should review and clarify the extent of a victim's right to access information, through counsel, that is relevant to the assertion of a particular right. Third, the Manual for Courts-Martial should clarify that a victim's right to be heard includes the right to be heard on legal issues through counsel. Fourth, the Secretary of Defense should direct the Services to implement additional selection criteria for their individual Special Victim Counsel programs to require that counsel have appropriate trial experience, whenever possible, prior to being selected as special victim counsel. Finally, the Secretary of Defense should direct the creation and implementation of mechanisms, where not currently in place, requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority regarding case disposition. These procedures should take into account the convening authority's role in the disposition of cases under the military justice system and create a process more analogous to a victim's right to confer with a prosecutor under the CVRA.

Victim Rights

In order to align victims' rights in the military with those under the federal CVRA, as an initial matter, the Panel recommends the Secretary clarify that victims have legal standing to enforce their rights throughout the court-martial process. Specifically, the Panel recommends that a victim have the right be heard regarding pretrial agreements or plea negotiations and the right to make an unsworn victim impact statement at a sentencing hearing. Similarly, the Panel recommends that trial counsel (military prosecutors) be required to verify, on the record, they have afforded victims their rights under statute and policy.

Victim Support

Just as in the civilian population, sexual assaults in the military remain chronically underreported when compared to reporting rates for other forms of violent crime. However, sexual assault victims in the military face certain barriers to reporting that do not exist in the civilian world. Primarily, military victims face the possibility of prosecution and punishment for their own minor collateral misconduct associated with their assault. Examples include underage drinking, adultery, drug use, or dereliction of duty. Such conduct is rarely prosecuted – or may not even be criminal – in the civilian system. Military victims also may fear negative career consequences will result from their reporting an incident. The DoD must address these barriers, and the Secretary of Defense should direct an expedited study of low-level collateral misconduct in sexual assault cases and examine whether a standardized procedure for granting limited immunity for victims should be implemented in the future.

The Panel also recommends that victims who make restricted reports be permitted to speak with military investigators without the report automatically becoming unrestricted and triggering a law enforcement investigation. Although investigators should be prohibited from using any information they obtain if it would result in the disclosure of the victim's identity, the additional information may serve as useful criminal intelligence data in identifying serial offenders and in other circumstances. In addition, the Service Secretaries should create a means by which sexual assault victims who file restricted reports may request an expedited transfer without their reports automatically becoming unrestricted.

ENSURING FAIRNESS AND DUE PROCESS TO THOSE SUSPECTED OR ACCUSED OF SEXUAL ASSAULT

An allegation of sexual assault against a Service member has profound impacts even absent a prosecution and conviction. Effective response systems to sexual assault in the military require appropriate measures to hold offenders accountable. It is equally important, however, to ensure that the rights of those Service members who are suspected or accused of sexual assault are not denigrated and the presumption of innocence is not degraded. The Panel makes several recommendations relating to fairness and due process that are essential to securing the confidence in the military justice system of both victim and accused Service members, the Armed Forces as a whole, and the public.

First, Service members who are suspected or accused of these crimes should be represented by adequately trained military defense counsel with experienced supervisory oversight. Those accused must continue to have access to witnesses and other resources for their defense as well as impartial panels (military juries) and military judges to determine guilt or innocence and adjudge punishments appropriate under the individual circumstances of each case. Case disposition decisions and courts-martial results must not be corrupted or tainted by unlawful command influence, long recognized as the "mortal enemy of military justice."

Second, the Panel seeks to correct an obvious imbalance between prosecution and defense resources, particularly in light of the substantial additional efforts in recent years to enhance prosecution capabilities. The Secretary of Defense should direct the Services provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.

Third, the Service Secretaries should ensure military defense counsel organizations are adequately resourced with funding and personnel. This includes defense supervisory personnel with training and experience comparable to their prosecution counterparts. In addition, the Service Judge Advocates Generals and the Staff Judge Advocate to the Commandant of the Marine Corps should review military defense counsel training for adult sexual assault cases to ensure funding of defense training opportunities is on par with that of trial counsel.

Fourth, the Service Judge Advocates General and the Staff Judge Advocate to the Commandant of the Marine Corps should sustain and broaden the emphasis on developing and maintaining shared resources, expertise, and experience in prosecuting and defending adult sexual assault crimes.

Finally, the Secretary of Defense and Service Secretaries should ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure sexual assault prevention and response training programs and other initiatives do not create perceptions among those who may serve as panel members (military jurors) at courts-martial that commanders expect particular findings or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and disposition, and access to witnesses or evidence. Judge advocates with knowledge and expertise in criminal law should review sexual assault preventive training materials to ensure the materials neither taint potential panel members nor present inaccurate legal information.

IMPROVING MILITARY JUSTICE PROCEDURES

The Panel closely studied the military justice process as a primary component of our overall assessment of the response systems to sexual assault. While many components of the process closely resemble or replicate features of civilian criminal justice systems, there are some critical differences. Some of the necessary distinctions result from the convening authority's role in the military justice process and the military justice system's role in maintaining good order and discipline across the Armed Forces.

The Panel concludes, however, that some of these military-specific procedures are no longer necessary even in the context of a separate and unique military justice system. In particular, the Panel recommends the unitary sentencing practice, which adjudges a single sentence for all offenses of which an accused is convicted, should be discarded. This will make it easier to measure sentencing trends and ascertain accountability for sexual assault. Conversely, the Panel also determined that certain procedures used in some state and federal systems are not warranted in the military at this time. The Panel does not recommend the military adopt sentencing guidelines in sexual assault or other cases, nor does the Panel recommend Congress enact further mandatory minimum sentences in sexual assault cases at this time.

Finally, other potential changes require in-depth study before deciding whether they are appropriate or desired changes to current procedures. It is the sense of the Panel that the military judge should be involved in the military justice process sooner than referral to court-martial, which may better protect the rights of the victim and accused, and facilitate access to witnesses, documents, and experts, thereby minimizing trial delays. The Panel recommends the Secretary of Defense direct the Military Justice Review Group or Joint Service Committee to evaluate the feasibility and consequences of involving military judges at an earlier stage.

SUSTAINING AND ADEQUATELY FUNDING PROMISING DEPARTMENT OF DEFENSE PROGRAMS AND INITIATIVES

Over the course of the Panel's study, witnesses expressed a recurring concern about sustaining and adequately funding effective but resource-intensive programs in the coming years during a time of decreasing defense budgets and other fiscal constraints. DoD's progress in combating sexual assault is tied in part to the resources and funding available for prevention and response efforts. Congress, the Secretary of Defense, the Service Secretaries, and senior Service officials must maintain their commitment to resolving the problem of sexual assault by ensuring effective prevention and response programs are adequately resourced.

Specifically, Congress should appropriate sufficient funds and personnel authorizations annually to DoD to ensure the Services are able to sustain a robust Special Victim Counsel program. The Services must also ensure

proper training of investigators and judge advocates to maintain the expertise necessary to investigate and litigate sexual assault cases in spite of the turnover created by personnel rotations. It is also vital to develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in handling these cases. Finally, the Service Secretaries should direct that current training efforts and programs be sustained so that military defense counsel are competent, prepared, and equipped.

CONDUCTING INDEPENDENT AUDITS AND ASSESSMENTS

Since the inception of DoD's comprehensive program in 2005, Congress has mandated and the Department has initiated numerous policies and programs directed toward sexual assault prevention and response. However, DoD has not sufficiently evaluated its initiatives to determine which are effective and which are not, which should be continued or expanded, or which should be discontinued or limited. To enhance overall program effectiveness and ensure the best use of resources, DoD should evaluate the programs and initiatives dealing with sexual assault. Additionally, the Department should assess the roles and responsibilities of sexual assault prevention and response personnel to ensure they operate effectively.

To verify the efforts of the DoD and enhance public confidence, the Department should seek external reviews of sexual assault prevention and response programs and performance. Evaluations of overall or specific programs by independent organizations, such as an audit of sexual assault investigations by persons or entities outside DoD, would serve to validate or disprove the Department's own internal assessments and would provide useful feedback on its programs, policies, and procedures.

Finally, the Panel renews a recommendation made previously by the 2004 Care for Victims of Sexual Assault Task Force and the 2009 Defense Task Force on Sexual Assault in the Military Services. The Secretary of Defense should establish an advisory panel, composed of persons external to DoD, to offer the Secretary and other senior Department leaders independent assessment and feedback on the effectiveness of sexual assault prevention and response programs and policies.

CONCLUSION

Spurred by vigorous public debate, Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes and additions to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent increased reporting trends, suggest that these efforts are having a positive impact in increasing victim confidence. Nonetheless, these reforms and changes have not yet been fully implemented or evaluated, and it is not possible at this time to assess their full impact or the satisfaction of victims. Having considered these reforms and the current state of affairs, it is the Panel's view that the additional changes recommended in this report will advance the military's efforts in this area. The Response Systems Panel submits these recommendations to further improve the Department of Defense's response systems to adult sexual assault crimes.

PANEL RECOMMENDATIONS

I. MEASURING THE SCOPE OF SEXUAL ASSAULT IN THE MILITARY AND CIVILIAN COMMUNITIES

Collecting and Comparing Data

RSP Recommendation 1: The Secretary of Defense direct the development and implementation of a military crime victimization survey, in coordination with the Bureau of Justice Statistics, that relies on the best available research methods and provides data that can be more readily compared to other crime victimization surveys than current data.

- The Department of Defense (DoD) Workplace and Gender Relations Survey of Active Duty Members (WGRA) is an unbounded (does not have mechanisms to detect events that are reported outside the specified time period) prevalence survey that uses a public-health methodological approach. The National Crime Victimization Survey is a time-bounded incidence survey that uses a justice system-response methodological approach. The two surveys cannot be accurately compared.

RSP Recommendation 2: Congress and the Secretary of Defense utilize results from the Workplace and Gender Relations Survey of Active Duty Members for its intended purpose—to assess attitudes, identify areas for improvement, and revise workplace policies, as needed—rather than to estimate the incidence of sexual assault within the military.

- Surveying and collecting data on sexual assault victimization is challenging and costly. There are two primary approaches to surveying sexual assault. The first is a public health approach, which casts a broad net to assess the scope of the number of those injured by coercive sexual behavior. The second is a criminal justice approach, which seeks to account for unreported incidences of criminal sexual misconduct and measure the scope of unreported sexual offenses.
- Data received from the WGRA provides important information about attitudes and perceptions, but the survey was not intended to, and does not accurately, measure the incidence of criminal acts committed against Service members.

RSP Recommendation 3-A: The Secretary of Defense direct the Service Secretaries to use a single, standardized methodology to calculate prosecution and conviction rates. The Panel recommends a methodology, based on the current Army model, which will provide accurate and comparable rates by tracking the number and rates of acquittals and alternate dispositions in sexual assault cases.

RSP Recommendation 3-B: Once the Services standardize definitions, procedures, and calculations for reporting prosecution and conviction rates in sexual assault cases, the Secretary of Defense direct a highly qualified expert, external to the military, to study the disposition process in sexual assault cases.

The study should at least assess the following:

- the rate at which the Services unfound sexual assault reports using the Uniform Crime Reporting Program definition and the characteristics of such cases to determine whether any additional changes to policies or procedures are warranted;
- the rates at which referral of cases to courts-martial against the advice of the Article 32 investigating or hearing officer resulted in acquittal or conviction; and
- the role victim cooperation plays in determining whether to refer or not refer a case to court-martial, and whether the case results in a dismissal, acquittal or conviction.

- DoD and the Services do not currently use standardized methods to calculate prosecution or conviction rates in sexual assault or other cases. In addition to different procedures, Services also use different definitions, which make meaningful comparisons of prosecution and conviction rates for sexual assault across the Services impracticable. In the absence of a standardized methodology, any attempt to compare military prosecution or conviction rates for sexual assault among the Services or between military and civilian jurisdictions is apt to be misleading.

RSP Recommendation 4: Congress and the Secretary of Defense not measure success solely by comparing military and civilian prosecution and conviction rates.

- Civilian and military prosecution rates are not comparable because of systemic differences including civilian police discretion to dispose of a case and the alternate dispositions that apply only to the military. Various jurisdictions also use different definitions, procedures, and criteria throughout the process.
- National data collection by the Uniform Crime Reporting (UCR) Program traditionally focused on forcible rape of women, although beginning in January 2013, the definition of rape was expanded to include gender-neutral nonconsensual penetrative offenses. The UCR Program also collects data about some other sex offenses which some civilian police agencies may classify as assault. In contrast, DoD includes data on all reported penetrative and contact sexual offenses ranging from unwanted touching to rape.

RSP Recommendation 5: Congress enact legislation to amend Section 1631(b)(3) of the National Defense Authorization Act for Fiscal Year 2011 and the related provisions in the National Defense Authorization Act for Fiscal Year 2012 and the National Defense Authorization Act for Fiscal Year 2013 to require the Service Secretaries provide the number of "unfounded cases," (i.e., those cases that were deemed false or baseless), as well as a synopsis of all other unrestricted reports of sexual assault with a known offender within the military's criminal jurisdiction. Eliminating the requirement to provide information about "substantiated cases" will result in DoD and the Services providing information that more accurately reflects the disposition of all unrestricted reports of sexual assault within the military's jurisdiction.

- DoD and the Services must comply with several mandates to report sexual assault data to multiple sources, including Congress, with each report containing different requirements, calculations, and definitions.
- Section 1631 of the National Defense Authorization Act (NDAA) for Fiscal Year 2011 mandates an annual report to Congress with a full synopsis of "substantiated cases" of sexual assaults committed against Service members. The term "substantiated" is not otherwise used by DoD or the Services through the investigative or disposition decision process in sexual assault cases, resulting in confusion and inaccuracy in the reports to Congress.

Independent Evaluation of WGRA Data and Designing Future Surveys

RSP Recommendation 6: The Secretary of Defense direct that raw data collected from all surveys related to workplace environments and crime victimization be analyzed by independent research professionals to assess how DoD can improve responses to military sexual assault. For example: the survey's non-response bias analysis plan should be published so that independent researchers can evaluate it; the spectrum of behaviors included in "unwanted sexual contact" should be studied to inform targeted prevention efforts; and environmental factors such as time in service, location, training status, and deployment status should be analyzed as potential markers for increased risk.

- The 2012 WGRA collected a large amount of data that is useful public health information and can be analyzed to provide DoD leadership with better insight into areas of concern, patterns and trends in behavior, and victim satisfaction. If used correctly, this data can aid leaders in: better evaluating readiness, assessing the health of the force, identifying patterns and trends in behavior, directing efforts in prevention of, and response to, sexual assault and sexual harassment across the force, and assessing victim satisfaction.
- The Centers for Disease Control and Prevention (CDC) conducts a public health survey called the National Intimate Partner and Sexual Violence Survey (NISVS) to measure the prevalence of contact sexual violence. In 2010, the NISVS was designed and launched with assistance from the National Institute of Justice and DoD. NISVS includes a random sample of active duty women and female spouses of active duty members. The NISVS revealed that the overall risk of contact sexual violence is the same for military and civilian women, after adjusting for differences in age and marital status.

RSP Recommendation 7: The Secretary of Defense direct the creation of an advisory panel of qualified experts from the Bureau of Justice Statistics and the National Academy of Sciences' Committee on National Statistics to consult with the RAND Corporation, selected to develop and administer the 2014 Workplace and Gender Relations Survey of Active Duty Members, and any other agencies or contractors that develop future surveys of crime victimization or workplace environments, to ensure effective survey design.

- The RAND Corporation will develop, administer, collect, and analyze data for the 2014 WGRA. The RAND Corporation has partnered with Westat, the same company the Bureau of Justice Statistics uses for survey expertise assistance.

RSP Recommendation 8: If implemented, the Secretary of Defense direct that military crime victimization surveys use the Uniform Code of Military Justice's (UCMJ) definitions of sexual assault offenses, including: rape, sexual assault, forcible sodomy, and attempts to commit these acts.

- The definition of "unwanted sexual contact" used in the 2012 WGRA does not match the definitions used by the DoD Sexual Assault Prevention and Response Office (SAPRO) or the UCMJ, making it more helpful as a public health assessment than an assessment of crime.
- DoD SAPRO evaluates the scope of unreported sex offenses by contrasting prevalence data of unwanted sexual contact extrapolated from the WGRA with reported sexual assault incidents and sexually based crimes under the UCMJ. The variances in definitions lead to confusion, disparity, and inaccurate comparisons of reporting rates within DoD. While the wide range of behaviors described in the 2012 WGRA are appropriate subjects of a public health survey, the WGRA's broad questions do not enable accurate or precise determination of sexual assault crime victimization.
- Crime victimization surveys must be designed to mirror law enforcement reporting practices and legal definitions of crimes so that data can be analyzed, compared, and evaluated to assess the relative success of sexual assault prevention and response programs.

Survey Response Rates and Survey Fatigue

RSP Recommendation 9: The Secretary of Defense seek to improve response rates to all surveys related to workplace environments and crime victimization to improve the accuracy and reliability of results.

- In 2012, the Defense Manpower Data Center sent the WGRA to 108,000 active duty Service members. Approximately 23,000 survey recipients, or 24%, responded. Twenty-four percent is considered a low response rate when compared to rates from other civilian public health surveys.

RSP Recommendation 10: DoD and the Services be alert to the risk of survey fatigue, and DoD SAPRO and Defense Equal Opportunity Management Institute monitor and assess what impact increased survey requirements have on survey response rates and survey results.

- The recent dramatic increase in the use and frequency of surveys administered by Defense Equal Opportunity Management Institute (DEOMI) last year raises concerns about 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 meaningful input.

Sentencing Data

RSP Recommendation 11: The Secretary of Defense direct the Service Secretaries to provide sentencing data, categorized by offense type, particularly for all rape and sexual assault offenses under Article 120 of the UCMJ, forcible sodomy under Article 125 of the UCMJ, or attempts to commit those acts under Article 80 of the UCMJ, into a searchable DoD database, to: (1) conduct periodic assessments, (2) identify sentencing trends, or (3) address other relevant issues. This information should be posted to a website or made available in a forum that is easily accessible to the public.

- Sentencing data from the different Services is not easily accessible to the public. The Services use different systems to internally report data from installations around the world. If the Services' software programs and data fields (in the Defense Sexual Assault Incident Database (DSAID), for example) are modified to include sentencing information, it would not be overly burdensome for the Services to provide this data to DoD.

RSP Recommendation 12: The Secretary of Defense direct the Services to release sentencing outcomes in all cases on a monthly basis to increase transparency and confidence in the military justice system.

II. ASSESSING THE ROLE OF THE COMMANDER: COMMANDER RESPONSIBILITY AND ACCOUNTABILITY, SEXUAL ASSAULT PREVENTION, AND THE COMMANDER AS CONVENING AUTHORITY

Sexual Assault Prevention

RSP Recommendation 13: The Secretary of Defense 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 are not tolerated and may constitute punishable offenses.
- DoD SAPRO should fund research on and 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.

RSP Recommendation 14: The Service Secretaries 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 commands are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.

RSP Recommendation 15: The Secretary of Defense direct appropriate DoD authorities to work 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 SAPRO to coordinate with the Services to evaluate promising programs some local commanders have initiated to mitigate alcohol consumption.

- The CDC and leading private prevention organizations agree there is no silver bullet answer to stop the occurrence of sexual assault. A prevention strategy has greater potential to impact behavior if it applies multiple and varied strategies that target risk factors at the individual, family/peer, community, and societal levels, because this comprehensive approach creates a "surround sound" effect that causes people to hear the same message in multiple ways from multiple influencers.
- DoD's prevention policies and requirements adopted since 2012 reflect Department efforts to coordinate with the CDC and leading private organizations like the National Sexual Violence Resource Center. Moreover, installation-level initiatives described to the Panel largely reflect prevention best practices.
- The CDC and leading private prevention organizations identify bystander intervention and alcohol mitigation as two promising sexual violence prevention strategies that warrant further research into their impact on behavior change.
- Alcohol use and abuse are major factors in military sexual assault affecting both the victim and the offender. Based on available studies, the CDC has identified pricing, outlet density, and college campus restrictions as promising alcohol policy strategies for reducing the incidence of sexual violence.
- DoD strategic documents have not mandated any of the alcohol mitigation strategies emphasized as promising by the CDC, such as pricing strategies, outlet density, and restrictions on availability. Nevertheless, some local commanders have developed innovative alcohol-mitigation programs, on their own, that warrant wider evaluation.
- 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.

RSP Recommendation 16: The Secretary of Defense 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 work with researchers to determine to what extent prior sexual victimization increases Service members' risk for sexual assault in the military to develop effective programs to protect against re-victimization.

- Research underscores the importance of developing programs to identify Service members who are victimized prior to entering the military and strengthen these members' resiliency in order to deal with the consequences of prior victimization and avoid being victimized again.

RSP Recommendation 17: The Secretary of Defense direct DoD SAPRO to consult with the Centers for Disease Control and Prevention and other appropriate agencies to develop and expand services for military members who experienced sexual abuse prior to joining the military, and to develop strategies to encourage utilization of these services to prevent re-victimization and develop or maintain skills necessary to fully engage in military activities and requirements.

- Results from the 2012 WGRA survey indicate that 19% of men and 45% of women in Armed Forces who said they experienced unwanted sexual contact while in the military also indicated they experienced unwanted sexual contact before entering military service.

Training the Force on Sexual Assault Prevention

RSP Recommendation 18: The Secretary of Defense and Service Secretaries 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.

- According to the CDC and leading sexual assault prevention research experts and organizations, effective bystander intervention programs encourage peer groups to guard against attitudes, beliefs, and behaviors that contribute to a climate in which sexual violence is more likely to occur. This includes language and behaviors such as sexist comments, sexually objectifying jokes, and vulgar gestures.

RSP Recommendation 19: The Secretary of Defense direct DoD SAPRO to establish specific training and policies addressing retaliation toward peers who intervene and/or report.

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

RSP Recommendation 20: The Secretary of Defense continue to develop and implement training for all members of the military, including new recruits, with examples of male-on-male sexual assault, including hazing and sexual abuse by groups of men. The training should emphasize the psychological damage done by sexual assault against male victims.

- Recent policies and training initiatives have sought to identify special populations within the military to prevent sexual assault. However, male victims of sexual assault are often left out of conversations about how sexual assault occurs in the military. This omission deters some male victims from reporting sexual assault.

RSP Recommendation 21: The Service Secretaries direct commanders of military entrance processing stations to determine how to best provide sexual assault prevention information to new recruits immediately upon entry into the Service that include the definition of sexual assault, possible consequences of a conviction for sexual offenses in the military and information about the DoD Safe Helpline and other avenues for assistance. This recommendation expands upon the Defense Task Force on Sexual Assault in the Services' recommendation to make available, and to visibly post, sexual assault prevention and awareness campaign materials at military entrance processing stations.

- Pursuant to Section 574 of the Fiscal Year 2013 NDAA and current DoD policy, all of the Services now provide sexual assault prevention and response (SAPR) training to Service members within the first two weeks of initial entrance on active duty.

RSP Recommendation 22: The Secretary of Defense continue to develop and implement training for all members of the military, including new recruits, emphasizing that reporting instances of sexual assault is essential for good order and discipline and protects rather than undermines morale. It is also essential that training continue to emphasize that good order and discipline require that the military justice system carries out its mission of determining guilt or innocence in an environment free from bias against an accuser or accused Service member.

- The ingrained notion of subordination of the individual to the mission that is unique to a military environment may be misinterpreted to deter reports of sexual assault and encourage retaliation against victims who come forward.
- There have been instances when military officials and Service members have ignored or retaliated against those who reported incidents of sexual assault when the offender is a high-performing Service member or superior offending against a subordinate.

RSP Recommendation 23: The Secretary of Defense continue to develop and implement training for all members of the military, including new recruits, that retaliation or harassment by Service members in response to an allegation of sexual assault violates good order and discipline.

- Harassment and retaliation against a victim in response to an allegation of sexual assault erodes unit cohesion, and the fear of harassment and retaliation deters victims from coming forward to report instances of sexual assault.
- Although current DoD policy requires commanders and senior leaders to receive training on recognizing and preventing retaliation towards a victim of sexual assault, the policy does not expressly provide that Service members receive such training.

RSP Recommendation 24: The Secretary of Defense continue to develop and implement training for all members of the military, including new recruits, explaining that implicit or explicit invitations or demands for sex or sexualized interactions from commanders or superiors are not lawful orders, should not be obeyed, violate the code of military conduct, and will be punished.

RSP Recommendation 25: The Department of Defense not promulgate at this time 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.

- FY14 NDAA directed the Panel to assess whether DoD should promulgate, and ensure the understanding of, and compliance with, a formal statement of accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means for addressing those issues within the Armed Forces.
- 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 victims, the roles and responsibilities of commanders and SAPR personnel, prevention strategies, and report documentation requirements.
- DoD SAPRO has established core SAPR training competencies with tailored instruction requirements for: accessions training, annual refresher training, pre- and post- deployment training, professional military education, senior leadership training, pre-command training, and response personnel training.
- In light of the SAPR training already in place, promulgating a formal statement at this time would be superfluous.

Organizational Climate Surveys

RSP Recommendation 26: DoD SAPRO and the Defense Equal Opportunity Management Institute 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.

- 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.
- Most issues and concerns expressed by victims are with lower-level leaders, not senior commanders or convening authorities. Unit climate assessments and response measures must be sufficiently comprehensive to include leaders and supervisors at every level.
- 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.

RSP Recommendation 27: The Secretary of Defense and Service Secretaries 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.

RSP Recommendation 28: DoD and the Services identify and utilize means in addition to surveys to assess and measure institutional and organizational climate for sexual assault prevention and response.

- 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.

RSP Recommendation 29: In addition to personnel surveys, DoD, the Services, and commanders identify and utilize other resources to obtain information and feedback on the effectiveness of Sexual Assault Prevention and Response programs and local command climate.

- Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations. However, they must ensure they do not seek out or use information that is otherwise confidential or protected.

RSP Recommendation 30: Congress not adopt Section 3(d) of the Victim's Protection Act of 2014. Alternatively, the Secretary of Defense 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.).

- 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.
- 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.

Commander Evaluation and Accountability

RSP Recommendation 31: DoD and the Services 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.

- While ineffective or inadequate commanders should be relieved, accountability must also include positive reinforcement that will strengthen good commanders.
- Although 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, Section 3(c) would not require performance appraisals to specifically address how a commander performs his or her sexual assault prevention responsibilities.
- 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.

RSP Recommendation 32: The Service Secretaries ensure sexual assault prevention and response performance assessment requirements extend below unit commanders to include subordinate leaders, including officers, noncommissioned officers, and civilian supervisors.

- While performance appraisals in each Service now directly impact promotion potential and future assignments, including command selection, the evaluation scope and level of detail required vary among the Services.
- 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.
- 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.
- SAPR program effectiveness will be limited without the full investment of subordinate leaders.
- Section 3(c) of the Victim's Protection Act of 2014 would extend evaluation requirements to all Service members.

RSP Recommendation 33: The Service Secretaries ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys.

- Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance.
- 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.

RSP Recommendation 34: To ensure military leaders clearly understand their duties and responsibilities, DoD SAPRO and the Service Secretaries ensure Sexual Assault Prevention and Response programs and initiatives are clearly defined and establish objective standards when possible.

- 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.

RSP Recommendation 35: The Secretary of Defense and Service Secretaries ensure commanders are trained in methods for monitoring a unit's sexual assault prevention and response climate, and they should ensure commanders are accountable for monitoring their command's sexual assault prevention and response climate outside of the conduct of periodic surveys.

Role of the Commander in the Military Justice System

RSP Recommendation 36: Congress not adopt the proposals in the Sexual Assault Training Oversight and Prevention Act or the Military Justice Improvement Act to modify the authority vested in convening authorities to refer sexual assault charges to courts-martial.

- Congress has enacted significant amendments to the UCMJ to enhance the response to sexual assault in the military, and the 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.
- The Military Justice Improvement Act (MJIA) includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel, yet implementing the convening authority mandate included in the MJIA will involve significant personnel and administrative costs. Resources are an issue of primacy for any legislation that creates additional structure.
- 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.

RSP Recommendation 37: Congress not further limit 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 DoD policy.

- 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.
- Pursuant to the Fiscal Year 2014 (FY14) NDAA amendments to the UCMJ and current practice, only a general court-martial convening authority 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.
- 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.
- If a convening authority has something other than an official interest in a particular case, the convening authority is required to recuse himself or herself.
- 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.
- 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.
- 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.

- 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.
- 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.
- 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.
- 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.

RSP Recommendation 38: The Secretary of Defense 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 exercise authorities assigned to them under the UCMJ.

- Legal training provided to senior commanders through resident and on-site Service Judge Advocate General School hosted courses varies significantly among the Services. For example, the Army and Navy Judge Advocate General Schools provide senior commanders with 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.

Reviewing Convening Authorities' Referral Decisions

RSP Recommendation 39: Congress repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, which requires a convening authority's decision *not* to refer certain sexual assault cases be reviewed by a higher general court-martial convening authority or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judge advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice.

- Establishing an elevated review of a convening authority's decision not to refer certain sexual assault cases may deter the convening authority from exercising his or her independent professional judgment when making a decision whether to refer a case.
- Elevated review may also impose inappropriate or illegal pressure on staff judge advocates to recommend and convening authorities to refer sexual assault cases.
- Convening authorities are better positioned to make informed decisions because they have the advice of their staff judge advocates, and are less removed from the alleged perpetrator, victim,

and the impact of the offense on the unit and good order and discipline than a higher level general court-martial convening authority or Service Secretary.

RSP Recommendation 40: If Congress does not repeal Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction declination statements or letters. The DoD should coordinate with the Department of Justice, or with state jurisdictions that are more familiar with the sensitive nature of sexual assault cases, to develop a standard format for use by all Services. Any such form should require a sufficient explanation without providing too much detail so as to ensure the written reason for declination to prosecute does not jeopardize the possibility of a future prosecution or contain victim-blaming language.

- There are no formal requirements for military investigators, judge advocates, or commanders to provide written opinions or justifications when declining to pursue criminal cases, including allegations of sexual assault, at any stage in the court-martial process. Staff judge advocates provide written advice to the convening authority prior to his or her decision whether to refer a case to general court-martial. In the past, if a convening authority dismissed charges or declined to prosecute a case after referral, the convening authority generally did not write a justification or declination statement.
- If a victim makes an allegation of rape, sexual assault, forcible sodomy, or attempts of those offenses, and the convening authority decides not to refer the allegation to court-martial, Section 1744(e)(6) of the FY14 NDAA requires a written statement explaining the convening authority's decision be included in the case file for superior authority review. DoD has not published guidance on what a declination memorandum must contain or what entity must write the letter.
- Civilian practices for recording decisions to decline cases vary. Prior to indictment, the common procedure is for the prosecutor to send the case back to the investigator to be closed. If the prosecutor declines a case after indictment, some offices informally include a note in the file, others complete a standard form, but none provide lengthy written justifications. When civilian offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect.

RSP Recommendation 41: Congress not enact Section 2 of the Victim's Protection Act of 2014, which would require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the staff judge advocate's recommendation against referral or the convening authority's decision not to refer one of these sexual assault cases. The staff judge advocate is the general court-martial convening authority's legal advisor on military justice matters; there is no evidence that inserting the senior trial counsel into the process will enhance the fair administration of military justice.

- 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.

Convening Authority and Clemency

RSP Recommendation 42: Congress 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.

- 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.

RSP Recommendation 43: Congress amend Section 1702(b) of the National Defense Authorization Act for Fiscal Year 2014 to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures.

- In civilian jurisdictions, each State has its own rules for handling clemency matters, but many provide the Governor with the power to pardon criminals and commute sentences as the final act after the person convicted exhausts the judicial appellate process. The convening authority normally exercises clemency authority under the recently amended Article 60 of the UCMJ after the findings and sentence of a court-martial, before appellate review. The scope of appellate review varies by the length of sentence approved.
- One unintended consequence from the recent amendments to Article 60 of the UCMJ is that the convening authority may no longer provide relief from forfeitures of pay to dependents of convicted Service members.

III. STRENGTHENING THE SPECIAL VICTIM COUNSEL PROGRAM, VICTIM RIGHTS, SUPPORT, AND SERVICES

Special Victim Counsel

RSP Recommendation 44: The Secretary of Defense direct the Services to extend the opportunity for special victim counsel representation, although not necessarily the same special victim counsel, to a victim so long as a right of the victim exists and is at issue.

- According to individual Service policies, the special victim counsel and victim have a privileged attorney-client relationship from their initial meeting through the final disposition of a case or transfer of the special victim counsel to another duty station.

RSP Recommendation 45: The Judicial Proceedings Panel and the Joint Services Committee should review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right.

- A special victim counsel's right to access records is no greater than his or her client's access rights. Currently, the government trial counsel may, but is not expressly required to, disclose information and records to the special victim counsel. Further, when disclosing information, the trial counsel is limited by the Freedom of Information Act and the Privacy Act.

RSP Recommendation 46: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to clarify a victim's right to be heard includes the right to be heard on legal issues through counsel.

- The Court of Appeals for the Armed Forces, the highest military court, composed of civilian judges has addressed the issue of whether a victim has the right to be heard through counsel with regard to certain issues, but the scope of representation set forth by the FY14 NDAA is more expansive than the issues addressed in case law.
- Litigation about a victim's right to be heard includes through counsel will likely continue unless DoD issues formal clarification.

RSP Recommendation 47: The Secretary of Defense direct the Services to implement additional selection criteria for their individual Special Victim Counsel programs to require that counsel have appropriate trial experience, whenever possible, prior to being selected as special victim counsel.

- Special victim counsel are required to meet the same qualifications as other legal assistance attorneys (i.e., judge advocate or a civilian attorney who is a member of the bar of a federal court or of the highest court of a state) and be certified as competent to be designated as a special victim counsel by the Service Judge Advocate General. In addition to these statutory requirements, special victim counsel selection considers other factors, such as previous military justice experience, maturity and sound judgment, and desire to serve in the position in the selection process.
- The length of time the individual served in a military justice position varies throughout each Service; it is unclear if actual trial experience is required across the Services.

RSP Recommendation 48: In addition to assessing victim satisfaction with the Special Victim Counsel program, the Service Secretaries survey convening authorities, staff judge advocates, prosecutors, defense counsel, military judges, and investigators to assess the effects of the program on the administration of military justice.

- Military trial and defense counsel, sexual assault response coordinator, and victim advocate personnel reported that they have positive working relationships with special victim counsel, but some counsel foresee potential issues such as privilege, confidentiality, or delays which could affect the relationships.

Sustain Special Victim Counsel

RSP Recommendation 49: Congress appropriate sufficient funds and personnel authorizations annually to DoD to ensure the Services are able to sustain a robust Special Victim Counsel program.

- Initial survey results from the Air Force, the only Service to have currently implemented a victim satisfaction survey, revealed responses were overwhelmingly positive and show the effectiveness of the Special Victim Counsel program. Witnesses who had been assigned special victim counsel told the Panel that their special victim counsel were critical to their ability to understand the process and participate effectively as witnesses against their accuser.
- Congress authorized $25 million to the Department of Defense in the FY14 NDAA to assist the Services with the cost of implementation, staffing, and operations for their individual Special Victim Counsel programs. However, the Services anticipate significant operating costs and increased staffing requirements to sustain effective Special Victim Counsel programs.

RSP Recommendation 50: The Service Secretaries establish and disseminate collaborative methods for special victim counsel between and among the Services, including an inter-Service website where special victim counsel may access resources and training materials, and receive training on best practices including the provision of advice and resources to sexual assault victims for issues related to negative personnel actions encountered as a result of being a victim or seeking treatment.

- While the Air Force and Army have created special victim counsel training courses, the Special Victim Counsel program is still a relatively new program and even the most experienced special victim counsel has limited experience as an advocate for victim rights. Further, because the program is in its infancy, limited case law exists to guide special victim counsel in their practice.
- The fear of damage to one's military career deters victims from reporting a sexual assault, and victims may seek guidance from special victim counsel regarding career implications for seeking treatment or reporting a sexual assault.

Assess Special Victim Counsel

RSP Recommendation 51: The Service Secretaries develop a standard evaluation mechanism in consultation with an independent evaluator with appropriate metrics to determine the effectiveness of the Special Victim Counsel program in each Service on an annual basis. This includes annually evaluating the effectiveness of the organizational structure of the Service Special Victim Counsel programs and assessing the individual Service policies on eligibility requirements for obtaining a special victim counsel.

- The Services currently do not have a standard evaluation of effectiveness for the Special Victim Counsel program.

RSP Recommendation 52: The Secretary of Defense establish an inter-Service working group to assess the practices of all Service Special Victim Counsel programs. The inter-Service working group should discuss, deliberate, and decide upon the best practices being utilized by all the Services. The working group should then ensure each Service implements the best practices of the Special Victim Counsel programs. The working group should consist of, at a minimum, the Special Victim Counsel program heads from each Service. The first meeting should occur within twelve months from the date of this report. Thereafter, the working group should meet at least annually.

- On August 14, 2013, the Secretary of Defense directed the Service Secretaries to establish a special victim's advocacy program best suited for the individual Service. Furthermore, he directed the Services to determine their own best practices and periodically share those practices with the other Services. No standards or requirements have been established outlining how and when these best practices should be shared.
- The Special Victim Counsel program managers of the respective Special Victim Counsel programs regularly reach out to one another via email and telephone to communicate special victim counsel issues and exchange lessons learned/best practices generated by their respective Services. On a more formal basis, the Special Victim Counsel program managers meet monthly to discuss a variety of Special Victim Counsel program issues.

Victim Rights

RSP Recommendation 53: The Secretary of Defense clarify that victims have legal standing to enforce their rights listed in Article 6b of the UCMJ at any relevant time in the proceedings, including before, during, and after trial.

- The FY14 NDAA did not address legal standing and did not specify enforcement mechanisms for the rights of victims set forth in Article 6b of the UCMJ. It instead requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe appropriate regulations to implement mechanisms to ensure enforcement of the rights.
- The Crime Victims' Rights Act (CVRA) expressly provides legal standing for victims to assert their rights in district court, which will then immediately decide any motion asserting a victim's right.
- The CVRA expressly provides for an expedited review of any trial court decision on a victim's right. The CVRA allows a victim to petition the court of appeals for a writ of mandamus and the appellate court shall review the issue within seventy-two hours of the filing of the petition.

RSP Recommendation 54-A: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations that provide victims a right to be heard regarding a pretrial agreement.

RSP Recommendation 54-B: The proposed changes provide victims the right to be heard by the convening authority regarding a plea, with appropriate consideration to account for military pretrial agreement practice.

RSP Recommendation 54-C: The recommended changes ensure the right to be heard before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement offer submitted by an accused. The convening authority should retain discretion to determine the best means to comply with this right and consider the victim's opinion (e.g., submission in writing, in person).

- The FY14 NDAA extended most of the rights afforded to civilian crime victims under the CVRA to crime victims under the military justice system by adding these rights into the UCMJ as Article 6b, except the right to be reasonably heard on the plea.
- Neither Article 6b nor DoD policy includes the victim's right to be reasonably heard on the plea before the accused and the convening authority come to an agreement.
- The military justice system handles pretrial agreements differently than civilian court proceedings, so opportunities in military and civilian systems to provide for a victim's right to be heard on the plea may not be analogous.
- The opportunity for victim input in the military justice system is before the convening authority decides to accept, reject, or propose a counter offer to a pretrial agreement submitted by an accused.

RSP Recommendation 55: The Secretary of Defense direct the creation and implementation of mechanisms, where not currently in place, requiring trial counsel to convey the victim's specific concerns and preferences to the convening authority regarding case disposition. These procedures will take into account the convening authority's role in the disposition of cases under the military justice system and create a process more analogous to a victim's right to confer with a prosecutor under the Crime Victims' Rights Act.

- The right to confer with the attorney for the government under the CVRA is not directly analogous to the right to confer with trial counsel under the military justice system since the convening authority, not the trial counsel, makes decisions on how to dispose of cases under the UCMJ.
- DoD policy, the CVRA, and the newly enacted Article 6b provide a crime victim the right to confer with the attorney for the government in the case.
- In the military justice system, a victim may confer with trial counsel on matters such as whether to pursue court-martial, nonjudicial punishment or administrative action in the case. If pursuing courts-martial, a victim may confer with the trial counsel regarding what level of court-martial may be appropriate for the particular charges.

RSP Recommendation 56: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to provide victims the right to make an unsworn victim impact statement, not subject to cross examination during the presentencing proceeding, with the following safeguards:

- The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;
- The substance of the unsworn statement, including all material facts, should be in writing, available to the defense counsel before sentencing and be subject to the same objections available to the government regarding the accused's unsworn statement; and
- If there is "new matter" that could affect the sentence brought up in the victim's unsworn statement, a military judge may take appropriate corrective action.

- The CVRA includes the opportunity for a victim to be reasonably heard at sentencing by allowing him or her to make a statement that is neither under oath nor subject to cross-examination.
- Under military rules, in the sentencing proceeding a sexual assault victim may present evidence of financial, social, psychological, and medical impact of an offense the accused committed.
- Military procedural rules covering the court-martial sentencing proceeding require the victim and other witnesses—except the accused—to appear and testify under oath, subject to the rules of evidence and defense cross-examination. Unless there is an agreement from the defense, the victim must testify under oath, and is subject to cross-examination.

RSP Recommendation 57: The Service Secretaries ensure trial counsel comply with their obligations to afford military crime victims the rights set forth in Article 6b of the UCMJ and DoD policy by, in cases tried by courts-martial, requiring military judges to inquire, on the record, whether trial counsel complied with statutory and policy requirements.

- Congress and the Services have established various points in the judicial process where military crime victims have the right to confer or consult with trial counsel. These requirements mirror the discussions civilian prosecutors routinely engage in with victims in sexual assault cases. In some civilian jurisdictions, the trial judge asks the prosecutor, on the record, if he or she has conferred with the victim and to present the victim's opinions to the court, even if the victim's opinions diverge from the government's position.

RSP Recommendation 58: The Secretary of Defense recommend to the President changes to the Manual for Courts-Martial and prescribe appropriate regulations to ensure that military investigators, prosecutors and other DoD military and civilian employees engaged in the detection, investigation, or prosecution of crime use their best efforts to notify and accord victims the rights specified in Article 6b of the UCMJ.

- The CVRA requires prosecutors and investigators to use their "best efforts" to see that crime victims are notified of, and accorded, the rights under the CVRA. The court is responsible for ensuring that crime victims are afforded the rights guaranteed under the CVRA.
- The FY14 NDAA did not place a similar requirement on military investigators, prosecutors, or military courts to ensure that crime victims in military proceedings have been afforded the rights specified in Article 6b of the UCMJ. Instead, the FY14 NDAA requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial to the President and to prescribe appropriate

regulations to implement mechanisms for ensuring that victims are notified of and accorded their rights.

RSP Recommendation 59: The Secretary of Defense assess the effectiveness of the processes to receive and investigate complaints relating to violations of or failures by military and civilian employees of all the Services to provide the rights guaranteed by Article 6b, UCMJ, and to determine whether a more uniform process is needed.

- To promote compliance, the CVRA directed the U.S. Attorney General to establish regulations that designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of crime victim's rights. The Department of Justice established the Office of the Victims' Rights Ombudsman to receive and investigate complaints filed by crime victims against its employees.
- The FY14 NDAA requires the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a Service in the Navy) to designate an authority within each Service to receive and investigate complaints relating to the provision or violation of such rights.
- Designation of a separate authority within each Service to receive and investigate complaints could result in disparate procedures, rules, and standards for making and investigating complaints.

Reporting

RSP Recommendation 60: The Secretary of Defense direct an expedited study of what constitutes low-level collateral misconduct in sexual assault cases and examine whether a procedure for granting limited immunity should be implemented in the future.

- Military sexual assault victims may anticipate they will face negative consequences for collateral misconduct such as underage drinking, fraternization, disobeying orders, and other military-specific offenses.
- Collateral misconduct by the victim of a sexual assault is a significant barrier to reporting because of the victim's fear of punishment.
- Under current DoD policy, commanders can defer action on victims' collateral misconduct until final disposition of the case, if appropriate, so as to encourage reporting of sexual assault and continued victim cooperation.
- The Services do not support a military-level immunity policy for victims who may have committed some collateral misconduct. The Services assert that granting blanket immunity could undermine discipline and increase challenges to the credibility of victims and the veracity of victim reports.

RSP Recommendation 61: The Secretary of Defense develop and implement policy and regulations such that sexual assault victims have the right and ability to consult with a special victim counsel before deciding whether to make a restricted or unrestricted report, or no report at all. Communication made during this consultation would be confidential and protected under the attorney-client privilege.

RSP Recommendation 62: The Secretary of Defense develop and implement policy that, when information comes to military police about an instance of sexual assault by whatever means, the first step in an investigation is to advise the victim that she or he has the right to speak with a special victim counsel before determining whether to file a restricted or unrestricted report, or no report at all.

- To be eligible for special victim counsel representation, an adult victim of sexual assault must make an unrestricted or restricted report of sexual assault under the UCMJ and otherwise be entitled to legal assistance under 10 U.S.C. § 1044e. It is not clear whether a victim of sexual assault would know that he or she may seek the advice of a special victim counsel before reporting or electing not to report.

RSP Recommendation 63: The Secretary of Defense direct DoD SAPRO, in coordination with the Services and the DoD Inspector General, to change restricted reporting policy to allow a victim who has made a restricted report to provide information to a military criminal investigative organization agent, but only when a victim advocate and/or special victim counsel is present, without the report automatically becoming unrestricted and triggering a law enforcement investigation. This should be a voluntary decision on the part of the victim. The policy should prohibit military criminal investigative organizations from using information obtained in this manner to initiate an investigation or title an alleged offender as a subject, unless the victim chooses, or changes, his or her preference to an unrestricted report. The Secretary of Defense should require this information be provided the same safeguards as other criminal intelligence data to protect against misuse of the information.

- Under current DoD policy, a victim who makes a restricted report of sexual assault cannot provide information to a military criminal investigative organizations (MCIO) investigator without the report becoming unrestricted.
- Some civilian police agencies allow a police officer or detective to speak to a sexual assault victim without automatically triggering an investigation.

RSP Recommendation 64: The Secretary of Defense implement policy that protects victims of sexual assault in the military from suffering damage to their military careers (including but not limited to weakened performance evaluations or lost promotions, security clearances, or personnel reliability certifications) based on having been a victim of sexual assault, having reported sexual assault, or having sought mental health treatment for sexual assault.

- Fear of damage to one's military career deters victims from reporting a sexual assault. Victims specifically noted concerns that mental health counseling may negatively impact their careers.

RSP Recommendation 65: The Secretary of Defense 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.

- 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. Reporting channels are 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.
- 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, which is incorrect.
- Under current law and practice, unrestricted reports of sexual assault must be referred to, and investigated by, MCIO that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation to the MCIO or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.

Reporting Data

RSP Recommendation 66: The Secretary of Defense direct that adult unwanted sexual contact reports handled by the Family Advocacy Program and recorded in its database be included in the annual DoD SAPRO report of adult unwanted sexual contact cases.

- DoD initiated the Family Advocacy Program (FAP) over twenty years ago to support military families and to provide services for victims of domestic violence and child abuse. Domestic violence victims who are also victims of sexual assault are treated and supported by the FAP.
- These incidents are recorded in the separate database used by the FAP, and not in the DSAID, which was developed to track sexual assaults. Thus, sexual assault reports that are part of domestic violence cases are not included in DoD SAPRO's annual report of adult unwanted sexual contact cases.

RSP Recommendation 67: The Secretary of Defense direct DoD SAPRO to develop policy and procedures for sexual assault response coordinators to input information into the Defense Sexual Assault Incident Database on alleged sexual assault offenders identified by those victims who opt to make restricted reports. These policies should include procedures on whether to reveal the alleged offender's personally identifying information to the military criminal investigative organization when there is credible information the offender is identified or suspected in another sexual assault, providing safeguards for that personally identifiable information.

- DoD does not currently input data on alleged offenders identified through restricted reports into DSAID, its sexual assault case management database, because current policy prohibits collecting and storing that information. DSAID has the capability to obtain information from restricted reports that could be used to identify allegations against repeat offenders.

Victim Services

RSP Recommendation 68: The Secretary of Defense direct DoD SAPRO to develop and implement a process to provide the installation commander, the first O-6 and first general or flag officer in the victim's chain of command with information on status and services provided to victims filing restricted reports of sexual assault within eight days of a report. When restricted reports are made, DoD SAPRO should work with the Services to ensure adequate measures are in place to protect the identity of the victim while providing sufficient information to track the victim's care.

- DoD policy requires the sexual assault response coordinator (SARC) to inform the installation commander within 24 hours of either a restricted or unrestricted report of sexual assault being filed.
- Section 1743 of the FY14 NDAA enhanced this requirement by directing the Secretary of Defense to establish a policy requiring a written incident report that details the actions taken and services offered or provided to the victim to the installation commander, if any, the first general officer, and first officer in the grade of O-6 in the chains of command of the victim and the alleged offender within eight days of a Service member filing an unrestricted sexual assault report.
- Because the FY14 NDAA does not include the same requirement for restricted reports, senior officers within the chain of command and on an installation are not provided with follow-up information on whether a victim filing a restricted report is receiving assistance and necessary support.

RSP Recommendation 69: Service Secretaries create a means by which sexual assault victims who file a restricted report may request an expedited transfer without having to make their report unrestricted.

- There is currently no mechanism that permits a sexual assault victim to maintain his or her restricted report and request an expedited transfer.
- DoD policy does not permit victims who file a restricted report of a sexual assault to request a temporary or permanent expedited transfer from their assigned command or installation, or to a different location within their assigned duty or living location.
- If the commander knows of or learns about a sexual assault, the report becomes unrestricted, even if the victim filed or intended to file a restricted report. The commander must immediately notify the MCIO and an investigation must be opened.
- By nature of their duties, a request for a transfer on behalf of another Service member from a SARC or SAPR victim advocate provides the commander with the information that a sexual assault has taken place and the identity of the victim. Under current policy, the commander will be obligated to start an investigation, even if the victim intended the report to stay restricted.

RSP Recommendation 70: Training for medical personnel, sexual assault response coordinators, and victim advocates, include the options that a commander has available to make or affect transfers when an unrestricted report is made.

- Commanders have inherent flexibility to transfer Service members or place them on limited duty status due to medical conditions. Current DoD policy allows health care personnel to convey to the victim's unit commander any possible adverse duty impact related to the victim's medical condition and prognosis, even when the sexual assault report is restricted. Under this policy, confidential communication related to the sexual assault may not be disclosed to the commander.
- Options for proposing and arranging a transfer of a victim who files an unrestricted report were not well known among medical personnel, SARCs, or victim advocates who met with Panel representatives.

RSP Recommendation 71-A: The Service Secretaries set forth clear guidance that the DoD Safe Helpline is the single military 24/7 sexual assault crisis hotline for Service members.

RSP Recommendation 71-B: The DoD Safe Helpline establish an easily remembered number similar to its website name of SafeHelpline.org.

RSP Recommendation 71-C: DoD require the Services to provide the Safe Helpline with sufficient contact information at each installation or deployed location so that local victim service providers can be reached on a 24/7 basis.

- DoD contracted with the Rape, Abuse, and Incest National Network (RAINN) to develop and staff a 24-hour secure and anonymous phone line for military sexual assault victims.
- Military installations advertise the Safe Helpline as a hotline phone number, but some also advertise their own installation numbers, which are not always answered 24 hours a day, 7 days a week and instead may require the caller to leave a message.
- Contact information provided to the Safe Helpline is not always adequate or accurate to ensure that every caller can be connected upon request to local victim service personnel (e.g., an installation's SARC or victim advocate) by the Safe Helpline staff.

RSP Recommendation 72: The Service Secretaries evaluate the availability of, and access to, adequate and consistent mental healthcare for victims of sexual assault, and the option of incorporating counselors into the Sexual Assault Prevention and Response program in a manner similar to the integration in the Family Advocacy Program.

- Despite the variety of mental health professionals who work with military Service members, sexual assault victims who appeared before the Panel described having difficulty obtaining timely mental health appointments and difficulty receiving consistent care from mental health providers.

RSP Recommendation 73: The Service Secretaries 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.

Victim Services Personnel

RSP Recommendation 74: The Secretary of Defense direct DoD SAPRO to determine necessary victim advocate staffing for each Service and appropriate caseload for each victim advocate to ensure that victim advocates become and remain proficient in their duties. Victim advocate duties should include partnering with or observing other professionals who provide victim services (including community providers) or other experiential work to gain further practical skills and confidence while awaiting assignment to a case.

- There are currently more than 20,000 trained and certified SARCs and victim advocates across the Services. Some part-time, uniformed SAPR victim advocates may not ever serve a victim because they are assigned to units in which there are few or no reports of sexual assault.
- It is difficult for victim advocates who do not regularly assist victims of sexual assault to develop or maintain proficiency in providing victim support.

RSP Recommendation 75: The Secretary of Defense direct that the periodic evaluations of training provided for Services' sexual assault response coordinators and victim advocates be conducted and include an assessment as to whether the training and curriculum across the Services is uniform, is effective, and reflects all existing initiatives, programs, and policies.

- In the Fiscal Year 2012 NDAA, Congress emphasized the importance of SARC and victim advocate training by codifying a requirement for the Secretary of Defense to establish a professional and uniform training and certification program for SARCs and victim advocates.
- DoD SAPRO conducted an initial evaluation of each of the Services' SARC and victim advocate training sessions in 2012. These evaluations, while providing useful information about the Services' training programs, did not use consistent criteria for evaluation across the Services; DoD SAPRO did not assess the uniformity of the programs across the Services.

Assess Sexual Assault Prevention and Response

RSP Recommendation 76: The Secretary of Defense establish an advisory panel, comprised of persons external to the DoD, 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.

RSP Recommendation 77: The Secretary of Defense direct DoD SAPRO to evaluate and assess all programs and initiatives dealing with sexual assault and measure the effectiveness of each to determine which programs and initiatives are effective, which should be continued, expanded, and preserved, and how best to allocate funding for the effective programs and initiatives.

- Over the last five years, Congress mandated and DoD initiated dozens of additions and changes to victim service programs, many in such quick succession that SAPR personnel had to begin implementing new initiatives before fully implementing previously required programs.
- Due to the speed with which programs and initiatives have been adopted, DoD has not thoroughly assessed and evaluated all current programs to determine their effectiveness or which should be continued, expanded or are duplicative of other programs.

RSP Recommendation 78: The Secretary of Defense direct periodic and regular evaluations of individual DoD, Service, or local Sexual Assault Prevention and Response 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 Sexual Assault Prevention and Response programs and initiatives.

- External evaluation of institutional and installation command climate is important to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness.

RSP Recommendation 79: The Secretary of Defense direct DoD SAPRO or the DoD Inspector General to assess the roles and responsibilities of sexual assault response coordinator, victim advocate, victim witness liaison, and Family Advocacy Program personnel, to ensure advocacy personnel are effectively utilized, their roles are properly delineated to allow for excellence; overlap is minimized; that sufficient positions are designated and to determine whether their roles should be modified, and whether all current victim assistance related programs should be sustained in this resource constrained environment.

- In 2013, DoD issued Instruction 6400.07, *Standards for Victim Assistance Services in the Military Community*, based on standards established by the National Victim Assistance Standards Consortium.
- The purpose of DoD Instruction 6400.07 was to establish a baseline of service standards for the victim services provided under the SAPR program, FAP, Victim and Witness Assistance Program (VWAP), and the Military Equal Opportunity program, and to ensure that uniform, quality victim assistance services are provided across the Services.
- Each of these programs was established independently and at different times and with somewhat differing constituents. However, there are no additional policies or requirements outside of this instruction that require identifying gaps or redundancies in victim services.

IV. ENSURING FAIRNESS AND DUE PROCESS TO THOSE SUSPECTED OR ACCUSED OF SEXUAL ASSAULT

Unlawful Command Influence

RSP Recommendation 80: The Secretary of Defense and Service Secretaries ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure sexual assault prevention and response training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and disposition, and access to witnesses or evidence. Judge advocates with knowledge and expertise in criminal law should review sexual assault prevention training materials to ensure the materials neither taint potential panel members (military jurors) nor present inaccurate legal information.

- In addition to protecting Service members from sexual assault and responding appropriately to incidents when they occur, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.

- Evidence presented to the Panel indicates it is increasingly difficult to seat military panel members in sexual assault cases because of their exposure to sexual assault prevention programs that lead some prospective panel members to draw erroneous legal conclusions, such as the idea that consuming one alcoholic drink makes consent impossible.

Defense Investigators

RSP Recommendation 81: The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.

- Many civilian public defender offices have investigators on their staffs, and consider them critical. Military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel stated both convening authorities and military judges routinely deny the requests.
- Military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources.

Military Defense Counsel Training, Funding, and Personnel

RSP Recommendation 82: The Service Secretaries ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience comparable to their prosecution counterparts, and direct the Services assess whether that is the case.

- Maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system.
- Unlike many civilian public defender offices, military defense counsel organizations generally do not maintain their own budget; instead, they receive funding from the convening authority, their Service legal commands, or other sources.

RSP Recommendation 83: The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps review military defense counsel training for adult sexual assault cases to ensure funding of defense training opportunities is on par with that of trial counsel.

- Some defense counsel told the Panel and the Comparative Systems Subcommittee that because they do not have independent budgets, their training opportunities were insufficient and unequal to those of their trial counsel counterparts.

RSP Recommendation 84: The Service Secretaries direct that current training efforts and programs be sustained to ensure that military defense counsel are competent, prepared, and equipped.

- Defense counsel handling adult sexual assault cases in all the Services receive specialized training. Many also have previous experience as trial counsel.

RSP Recommendation 85: The Services continue to provide experienced defense counsel through regional defense organizations and from personnel with extensive trial experience and expertise in the Reserve component.

- DoD did not establish defense capabilities analogous to the Special Victim Capability in the military trial defense organizations.
- Neither civilian public defenders nor military defense counsel specialize in sexual assault cases; instead both attempt to use the most experienced attorneys to try more complex cases, including sexual assaults. The Services' regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault.

RSP Recommendation 86: The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps permit only counsel with litigation experience to serve as lead counsel defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel.

- It is difficult to develop defense experience due to the relatively low number of courts-martial and personnel turnover. The Marine Corps faces particular problems with personnel turnover because their attorneys perform line duty mission requirements and may serve in defense counsel tour lengths as short as 12 months.
- Not all military defense counsel possess trial experience prior to assuming the role of defense counsel.

Assess Defending Service Members Accused of Sexual Assault

RSP Recommendation 87: The Secretary of Defense direct the Services to assess military defense counsels' performance in sexual assault cases similar to performance assessment of prosecutors and identify areas that may need improvement.

- In contrast to assessment of the performance of prosecutors, there are currently no requirements or pending initiatives for the Services to measure military defense counsel performance trying sexual assault cases.

V. IMPROVING MILITARY JUSTICE PROCEDURES

Standardize Procedures for the Investigation of Reports of Sexual Assault

RSP Recommendation 88: The Secretary of Defense direct the standardization of procedures regarding the requirement for military criminal investigative organization investigators to advise victim and witness Service members of their rights under Article 31(b) of the UCMJ for minor misconduct uncovered during the investigation of a felony to ensure there is a clear process that complies with law, throughout the Services.

- Most civilian police agencies contacted during the Panel's review reported they did not routinely pursue action for minor criminal behavior on the part of victims reporting sexual assault. They do not interrupt victim interviews to advise victims of their rights for minor offenses.
- MCIO investigators reported that stopping an interview to advise a victim of his or her rights under Article 31(b) of the UCMJ for minor misconduct that is collateral to the alleged sexual assault can make the victim reluctant to continue the interview and may hinder investigation of a reported sexual assault.
- MCIOs document minor collateral misconduct information in the case file, which is provided to the victim's commander for action, but they do not follow the same practices regarding the legal requirement to stop and advise Service members of their Article 31 rights during an interview. Naval Criminal Investigative Service (NCIS) investigators told Panel members that NCIS has an unwritten policy that investigators will not read Article 31(b) rights to victims for minor collateral misconduct, regardless of the law's requirements, because NCIS only investigates felony level crimes.

RSP Recommendation 89: The Secretary of Defense direct the commanders and directors of the military criminal investigative organizations to authorize the utilization of Marine Corps Criminal Investigation Division, military police investigators, or security forces investigators to assist in the investigation of some non-penetrative sexual assault cases under the direct supervision of a special victim unit investigator to retain oversight.

- Unlike patrol officers in many civilian jurisdictions, military police have no discretion regarding the handling of sexual assault reports. They must immediately report all incidents of sexual assault to the MCIO, which assigns cases to investigators who meet specified training requirements.
- DoD policy now requires assignment of specially trained and selected MCIO investigators as the lead investigators for all sexual assault cases, which has substantially increased MCIO case loads. The policy precludes assignment of Marine Corps Criminal Investigation Division investigators, military police investigators, or security forces investigators to sexual assault investigations.

RSP Recommendation 90: The Secretary of Defense direct commanders and directors of the military criminal investigative organizations to require special victim investigators not assigned to a dedicated special victim unit coordinate with a senior special victim unit agent on all sexual assault cases.

- Large civilian police agencies and MCIOs have special victim units (SVUs) comprised of specially trained investigators who are experienced in responding to sexual assaults. Smaller agencies and offices without an SVU often have a specially trained detective to investigate sexual assaults, and they coordinate with larger offices for assistance and guidance.
- Investigators located at smaller installations are often not dedicated SVU investigators specializing in sexual assault, and there is currently no requirement for these agents to coordinate with a dedicated SVU investigator supporting the Special Victim Capability.

RSP Recommendation 91: The Secretary of Defense direct a review of the Services' procedures for approving military criminal investigative organizations agent requests to conduct timely pretext phone calls and text messages and establish a standardized procedure to facilitate and expedite military criminal investigative organizations' use of this investigative technique, in accordance with law.

- Pretext phone calls and texts are an important investigative technique commonly used to corroborate victim complaints and obtain incriminating or exculpatory statements by suspects.
- Civilian detectives indicated they have no difficulty obtaining permission for pretext calls and texts. In contrast, the Services have different procedures to approve recorded pretext phone calls and text messages, based on differing interpretations of legal standards. Some military procedures can require several days to obtain approval.

RSP Recommendation 92: The Secretary of Defense direct the appropriate agency to eliminate the requirement to collect plucked hair samples as part of a sexual assault forensic examination.

- Military and civilian laboratory examiners and medical forensic examiners told Panel members that the taking of plucked hairs was of little probative value.

RSP Recommendation 93: The Secretary of Defense direct the Service Secretaries to standardize the process for determining a case is unfounded. The decision to unfound reports should apply the Uniform Crime Reporting Program standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.

- While various definitions used within DoD for unfounding decisions conceptually meet the same intent as the "false or baseless" definition by the UCR Program, the Services apply the term inconsistently or use additional or different definitions.
- In the Army, commanders do not determine whether to unfound cases because Army CID makes the decisions after coordinating with the trial counsel based on a probable cause standard. However, in the Air Force, the Navy, and the Coast Guard, commanders make unfounding determinations, not the MCIOs.
- The Army follows a different procedure than the other Services. Army trial counsel provide an opinion on whether there is probable cause the suspect committed the offense to the investigating agent prior to presenting a case to the commander for a disposition decision. The trial counsel's opinion as to probable cause is reflected in the case file. In Fiscal Year 2012, the trial counsel, acting in coordination with the Army Criminal Investigation Command, determined that 25% of the cases

involving sexual assault allegations, 118 out of 476 cases, lacked probable cause and the cases were closed. In contrast, the other Services' MCIOs present all cases to the commanders who consult with the supporting trial counsel to determine the appropriate disposition of each case.

RSP Recommendation 94-A: The Secretary of Defense direct military criminal investigative organizations to standardize their procedures to require that military criminal investigative organization investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file, that the trial counsel agrees all appropriate investigation has taken place, before providing a report to the appropriate commander for a disposition decision. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists.

RSP Recommendation 94-B: To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the military criminal investigative organization commanders and directors continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until final disposition of the case.

- Some trial counsel reported that MCIOs are not always responsive to their specific investigative requests and MCIOs do not always coordinate completed investigations with senior trial counsel prior to issuing their final reports.

Audit Investigations

RSP Recommendation 95: The Secretary of Defense direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits.

- External agencies conducted audits of closed case files at several police departments to assess transparency and ensure confidence in the police response to sexual assault.
- The DoD Inspector General provides oversight of sexual assault training within the DoD investigative community, but there is currently no procedure for an entity outside DoD to review sexual assault investigations to ensure cases are appropriately investigated and classified.

Sustain and Fund Forensic and Investigative Capabilities

RSP Recommendation 96: The Secretary of Defense direct military criminal investigative organization commanders and directors to carefully select and train military investigators assigned as investigators for special victim units, and whenever possible, utilize civilians for specialized investigative oversight to maximize continuity and expertise. Military criminal investigation organization commanders and directors ensure that military personnel assigned to a special victim unit have the competence and commitment to investigate sexual assault cases.

- A best practice in civilian investigative agencies with SVUs is careful interview and selection of applicants to ensure those investigators with biases or a lack of interest in investigating sexual assault cases are not assigned, as well as reassigning those who experience "burn out."

- A best practice in the military is the assignment of civilian investigators to supervise the SVU enhancing the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.
- Based on military mission requirements and the resulting need for flexibility in personnel assignments, a military Service member agent may be assigned to support an SVU or act as the lead agent on a sexual assault investigation.
- Both military and civilian agencies recognize the possibility of potential biases or factually inaccurate perceptions of victim behavior in their officers and investigators.

RSP Recommendation 97: The Secretary of Defense direct commanders and directors of the military criminal investigative organizations to continue training of all levels of law enforcement personnel on potential biases and inaccurate perceptions of victim behavior. The Secretary of Defense direct the military criminal investigation organizations to also train investigators against the use of language that inaccurately or inappropriately implies consent of the victim in reports.

- Military investigators have more robust and specialized sexual assault investigation training than their civilian counterparts. The Services require investigators assigned to SVUs to have advanced training, but the courses vary in content and emphasis.
- A best practice in military and civilian agencies is to provide training to address potential biases and inaccurate perceptions of victim behavior, preparing officers and investigators to effectively respond to and investigate sexual assault.
- In both civilian and military law enforcement communities, bias in the terms used in documenting sexual assaults sometimes inappropriately or inaccurately implies consent of the victim.

RSP Recommendation 98: Congress appropriate funds for training of sexual assault investigation personnel. The Secretary of Defense direct the Service Secretaries to program and budget funding, as allowed by law, for the military criminal investigative organizations to provide advanced training on sexual assault investigations to special victim unit investigators.

- The MCIOs face a continual challenge to ensure adequate funding is available to send investigators to advanced sexual assault investigation training courses.

RSP Recommendation 99: The Service Secretaries direct their Surgeons General to: (1) review Section 1725 of the National Defense Authorization Act for Fiscal Year 2014, which requires the assignment of at least one full-time sexual assault nurse examiner to each military medical facility with a 24 hour, seven days a week emergency room, and (2) provide recommendations to amend the legislation so as to permit the most effective way to provide sexual assault forensic examinations at their facilities, given that many civilian medical facilities have more experienced forensic examiners than are typically located on a military installation and those facilities serve as the community's center of excellence for sexual assault forensic examinations.

- In civilian jurisdictions, specially trained nurses or other trained health care providers perform sexual assault forensic examinations (SAFEs). Not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim's hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

- The FY14 NDAA requirement that all military treatment facilities with a 24 hour, seven days a week emergency room capability maintain a sexual assault nurse examiner (SANE), is overly prescriptive. Depending on the location, many civilian medical facilities serve as the community's center of excellence for SAFEs and have more experienced SANEs than are typically available on a military installation.

RSP Recommendation 100: The Secretary of Defense exempt DNA and other examiners at the Defense Forensic Science Center, as well as other critical civilian members of the criminal investigative process, from future furloughs, to the extent allowed by law.

- DNA and other examiners at the Defense Forensic Science Center/United States Army Criminal Investigation Laboratory (DFSC/USACIL) were not exempted from Federal government furloughs in 2013, which resulted in delays processing evidence and increased DNA processing times.

Train Sexual Assault Forensic Examiners

RSP Recommendation 101: The Secretary of Defense direct the Services to create a working group to coordinate the Services' efforts, leverage expertise, and consider whether a joint forensic exam course open to all military and DoD practitioners, perhaps at the Joint Medical Education and Training Center, or portable forensic training and jointly designed refresher courses would help to ensure a robust baseline of common training across all Services.

- The Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities; however, the Services instituted different programs and developed guidelines independently.

Special Victim Capability in Sexual Assault Cases

RSP Recommendation 102: The Secretary of Defense maintain the requirement for an investigator to notify the prosecution section of the staff judge advocate's legal office of an unrestricted sexual assault report within 24 hours, and for the special victim prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Establish milestones to insert the prosecutor into the investigative process early and to ensure that the special victim prosecutor contacts the victim or the victim's counsel as soon as possible after an unrestricted report.

- When prosecutors become involved in sexual assault cases early, including meeting with the victim, victims are more likely to cooperate in the investigation and prosecution of the alleged offender.
- Military special prosecutors are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. DoD established timelines to ensure military prosecutors' early involvement in sexual assault investigations. MCIOs inform the legal office within 24 hours of learning of a report, and the special prosecutor coordinates with the investigator within 48 hours. There is no current requirement for the prosecutor to meet with the victim as soon as possible.

RSP Recommendation 103: The Secretary of Defense direct that the Directive-Type Memorandum 14-003, the policy document that addresses the Special Victim Capability, be revised so that definitions of "covered offenses" accurately reflect specific offenses listed in the relevant version(s) of Article 120 of the UCMJ.

- Using definitions from the UCMJ will clarify responsibilities and improve resource allocation. The generic terms in the Directive-Type Memorandum could be interpreted to exclude some current sex-related offenses, including rape, or include conduct that is not a specific offense in the UCMJ, such as domestic violence.

RSP Recommendation 104: The Secretary of Defense and Service Secretaries develop policy that does not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special victim prosecutors to handle every case undermines effective prevention, investigation, and prosecution.

Sustain Special Victim Capability

RSP Recommendation 105: The Service Secretaries continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases.

- The Services have implemented the Special Victim Capability Congress mandated in the NDAA for Fiscal Year 2013 and the Panel is optimistic about this approach.

RSP Recommendation 106: The Service Secretaries continue to assess and meet the need for well-trained prosecutors to support the Services' Special Victim Capabilities, especially if there is increased reporting of sexual assaults.

- Experienced civilian advocates serve an important role in training prosecution and defense counsel in the Army, Air Force, Navy, and Marine Corps. Given the attrition and transience of military counsel, civilian involvement in training ensures an enduring base level of experience and continuity, and adds an important perspective. Civilian expert advocate participation also adds transparency and validity to military counsel training programs.
- DoD has dedicated substantial resources to combat sexual assault. DoD did not authorize any additional personnel to the individual Services specifically to meet the requirement for special prosecutors within the Special Victim Capability, although the Services may have obtained additional personnel prior to the Congressional mandate.
- The Services fully fund special prosecutors' case preparation requirements.

RSP Recommendation 107-A: The Secretary of Defense assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses.

RSP Recommendation 107-B: The Service Secretaries direct that each Service's Judge Advocate General Corps and military criminal investigative organizations work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victim prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the Panel does not recommend that the sexual assault response coordinator, victim advocate, special victim counsel or other victim support personnel be merged with the offices of prosecutors and investigators.

- Organizational structures of civilian prosecution offices vary. Some civilian prosecutors specialize in sexual assault cases for their entire careers or rotate through sex crime units specializing for a few years, whereas others do not specialize and handle all felony level crimes. The structure of civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases.
- Consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize additional trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also compromise privileges for military victim advocates or cause other perception problems.

RSP Recommendation 108: The Secretary of Defense require standardization of Special Victim Capability duty titles to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service's organizational structure.

Assess Special Victim Capability

RSP Recommendation 109: The Secretary of Defense assess the Special Victim Capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics such as the victim "drop-out" rate, rather than conviction rates, to determine success.

- DoD established evaluation criteria to ensure expert prosecution of special victim offense cases and appropriate care for victims by Special Victim Capability personnel. The Army also uses the victim "drop out" rate to measure the effectiveness of its Special Victim Prosecutor program. Since the Army established its program in 2009, only 6% of sexual assault victims "dropped out" or were unable to continue to cooperate in the investigation and prosecution of the case. In contrast, in 2011, prior to implementing its specially trained prosecutors program and victims' counsel, the Air Force experienced a 29% victim drop-out rate.

Sustain and Fund Judge Advocate Training

RSP Recommendation 110: The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps sustain or increase training of judge advocates to maintain the expertise necessary to litigate adult sexual assault cases in spite of the turnover created by personnel rotations within the Services' Judge Advocate General Corps.

- There are no national or state minimum training standards or experience for civilian prosecutors handling adult sexual assault crimes. Though each civilian prosecution office has different training practices, most sex crime prosecutor training occurs through supervised experience handling pretrial motions, trials, and appeals.
- Civilian sex crimes prosecutors usually have at least three years of prosecution experience, and often more than five. Experience can also be measured by the number of trials completed, though there is no uniform minimum required number of trials to be assigned adult sexual assault cases. Some prosecutors in medium to large offices have caseloads of at least 50-60 cases, and spend at least two days per week in court.
- All the Services have specially-trained and selected lawyers who serve as lead trial counsel in sexual assault crimes cases. Defense counsel handling adult sexual assault cases in all the Services are also trained; many previously served as trial counsel.

RSP Recommendation 111: The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps sustain and broaden the emphasis on developing and maintaining shared resources, expertise, and experience in prosecuting and defending adult sexual assault crimes.

RSP Recommendation 112: The Secretary of Defense direct the establishment of a DoD judge advocate criminal law joint training working group to optimize sharing of best practices, resources, and expertise for prosecuting and defending adult sexual assault cases. The working group should produce a concise written report, delivered to the Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps at least annually, for the next five calendar years.

The working group should identify best practices, strive to eliminate redundancy, consider consolidated training, consider ways to enhance expertise in litigating sexual assault cases, and monitor training and experience throughout the Services. The working group should review training programs such as: the Army's Special Victim Prosecutor program; the Navy's Military Justice Litigation Career Track program; the Highly Qualified Expert programs used for training in the Army, Navy, and Marine Corps; the Trial Counsel Assistance and Defense Counsel Assistance Programs; the Navy's use of quarterly judicial evaluations of counsel; and any other potential best practices, civilian or military.

- Currently, all Services send attorneys to training courses and the Judge Advocate General schools of the other Services. The Services also informally share resources, personnel, lessons for training, and collaborate on some training. This enables counsel to share successful tactics, strategies, and approaches, but these practices are not formalized and have not led to the clarification of terms and processes that would enhance comparability and efficiency.
- Trial counsel in all the Services generally have more standardized and extensive training than some of their civilian counterparts, but fewer years of prosecution and trial experience. The Services all use a combination of experienced supervising attorneys, systematic sexual assault training, and

smaller caseloads to address experience disparities. Additionally, the Navy has developed the Military Justice Litigation Career Track program for its attorneys.

- Military judges in the Navy prepare quarterly evaluations of counsel's advocacy that are forwarded to the Chief Judge of the Navy for review and shared with the Defense Counsel Assistance Program for use in training plans. The other Services do not similarly measure and assess performance following advanced training.

Military Sexual Assault Statute and Jurisdiction

RSP Recommendation 113: The Judicial Proceedings Panel and Joint Service Committee consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120.

RSP Recommendation 114: Congress not enact Section 3(b) of the Victim's Protection Act of 2014, which requires the convening authority to give "great weight" to a victim's preference where the sexual assault case be tried, in civilian or military court. The Services do not have control over the civilian justice system, and jurisdiction must be based on legal authority, not the victim's personal preferences, so this decision should remain within the discretion of the civilian prosecutor's office and the convening authority.

- Jurisdiction is based on legal authority, not necessarily the victim's preferences.
- Decisions about whether civilian or military authorities will prosecute a case are routinely negotiated in cases of shared jurisdiction. The Panel did not hear of problems with coordination between civilian prosecutors and military legal offices. In fact, the opposite appears to be true. There appears to be significant coordination and cooperation between military and civilian authorities with concurrent jurisdiction.

Article 32 Proceedings

RSP Recommendation 115: The Judicial Proceedings Panel assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers.

- Civilian jurisdictions have differing approaches to victim testimony before trial. In Philadelphia, for example, victims must testify at preliminary hearings with limited exceptions; in Washington State, either party may request to interview material witnesses under oath before trial.
- In Section 1702 of the FY14 NDAA, Congress enacted substantial changes to the Article 32 pretrial investigation, transforming it into a preliminary hearing and establishing that crime victims may not be compelled to testify at the proceeding. This may result in additional requests to depose victims and other witnesses.

RSP Recommendation 116: The Secretary of Defense direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a general court-martial convening authority should not have authority to override an Article 32 investigating officer's recommendation against referral of an investigated charge for trial by court-martial.

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

Study Military Plea Bargaining Process

RSP Recommendation 117: The Judicial Proceedings Panel study whether the military plea bargaining process should be modified.

- In civilian jurisdictions, most plea agreements between the prosecutor and defendant are for an agreed-upon sentence, which the judge accepts or rejects entirely. Some jurisdictions use plea deals that consist of agreements to sentences within a range; the judge then determines the exact sentence within that range.
- In the military justice system, the accused may negotiate a pretrial agreement (plea bargain) with the convening authority, through the staff judge advocate, that places a limit or "cap" on the maximum sentence the accused will serve in exchange for a guilty plea. The sentencing authority does not know the agreed limit prior to adjudging the sentence. The accused gets the benefit of whichever is lower, the adjudged sentence or the cap agreed to with the convening authority.
- Accused Service members plead not guilty in a large majority of military sexual assault cases, possibly due to evidentiary challenges, issues in proving sexual assault charges beyond a reasonable doubt, and the requirement to register as a sex offender if convicted.
- Some civilian defense attorneys are using sex offender risk assessments at various stages of proceedings. Evidence demonstrates that sex offender risk assessments can be used as a tool to help promote rehabilitation and prevent recidivism by identifying appropriate therapy. Defense attorneys sometimes use risk assessments when negotiating a plea bargain with the government.

Study Military Judge's Pre-Referral Role

RSP Recommendation 118: It is the sense of the Panel that military judges should be involved in the military justice process at an earlier stage to better protect the rights of victims and the accused. The Secretary of Defense direct the Military Justice Review Group or Joint Services Committee to evaluate the feasibility and consequences of involving military judges at an earlier stage.

- Civilian judges or magistrates control the proceedings in preliminary matters from the time of indictment or arrest of the defendant, whichever is earlier, while military judges do not usually become involved until a convening authority refers charges to a court-martial which can cause or result in inefficiencies in the process and ineffective or inadequate remedies for the government, accused, and victims.
- Military defense counsel currently submit requests for witnesses, experts, and resources through the trial counsel and staff judge advocate to the convening authority. Depending on Service practice, the trial counsel, as the representative of the convening authority in a court-martial, may determine

whether to grant or deny defense witness requests, other than expert witness requests which require the convening authority's personal decision. Additionally, if the convening authority denies the request, the defense counsel must wait until the case is referred to submit the request to the military judge. No similar practice is found in civilian jurisdictions.

- This practice requires defense counsel to disclose more information to the trial counsel sooner than their civilian counterparts, requiring them to reveal information about defense witnesses and their theory of the case to justify the requests, which may hinder the ability of defense counsel to provide constitutionally effective representation to their clients.
- Military trial counsel request and obtain resources and witnesses without notifying the defense or disclosing a justification and, in most instances, without a specific request for the convening authority's personal decision. This leads to a perception that trial counsel have unlimited access to obtain witnesses and resources and that the process for obtaining witnesses and other evidence is imbalanced in favor of the government.
- In the civilian sector, some public defenders have subpoena power or they request subpoenas through the judge. Military defense counsel do not have subpoena power. In contrast, military trial counsel have nationwide subpoena power with rare judicial oversight.
- Giving military judges an enhanced role in pre-trial proceedings would affect the prosecution of all cases, not only sexual assaults.
- Further study is appropriate to fully assess what positive and negative impacts would result from moving some pretrial or trial responsibilities from convening authorities to military judges.

Training Military Judges

RSP Recommendation 119: The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps continue to fund and expand programs that provide a permanent civilian presence in the training structure for both trial and defense counsel. The Services should continue to leverage experienced military Reservists and civilian attorneys for training, expertise, and experience.

RSP Recommendation 120: The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps continue to fund sufficient training opportunities for military judges and consider more joint and consolidated programs.

Character Evidence of the Accused at Trial

RSP Recommendation 121: Congress should enact Section 3(g) of the Victim's Protection Act of 2014 because it may increase victim confidence. Further changes to the military rules of evidence regarding character evidence are not necessary at this time.

- Civilian and military rules of evidence about introducing character evidence in criminal trials are nearly identical. The rules of evidence in both military and civilian jurisdictions permit relevant character evidence at trial. The military courts have consistently ruled that a Service member's good military character may be admissible during trial as a relevant character trait.

- Section 3(g) of the VPA would modify Military Rule of Evidence 404(a) regarding the character of the accused. The provision prohibits the admission at trial of evidence of general military character to raise reasonable doubt as to the accused's guilt. The proposal permits the admission of evidence of military character at trial when it is relevant to an element of an offense for which the accused has been charged. Therefore, the accused retains the ability to offer military character evidence so long as defense counsel establish a proper basis to demonstrate its relevance to an element of a charged offense.
- The Panel cautions, however, that this change is unlikely to result in significant modification of current trial practice. Military and other character evidence properly remains relevant and admissible at trial as part of the accused's defense under appropriate circumstances, and can, on its own, raise reasonable doubt as to the accused's guilt.

Study Judge-Alone Sentencing

RSP Recommendation 122: The Secretary of Defense direct a study to analyze whether changes should be made to the Manual for Courts-Martial, the UCMJ, and Service regulations, respectively, to make military judges the sole sentencing authority in sexual assault and other cases in the military justice system.

- In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases. There are six states that allow jury sentencing in felony cases. The military retains an option for sentencing by panel members at the accused's request.

Unitary Sentencing

RSP Recommendation 123: The Secretary of Defense recommend amendments to the Manual for Courts-Martial and UCMJ to impose sentences which require the sentencing authority to enumerate the specific sentence awarded for each offense and to impose sentences for multiple offenses consecutively or concurrently to the President and Congress, respectively.

- The military system uses a unitary or aggregate sentence provision for multiple specifications (counts) of conviction. In other words, a sentence is adjudged as a total for all offenses, rather than by specific offense.
- Changes to Article 60 of the UCMJ in the FY14 NDAA restrict the convening authority's ability to set aside or commute findings of guilt, and specifically exclude offenses under Article 120(a) or 120(b), Article 120b, or Article 125 of the UCMJ. Offenders may be convicted on other non-sexual offense charges in addition to being convicted for a sexual offense. Imposing a sentence as a total rather than for each offense of conviction means the convening authority's ability to act on these additional specifications is unclear. It also obscures the punitive consequences of specified offenses and makes accountability for sexual assault difficult to ascertain.

Sentencing Guidelines

RSP Recommendation 124: The Panel does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time.

- There are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President establishes by Executive Order a maximum punishment for each offense. In contrast, the federal system, twenty states, and the District of Columbia use some form of a sentencing guideline system.
- Sentencing guidelines are often complex and may require substantial infrastructure to support them, including sentencing commissions which study, develop, implement and amend the guidelines over time. For instance, to formulate baseline recommendations for federal sentencing guidelines, the United States Sentencing Commission collected and examined data from 100,000 cases that had been sentenced in federal courts—10,000 of which it studied in "great detail." Twenty-four states and the District of Columbia currently have sentencing commissions.
- A proper analysis of sentencing guidelines would require the appropriate time and resources to: (a) gather the data and rationale to support such a recommendation, (b) determine the form the guidelines should take, (c) and assess whether the military should adopt sentencing guidelines in sexual assault or other cases.
- A proper assessment of whether the military should adopt some form of sentencing guidelines in sexual assault or other cases requires in depth study.
- The Panel heard no empirical evidence of whether inappropriate sentencing disparities exist in sexual assault or other courts-martial. After gathering evidence and testimony from federal and state experts in sentencing guidelines, the Panel recognized that a complete study would involve a comprehensive comparison to federal and state sentencing guidelines to determine whether they would be appropriate in the military justice system, and if so, what guideline model to follow.
- There are numerous complicated policy and structural issues to factor into such a decision, including:
  - The overarching goals in current state and federal sentencing guidelines vary based on the method of development, articulated purposes, structure, and application. Some common objectives include reducing sentencing disparities, achieving proportionality in sentencing, and protecting public safety.
  - There are two approaches used in creating sentencing guidelines: (1) a descriptive approach, which is data-driven and used to achieve uniformity, and (2) a prescriptive approach, which is used to promote certain sentences.
  - Different entities oversee sentencing guidelines in the state and federal systems, with some choosing judicial agencies and others choosing legislative agencies.
  - The flexibility of sentencing guidelines varies widely in the states, ranging from mandatory to presumptively applicable to completely discretionary.
  - Additional details include: (1) whether a worksheet or structured form is required, (2) whether the commission regularly reports on guidelines compliance, (3) whether compelling and substantial reasons are required for departures,(4) whether written rationales are required for departures, and (5) whether there is appellate review of defendant or government based challenges related to sentencing guidelines.

  - The actual prison sentences defendants serve in jurisdictions with sentencing guidelines also varies depending on laws affecting parole and other "truth in sentencing" issues.

- The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all special and general courts-martial to the Navy Times on a monthly basis.

Mandatory Minimums

RSP Recommendation 125: Congress not enact further mandatory minimum sentences in sexual assault cases at this time.

- Very few military offenses currently require mandatory minimum sentences. A DoD-directed study of military justice in combat zones recently recommended review of "whether to amend the UCMJ to eliminate the mandatory life sentence for premeditated murder and vest discretion in the court-martial to adjudge an appropriate sentence."
- Mandatory minimum sentences remain controversial. Testimony and other evidence gathered from civilian prosecutors, civilian defense counsel, and victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting.
- Mandatory minimum sentences may decrease the likelihood of resolving cases through guilty pleas, especially if the mandatory minimum sentences are perceived as severe.

Chapter One:
OVERVIEW OF PANEL ASSESSMENT

A. RESPONSE SYSTEMS PANEL STATUTORY CHARTER

Congress directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel ("Response Systems Panel," "RSP," or "Panel") "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 (UCMJ)), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems."[1] The nine-member Panel, established in May 2013, was composed of five Secretary of Defense appointees and one member each appointed by the chairman and ranking members of the Committees on Armed Services of the Senate and House of Representatives.[2] The Honorable Barbara S. Jones (Retired) served as Panel Chair.

Congress tasked the Response Systems Panel to conduct a systemic review and assessment of military response systems to make specific recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of sexual assault related crimes. As part of its review, Congress initially assigned the following duties to the Panel:

1. Using criteria the Panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the Uniform Code of the Military Justice, and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period 2007 through 2011;

2. A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims and the identification of civilian best practices that may be incorporated into any phase of the military system;

3. An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial;

4. An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the federal and state court systems;

5. An assessment and comparison of military court-martial conviction rates with those in the federal and state courts and the reasons for any differences;

6. An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault;

7. An assessment of the strengths and weakness of 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 crime;

8. An assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by Section 3771 of Title 18, United States Code, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2; and

9. Such other matters and materials the Panel considers appropriate.[3]

In the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA), Congress assigned additional duties to the Panel. These included:

1. An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under Chapter 47 of Title 10, United States Code (the Uniform Code of Military Justice), would have on overall reporting and prosecution of sexual assault cases;

2. An assessment regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance under Section 1044e of Title 10, United States Code, as added by Section 1716, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense;

3. An assessment of the feasibility and appropriateness of extending to victims of crimes covered by [the UCMJ] the right afforded a crime victim in civilian criminal legal proceedings under subsection 17 (a)(4) of Section 3771 of Title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section;

4. An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel only for the purposes of identifying individuals who are subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report of sexual assault in those cases in order to facilitate increased prosecutions, particularly of serial offenders;

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

6. 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 for addressing those issues within the Armed Forces. If the

> Panel recommends such a formal statement, the Panel shall provide key elements or principles that should be included in the formal statement.[4]

In addition to the tasks Congress assigned the Panel, on September 4, 2013, the Acting General Counsel of the Department of Defense, on behalf of the Secretary of Defense, requested the Panel "study the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy . . . [and] assess the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates)."[5] Congress initially required the Panel to submit its report and recommendations to the Committees on Armed Services of the Senate and the House of Representatives, through the Secretary of Defense, within eighteen months after the Panel's first public meeting on June 27, 2013. The FY14 NDAA reduced the time allotted to twelve months.

B. METHODOLOGY SUMMARY

The Panel utilized various methods to gather information and gain a comprehensive understanding to inform its findings and recommendations. Appendix D provides a complete description of the Response System Panel's methodology. To complete the Panel's expansive assessment in the time allotted, at the Chair's request, the Secretary of Defense established three subcommittees: Comparative Systems, Role of the Commander, and Victim Services, and assigned each specific objectives in support of the Panel. Four Panel members and additional subject matter experts served on each subcommittee. The subcommittees submitted reports and proposed recommendations to the Panel, which the Panel considered in its own deliberations. The subcommittees' reports to the Panel contain a wealth of information about the topics assigned to each subcommittee and are included as an Annex to the Panel's report.

Overall, the Response Systems Panel held 14 days of public meetings, heard from 154 witnesses, and reviewed thousands of pages of documents. The three subcommittees held 65 additional meetings, heard from 456 additional witnesses, and also received and reviewed thousands of pages of documents. Witnesses provided the Panel and subcommittees a wide variety of perspectives, experiences, and expertise. The Panel especially appreciates the gracious participation of our Allies from Australia, Canada, Israel, and the United Kingdom and the contributions and testimony of sexual assault survivors. In accordance with the Federal Advisory Committee Act,[6] the Panel also received written submissions from members of the public and heard public comments at its meetings. Appendix E provides a complete list of meetings and those who provided testimony to both the Panel and its subcommittees.

In addition to information received from witnesses at Panel and subcommittee meetings, the Panel and its subcommittees gathered information from site visits, requests for information, publicly available documents and studies, legal research, and general research to support their assessments. Panel and subcommittee members visited military installations, crime laboratories, civilian law enforcement, and victim support organizations to consult with personnel involved in military and civilian response systems. The Panel Chair sent letters with more than 150 requests for information to the Secretary of Defense and the Secretaries of the Military Services and received more than 15,000 pages of narrative responses and supporting policies, procedures, data, correspondence, and surveys. The Panel also requested input from eighteen victim advocacy organizations, including organizations specifically addressing military sexual assault. Finally, the Panel researched publicly available information, case law on victims' rights in civilian and military justice systems, and historical trends. Appendix F provides a complete list of sources that are referenced in this report.

Information received and considered by the Panel is available on its website (http://responsesystemspanel.whs.mil/). The Panel wishes to express its gratitude to all presenters and to those who provided information and other assistance as part of this review and assessment.

C. RECENT AND ONGOING LEGISLATIVE AND POLICY INITIATIVES DIRECTED AT SEXUAL ASSAULT PREVENTION AND RESPONSE

Since it directed the development of a uniform sexual assault prevention and response policy in 2005, Congress has adopted many other statutory reforms that shape programs and responses in DoD. Part of the Panel's study focused on Article 120 of the UCMJ, which proscribes the primary sexual violence offenses criminalized by the Code. Congress overhauled Article 120 twice in five years; the most recent version became effective June 28, 2012.[7]

Legislation targeting sexual assault in the military has continued at a fast pace, particularly throughout the last two years and during the pendency of the Panel's assessment. A full list of recent legislative amendments addressing sexual assault prevention and response in the military appears in Appendix G. During the Panel's review, Congress enacted a record 36 sexual assault provisions in the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA)[8] in December 2013. These amendments and their potential impact on particular aspects of sexual assault prevention and response programs in DoD are discussed throughout this report.

Collectively, the 36 sexual assault related provisions included in the FY14 NDAA represent the most comprehensive modification of the military justice system in decades. Some provisions only recently took effect, others will not take effect until later this year. Because these reforms are comprehensive and their impact must be considered in practice, meaningful assessment of the cumulative impact of these changes will take time.

Contemporaneous with Congressional action, DoD has imposed substantial policy requirements to address the issue of sexual assault.[9] For example, DoD released the most recent update to its Sexual Assault Prevention Strategy on May 1, 2014.[10] Other notable recent DoD policies include establishing a special victim unit within each Service in 2012, mandating enhanced training programs for sexual assault prevention,[11] and requiring the Services in 2013 to create special victim counsel programs to represent sexual assault victims. Department of Defense policy requirements and modifications, including their impact on particular aspects of sexual assault prevention and response programs, when possible, are discussed throughout this report.

While recent legislative and policy actions to address military sexual assault have been extensive, lawmakers continue to propose additional measures to modify military sexual assault prevention and response activities. On January 14, 2014, Senator Claire McCaskill (D-MO) filed the Victims Protection Act of 2014 (VPA), which aims to provide additional enhancements to the sexual assault prevention and response activities of the Armed Forces. On March 10, 2014, the Senate unanimously passed the VPA and sent it to the House of Representatives for consideration.[12] The VPA passed the Senate during the same time period that Senator Kirsten Gillibrand (D-NY) sought a vote on the Military Justice Improvement Act of 2013 (MJIA),[13] which would remove commanders from prosecutorial decisions for most major offenses under the UCMJ. The MJIA did not meet the 60-vote threshold required to proceed to a vote, although the proposal was supported by a majority of Senators.[14]

As Congress crafts the next defense authorization bill, additional measures on sexual assault are certainly forthcoming. Both versions of the National Defense Authorization Act for Fiscal Year 2015—as passed by the House of Representatives, and the mark-up conducted by the Senate Armed Services Committee—contain numerous measures attempting to address the issue of sexual assault in the U.S. military.[15]

Chapter Two:

Assessing Sexual Assault in the Military – Defining the Scope of the Problem

Crimes of sexual violence are a national concern. Many of the same factors and barriers to improving sexual assault prevention and response efforts throughout American society persist in the military. There are also unique attributes that affect sexual assault reporting and accessing victim services in the military.

A 2010 study conducted by the Centers for Disease Control and Prevention (CDC) found that nearly 1 in 5 women in the United States and 1 in 71 men are raped during their lives.[16] The numbers, however, do not tell the full story of sexual assault.[17]

The majority of sexual violence victims are young—between the ages of 16 and 24. The CDC reports that 80% of women victims are raped before they turned 25, almost half before they are 18. The college-age population in the United States, a similar age demographic to a large portion of the military, is especially at risk: 1 in 5 women are sexually assaulted while in college.[18]

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.[19] The 2010 CDC study estimated that 40.3% of women in the general population experienced contact sexual violence during their lifetimes, compared to 36.3% of active duty women.[20] When controlled for age and marital status, the differences in results between the two surveys were not statistically significant.[21]

A. BARRIERS TO REPORTING SEXUAL VIOLENCE

Most victims of violent crimes such as robbery or aggravated assault report the crimes to the police. Victims of sexual assault, however, chronically underreport, compared to reporting rates for other forms of violent crime, in both the military and the civilian sector. Studies indicate that reporting rates among female victims are similar in the military and civilian sectors.[22] As a result, the Department of Defense and the Services have focused significant efforts 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."[23] However, various societal and military-specific barriers deter victims from reporting and accessing available services.

1. Societal Barriers

Experiences of sexual assault are often shrouded in silence and secrecy for many reasons, including society's tendency to blame the sexual assault victim for the crime; the victim's struggles with shame and self-blame; feelings of confusion, helplessness, and lack of control; and the fear of the consequences of reporting.[24] Further complicating the nature of sexual assaults are the circumstances surrounding such crimes. Most victims know their assailants. Young people and those who have been victimized previously are especially at risk.[25]

Victims in the civilian sector indicate a number of reasons for not reporting. Top reasons included fearing reprisal, considering the incident a personal matter, and believing that the police would not do anything to help.[26] Other reasons for not reporting included that it was not important enough to report and not wanting to get the offender in trouble with the law.[27]

A study of college-age sexual assault victims highlights additional reasons for not reporting.[28] Common reasons include that "they did not think the incident was serious enough to report," or were "unclear as to whether a crime was committed or that harm was intended."[29] Alcohol and drug abuse among college students was a significant factor in low reporting rates. Where alcohol was involved in a sexual assault to the extent that the victim could generally be described as incapacitated, 50% of victims said they did not report the incident because they felt partially or fully responsible.[30] In addition, 29% said they did not report the incident to the police because they did not want anyone to know; 31% said they did not remember or know what really happened.[31]

2. Reporting Barriers Unique to the Military

Victims of sexual assault who serve in the military face unique barriers to reporting that do not exist in the civilian world. The hierarchical structure of military service and its focus on obedience, order, and mission before self, although crucial to success in battle, may provide opportunities for sexual assault and discourage victims from reporting. Specific barriers include the duty to obey lawful orders, the close proximity in which Service members live and work, the potential for an offender to outrank or supervise a victim, the perceived likelihood of damage to a victim's military career, limited focus on male sexual assault victims, and the victim's fear of punishment for collateral misconduct such as underage drinking, fraternization, or violation of orders.[32] Military sexual assaults generally involve 18 to 24 year-old Service members who know each other, are close in rank, have consumed alcohol, and are off-duty on a military installation.[33] These particular characteristics of victims and offenders, as well as the circumstances surrounding many of the incidents, may actually enhance the difficulties inherent in overcoming barriers to reporting that are due, in part, to the very nature and essence of military organizations. Reporting sexual assault in the military is crucial because it is the first step for the victim to receive the care, support, and services he or she needs and for the system to hold those proven to be offenders appropriately accountable.

a. Retaliation and Harassment

In a June 2013 hearing, a representative from the Service Women's Action Network (SWAN) told the Senate Armed Services Committee that "Servicemembers 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."[34] According to the Department of Defense's 2012 Workplace and Gender Relations Survey (WGRA),[35] 47% of women surveyed who did not report "unwanted sexual contact" indicated they were afraid of reprisal or retaliation from the person who did it, or from their friends, or thought they would be labeled a troublemaker.[36] Of those victims surveyed who did not report the unwanted contact to the chain of command, 43% of active duty women who were victims and 14% of active duty men who were victims indicated that they did not report because they heard about negative experiences of other victims who reported their situations.[37]

Service members live and work in close proximity to one another.[38] Once a sexual assault has occurred, the nearby presence of the offender can cause psychological trauma for a victim. As one victim explained, "I ended up spending a year living about 100 feet away from the man that assaulted me and that again probably did more damage than anything else."[39]

A sexual assault allegation involving members of the same military unit may divide loyalties among a close-knit group of people who should be working toward a common goal. Some unit Service members may seek to silence the victim's sexual assault allegation or retaliate against him or her to protect unit cohesion and

keep the unit "whole." As one victim explained, "[I]n my unit where I worked, I mean once the report became unrestricted, they kind of turned into a choosing sides battle. I had my food stolen. I had my wallet stolen. I had to dig it out of the trash. It was just overall really bad."[40] This kind of retaliation from peers can cause psychological trauma to victims.

Another victim described how the retaliation she experienced deterred others in the same unit from reporting, saying,

> I was not the only person . . . that this drill sergeant had victimized. There were many and there was many in that same unit with me in that same bay. Once I had came forward, they saw what I had went through, all the hazing, all the harassment and they were terrified . . . [I] have asked them . . . why didn't you say anything? And they just, they all had said that they were not strong enough. They didn't feel like they could trust anybody there and they didn't want to put themselves out there and have people look at 'em funny.[41]

b. Prosecution for Collateral Misconduct

Some sexual assault victims in the military also fear they may face discipline for any collateral misconduct – underage drinking and other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders – that occurred at the time they were assaulted.[42] The president of Protect Our Defenders told the Panel that victims "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."[43] She noted that "[t]his is often enough to silence a victim who is already intimidated or distrustful of the system."[44] The 2012 WGRA indicated that 23% of the active duty women surveyed who reported they were victims and chose not to report the unwanted sexual contact feared they or others would be punished for infractions or violations, such as underage drinking, if they reported.[45] Of the active duty men who are victims who did not report, 22% of those surveyed feared they or others would be punished for infractions or violations, such as underage drinking.[46]

As a result, the Department of Defense recognizes that "[c]ollateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment."[47] Commanders have discretion to defer taking disciplinary action on collateral misconduct by sexual assault victims.[48] In fact, the Coast Guard submitted information from Fiscal Year 2007 to Fiscal Year 2013 that indicated few punishments of sexual assault victims.[49] The Army submitted information for Fiscal Year 2013 that indicated that adverse actions against sexual assault victims for collateral misconduct occurred in less than 5% of cases.[50] However, these numbers are incomplete and, regardless of numbers, the perception remains.

c. Damage to Military Career

Even if consequences for collateral misconduct are not an issue, military victims often face concerns about possible impacts that reporting a sexual assault crime may have on their military service. The 2012 WGRA indicated that 28% of active duty women and 16% of active duty men who responded to the survey indicating they were victims and did not report believed that, if they had reported their sexual assaults, their performance evaluations or chances for promotion would suffer.[51] Similarly, 15% of both women and men who responded to the survey indicating they were victims believed they might lose their security clearances or personnel reliability certifications.[52]

d. Deference to Seniority

A sexual assault victim in the military may be subordinate in rank or position to her or his assailant. Particularly when an offender is a superior, victims may believe that others will ignore or tend to disbelieve

their allegations of sexual assault. One victim explained that, because of the initial response she received from her senior leadership, she felt reporting was futile:

> From 2004 to 2006 . . . I was physically and sexually assaulted on numerous occasions by another soldier. The abuser was a staff sergeant, later promoted to sergeant first class while I was a sergeant E-5 at the time. He was very well respected in our unit by fellow soldiers and our command team, and though I sought help from my command on numerous occasions, my cries for help were deliberately ignored. At one point, I sought out my command sergeant major for help one-on-one in her office, and her response to me was, if you would just listen to him, he would stop hitting you.[53]

Offenders may be competent or outstanding Service members, respected by leaders and subordinates alike, which may lead victims to feel others will not believe them if they report. One victim described how "people look at just the outside," focusing on the competence and "outside character" presented by a person. She noted in her case that "[f]rom the outside this drill sergeant was stellar. He was fast-tracking on his way to first sergeant. . . . [A] lot of times people miss, they miss the, the singling out stuff, and they miss him pulling females to the side."[54]

At other times, a victim may be under an offender's direct control. A victim described that her assailant "taught our sexual harassment class and we were given instructions to report to him if we had any issues."[55] She explained that the military teaches Service members to obey lawful orders. "In boot camp, you are taught blind obedience to every order as your only option. Saying 'no' did not exist. There was no one to reach out to."[56]

e. Subordination of the Individual to the Mission

The military appropriately trains Service members to be mission-focused and willing to subordinate themselves in service of the larger goals and needs of the unit. However, an exclusive focus on the unit may deter sexual assault reporting. As one sexual assault victim told the Panel:

> I didn't have the courage at that point to pick up a phone and call 911 and have police come and get me and take me where I should have gone. Instead, I thought, I need to go home and fix this and change my clothes and get to work and do my job, because that's what I'm supposed to do. . . . Part of that was driven by my requirement to deploy. I felt that reporting it would distract my unit and distract me from that mission that I was given.[57]

f. Limited Focus on Male Sexual Assault Victims

Men who are victims of sexual assault often do not identify themselves as victims and may not report their attacks, in part, because sexual assault awareness campaigns tend to focus predominantly or exclusively on women who are victims. One victim explained to the Panel that "[o]ne of the biggest hurdles today for male survivors in the military to face is the lack of recognition of their status as survivors."[58] Additionally, cultural stigmas about homosexuality and lingering barriers that existed in the past, such as "Don't Ask, Don't Tell,"[59] still serve to limit openness about crimes of sexual violence against men.

g. Victim's Lack of Control over the Report

Results of the 2012 WGRA reported that those surveyed who indicated they were sexual assault victims in the military, responded that victims do not report because they often do not believe they can control information disclosed if they make a report of sexual assault.[60] Seventy percent of survey respondents who indicated they did not report said they did not want anyone to know of the sexual assault. Sixty-six percent felt uncomfortable

making a report of sexual assault to command. Fifty-one percent indicated they did not think the report would remain confidential.[61]

B. DEPARTMENT OF DEFENSE SEXUAL ASSAULT PREVENTION AND RESPONSE POLICY DEVELOPMENT

In February 2004, responding to concerns about allegations of sexual assault on Service members deployed to Iraq and Kuwait, the Secretary of Defense directed the formation of a Department of Defense task force to review treatment and care for victims of sexual assault.[62] Following a 90-day review of Department and Service sexual assault policies and programs, the Care for Victims of Sexual Assault Task Force, led by the Deputy Assistant Secretary of Defense for Force Health, Protection, and Readiness, released its report with thirty-five findings and nine recommendations in April 2004. The Task Force's first recommendation was for the Department of Defense to "establish a single point of accountability for all sexual assault policy matters . . . ." [63] The Task Force recommended this office advise the Secretary of Defense and address gaps in the existing "stovepipe systems created by the absence of any specific sexual assault policies and programs," address the standardization of definitions, and "create outcome-based accountability for the Services."[64]

In the National Defense Authorization Act for Fiscal Year 2005, Congress directed the Secretary of Defense to develop a uniform definition of sexual assault and, based on the recommendations of the Task Force, a "comprehensive policy for [DoD] on the prevention of and response to sexual assaults involving members of the Armed Forces."[65] The Department responded by establishing the Sexual Assault Prevention and Response (SAPR) program "to promote prevention, encourage increased reporting of the crime, and improve response capabilities for victims." [66] In October 2005, the Department of Defense issued its initial comprehensive SAPR policy[67] and established the Sexual Assault Prevention and Response Office (SAPRO) to serve as the Department's single point of authority, system accountability, and oversight for the SAPR program, except for criminal investigative matters that are the responsibility of the Department of Defense Inspector General and legal processes that are the responsibility of the Judge Advocate Generals of the Military Departments.[68] Convened by the Joint Chiefs of Staff, the senior standing military oversight body for SAPR matters is the SAPR Joint Executive Council. The SAPR Joint Executive Council held its inaugural meeting in November 2012 and meets quarterly to review SAPR program performance and effectiveness across each of the Military Services.[69]

In its policy, DoD SAPRO established a uniform definition of "sexual assault," which it currently defines as "intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent."[70] This definition of sexual assault is intended "as an overarching term . . . that encompasses a range of contact sexual offenses that are prohibited by the UCMJ and characterized by the use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent."[71] This broad term differs from the definitions of many crimes of sexual violence in the current version of the UCMJ, including the specific offense of "sexual assault."[72] In other words, while the current DoD SAPRO definition encompasses a wide range of sexual contact, it does not literally reflect criminal sexual offenses in the military.

C. REPORTING METHODS AND DATA AND SEXUAL VIOLENCE OFFENSES UNDER THE UNIFORM CODE OF MILITARY JUSTICE

1. Development of Department of Defense Sexual Assault Reporting Options

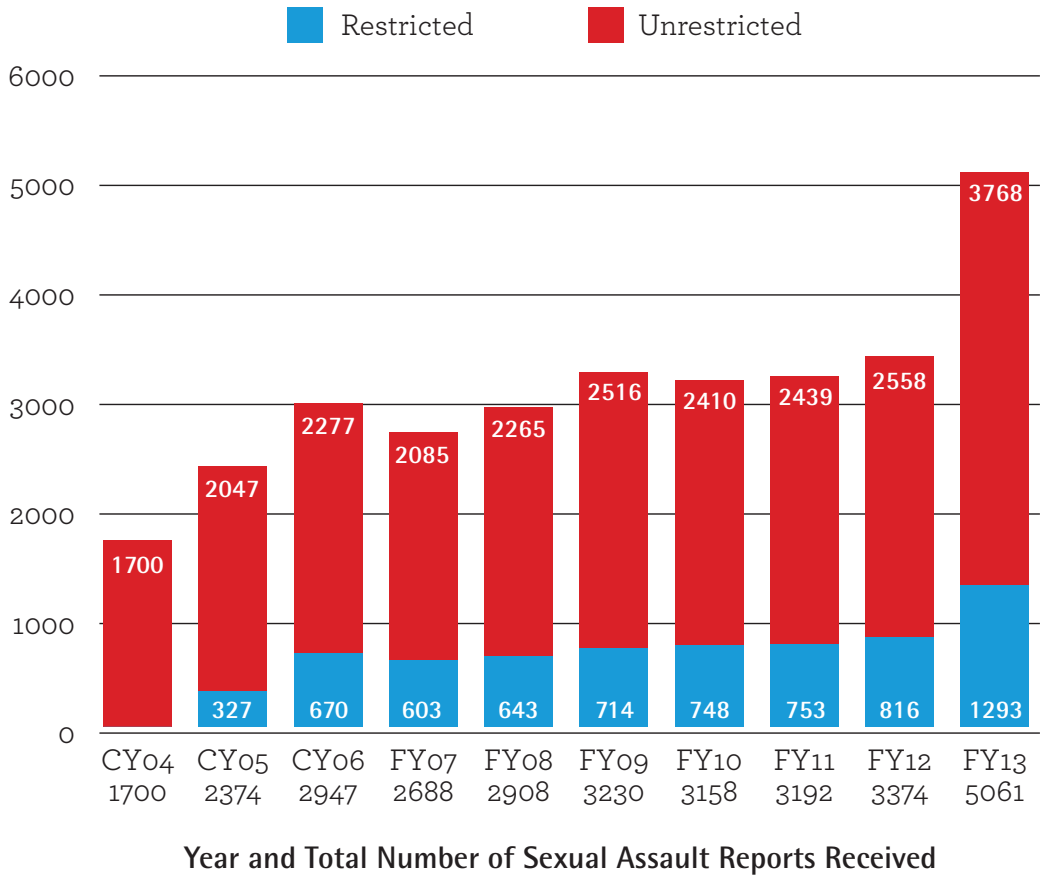
In addition to its recommendation that led to the creation of DoD's SAPR program, the Care for Victims of Sexual Assault Task Force also recommended DoD establish means to "increase privacy and provide

confidential disclosure for sexual assault victims."[73] In response, the October 2005 SAPR policy established unrestricted and restricted report options for a victim to choose between when reporting an incident of sexual assault. The chain of command is informed of unrestricted reports of sexual assault in the unit and the reports are investigated by the Service military criminal investigative organization (MCIO).[74] Restricted reports, responding to a victim's desire for confidentiality, do not trigger an investigation, collect limited data about the victim and the offense, and the chain of command is not informed of any information that would identify either the victim or the offender.[75]

2. Department of Defense Sexual Assault Reporting Trends

DoD SAPRO has monitored trends for unrestricted and restricted reports of sexual assault that involve a military subject or military victim since it was established in 2005.[76] Figure 1 shows the total number of sexual assault reports DoD received each year, as well as the distribution between restricted and unrestricted reports:

FIGURE 1 – Sexual Assault Reports Received[77]



3. Sexual Violence Offenses under the Uniform Code of Military Justice

The definitions of crimes constituting sexual assault are broad. Restricted and unrestricted reports of sexual assault in the military include allegations ranging from rape to less severe forms of sexual criminal offenses, such as sexual contact over clothing.[78] Article 120 of the UCMJ sets forth the major criminal sexual violence offenses proscribed by military law. Congress substantially overhauled Article 120 twice since 2006. The first

version of Article 120 was in effect until October 1, 2007; the second version was in effect from October 1, 2007 to June 27, 2012; and the current version took effect on June 28, 2012.[79] The following table illustrates the framework of all three iterations of Article 120.

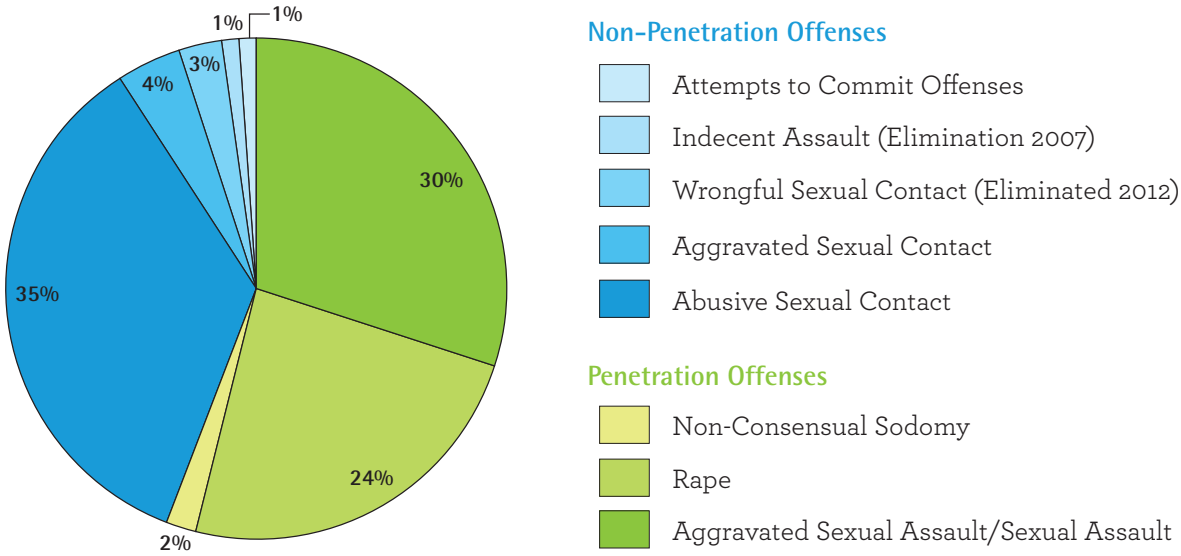
Prior to October 1, 2007	October 1, 2007 to June 27, 2012	Since June 28, 2012
The offenses that constituted sexual assault: • Rape (Article 120, UCMJ); • Forcible Sodomy (Article 125, UCMJ); • Indecent Assault (Article 134, UCMJ); and • Attempts to Commit these Crimes (Article 80, UCMJ).	The offenses that constituted sexual assault: • Rape (Article 120, UCMJ); • Aggravated Sexual Assault (Article 120, UCMJ); • Aggravated Sexual Contact (Article 120, UCMJ); • Abusive Sexual Contact (Article 120, UCMJ); • Wrongful Sexual Contact (Article 120, UCMJ); • Forcible Sodomy (Article 125, UCMJ); and • Attempts to Commit these Crimes (Article 80, UCMJ).	Current sexual violence crimes are: • Rape (Article 120, UCMJ); • Sexual Assault (Article 120, UCMJ); • Aggravated Sexual Contact (Article 120, UCMJ); • Abusive Sexual Contact (Article 120, UCMJ); • Forcible Sodomy (Article 125, UCMJ); and • Attempts to Commit these Crimes (Article 80, UCMJ).
"Old Article 120" Elements of Rape: a) that the accused committed an act of sexual intercourse; and b) that the act of sexual intercourse was done by force and without consent.[80] Assault with intent to Commit Rape, Indecent Assault, Indecent Acts, and Indecent Exposure were separate offenses under Article 134, UCMJ.[81]	The main four offenses are: rape, aggravated sexual assault, aggravated sexual contact, and abusive sexual contact. Statutory definitions for "sexual act" and "sexual contact," along with the set of attendant circumstances identified in the statute, combine to define each of the four offenses. The attendant circumstances include: by force, by causing grievous bodily harm, by threatening death, by rendering unconscious, or by administering an intoxicant.[82] Force includes the "action to compel submission of another or to overcome or prevent another's resistance. . . ."[83] Indecent Assault, Indecent Acts, and Indecent Exposure are now offenses under Article 120, UCMJ.[84] Article 120a includes stalking.[85]	The main offenses essentially remain the same: Rape, Sexual Assault, Aggravated Sexual Contact, and Abusive Sexual Contact. Aggravated sexual assault in now called sexual assault.[86] Statutory definitions for "sexual act" and "sexual contact," along with the set of attendant circumstances identified in the statute, continue to combine to define each of the four main offenses.[87] Additional attendant circumstances are added to the statute.[88] The definition of force is modified to focus less on the actions of the victim and more on the actions of the accused, and includes "use of strength or violence as is sufficient to overcome, restrain, or injure a person."[89] Article 120a continues to include stalking, Article 120b now includes child sex crimes, and Article 120c includes other sexual misconduct.[90]

Lack of consent is an element of the offense which must be proven by the government beyond a reasonable doubt. In determining whether force and lack of consent occurred, a totality of the circumstances is considered. The lack of consent required is more than a mere lack of acquiescence. When the victim is capable of resisting, some force more than that required for penetration is necessary.	Lack of consent is no longer an element which must be proven by the government beyond a reasonable doubt. Consent and mistake of fact as to consent are affirmative defenses available to the main offenses.[91] Initially the accused had the burden of proving consent and mistake of fact as to consent by a preponderance of the evidence. The government would then have to disprove the defense beyond a reasonable doubt. However, this provision of the statute was determined to be unconstitutional.[92]	The 2012 Article 120 eliminated affirmative defenses specific to the statute. An accused will now use the defenses available under R.C.M. 916.[93]

Under the current framework of Article 120 of the UCMJ, criminal sexual conduct ranges broadly from minor non-penetrative touching of another person's body, with no requirement to gratify any person's sexual desire, to penetrative offenses accomplished by force.[94] Even in light of changes to Article 120, military and civilian jurisdictions categorize crimes referred to generically as "sexual assault" in different ways. "Sexual assault" in civilian jurisdictions is generally classified as either a penetrative offense or a contact offense with intent to gratify the sexual desires of some person. *The Judicial Proceedings Panel and the Joint Service Committee should consider whether to recommend legislation that would either split sexual assault offenses under Article 120 of the UCMJ into different articles that separate penetrative and contact offenses from other offenses or narrow the breadth of conduct currently criminalized under Article 120. [RSP Recommendation 113]*

As noted above, there are currently two broad categories of offenses that DoD SAPRO tracks: 1) penetrative offenses, including rape, sexual assault, and forcible sodomy; and 2) non-penetrative contact offenses, such as aggravated or abusive sexual contact and attempts to commit other sexual assault offenses. The Department of Defense reporting data from Fiscal Year 2013 indicates that 56% of unrestricted reports alleged penetrative offenses and 44% alleged non-penetrative contact offenses,[95] as shown in Figure 2.[96] While the overall number of sexual assault reports has increased since DoD SAPRO first tracked this data in Fiscal Year 2007, the ratio of penetrative to non-penetrative offenses has remained largely consistent.[7]

FIGURE 2: Unrestricted Reports of Sexual Assault, FY13



D. SEXUAL ASSAULT SURVEYS

Rape and sexual assault are among the most challenging criminal acts to assess through surveys.[98] Different surveys use distinct methodologies to understand and capture different statistics. Crime victimization surveys are commonly used to assess the actual incidence of crimes of sexual violence because sexual assault crimes are significantly underreported.[99] Public health surveys often measure the prevalence rate, reflecting the number of victims of sex related acts rather than number of incidents, which helps assess the services needed. Basic survey terminology is reflected below in Figure 3.

FIGURE 3: Key Survey Terms

Incidence Rate: "Refers to the measure of the total number of incidents (or events) that occurred in a given period. It counts the total number of incidents or victimizations; it does not count the total number of individual victims."[100] Incidence rates are normally used in **criminal justice surveys**.

Prevalence Rate: "Refers to the number of victims. It counts the number of individuals who have been victimized at least once; it does not count the total number of incidents."[103] Prevalence rates are normally used in **public health surveys**.

Criminal Justice Surveys: "Measure criminal victimizations: 'point-in-time' events that are judged to be criminal."[101] Criminal justice surveys are designed to capture the "dark figure" of crime; that is, underreporting of crime not captured in law enforcement statistics.[102]

Public Health Surveys: Measure "victimization as a condition that endures over a period of time, and may not necessarily be criminal. These surveys are less focused on identifying point-in-time events."[104]

1. Survey Types and Methodologies

The public health approach casts a broad net to determine the number of those injured by coercive sexual behavior. Public health surveys measure prevalence, "the number of people in a population who experienced at least one event of interest."[105] Public health surveys, such as the National Intimate Partner and Sexual Violence Survey (NISVS) conducted by the CDC, provide information to evaluate and characterize physical and mental health damage to victims of sexual assault. The accuracy of events reported through public health surveys is

largely unverified because there is little or no follow-up to distinguish timeline, definitions, or if the reported behavior actually falls within the intended survey parameters.[106]

The criminal justice approach seeks to account for unreported incidences of criminal sexual misconduct and measure the scope of unreported sexual offenses. Criminal justice surveys are designed to determine whether a well-defined, specified criminal event falls into the time period captured by the survey; they are normally used for comparison with actual arrest and conviction statistics.[107] The method of defining a time period and ensuring that events are accurately captured within the desired time frame is known as "bounding" a survey.

Incidence surveys like the National Crime Victimization Survey (NCVS), conducted by the U.S. Census Bureau for the Department of Justice Bureau of Justice Statistics (BJS), capture the number of criminal events rather than the number of people affected by crime.[108] The NCVS is a national survey of randomly selected households administered to all members age 12 and older residing in a selected household.[109] After selecting a household, the Census Bureau surveys the residents every six months for a period of three years and the BJS reports incidence of crime victimization on an annual basis. By conducting survey interviews every six months, the BJS can isolate criminal events and determine whether or not those events were reported to the police. In doing so, the NCVS attempts to get at the "dark figure" of crime; that is, underreporting of crime not captured in law enforcement statistics.[110]

Survey variables between different studies impact the ability to compare data and can result in estimates of sexual violence that vary by as much as a factor of ten.[111] Experts have conducted studies on survey purpose, design, methodology, phraseology in survey questions, and other variables to explain "why such widely diverging estimates of the level of rape occur."[112] Additionally, distinct differences in purpose, design, and methodology between public health and crime victimization surveys mean that information from the different types of surveys cannot be accurately compared.

The personal nature of sexual assault and barriers to reporting also lead to issues that impact assessment, such as divergent opinions of criminal behavior, reluctance to disclose personal experiences, inaccurate recollection, or respondent sensitivity.[113] Crime victimization surveys, particularly rape and sexual assault surveys, are also extremely difficult to validate because they are created to uncover events never reported to law enforcement.[114] Therefore, the information about prevalence and incidence rates garnered from surveys may be helpful, but it is not clear that the extent or nature of sexual assault can be accurately gleaned from survey results.

2. The Workplace and Gender Relations Survey of Active Duty Members (WGRA)

The DoD WGRA was designed in the 1990s as a public health survey to "research attitudes and perceptions about gender-related issues, estimate the level of sexual harassment and unwanted sexual contact, and identify areas where improvements are needed by surveying a random population of active duty personnel."[115] The information was intended to be used to formulate policies "to improve the working environment."[116] The Defense Manpower Data Center (DMDC) administers the Workplace and Gender Relations Survey (WGRS) to both active duty and Reserve members of the Armed Forces every two years, per Title 10 of the U.S. Code.[117] The Coast Guard is not included in the survey population.[118]

DMDC administered the WGRA in 1995, 2002, 2006, 2010, and 2012. The WGRA is currently web-based and self-administered. It does not include follow-up interviews or other "second-staging" to confirm that an event reported by a respondent meets the intended definition within WGRA parameters.[119] This is typical of public health surveys, which are less concerned with the event and more focused on the impact on the individual.[120] The WGRA is also an unbounded survey, meaning it does not have mechanisms to detect events that are reported outside the specified time period.[121]

DoD first incorporated questions and calculated survey data about "unwanted sexual contact" in the 2006 WGRA. Questions asked were designed to "calculate annual prevalence rates . . . of unwanted sexual contact, unwanted gender-related behaviors (i.e., sexual harassment and sexist behavior), and gender discriminatory behaviors and sex discrimination" over the course of twelve months.[122] Questions about "unwanted sexual contact" were also included in the 2010 and 2012 versions of the WGRA.[123]

The 2012 WGRA included 94 questions on all facets of job satisfaction and gender relations, including a number of questions regarding unwanted gender-related behaviors, gender discriminatory behaviors, and "unwanted sexual contact" the respondents experienced during the preceding 12 months. The 2012 WGRA defined "unwanted sexual contact" as "intentional sexual contact that was against a person's will or which occurred when the person did not or could not consent, and includes completed or attempted sexual intercourse, sodomy (oral or anal sex), penetration by an object, and the unwanted touching of genitalia and other sexually-related areas of the body."[124] The behavior surveyed ranged from unwanted touching over clothing to rape. The term "unwanted sexual contact" differs from the definition of sexual assault offenses in the UCMJ, described earlier, and is so broad it captures non-criminal conduct.[125]

For the 2012 WGRA, the DMDC sent surveys to a sample population of 108,000 active duty Service men and women from September to November 2012. DMDC received "completed" surveys[126] from 22,792 individuals, an overall weighted response rate of 24%. The following table compares the prevalence rates for men and women in the 2006, 2010, 2012 WGRAs and the extrapolated number of Service members who would be expected to have experienced unwanted sexual contact, according to data calculated from each WGRA:

	2006 WGRA[127]	**2010 WGRA**[128]	**2012 WGRA**[129]
Estimated individuals who experienced unwanted sexual contact	**34,000**	**19,000**	**26,000**
Rate for Males	**1.8%**	**0.9%**	**1.2%**
Rate for Females	**6.8%**	**4.4%**	**6.1%**

3. Using WGRA Survey Results

Since the introduction of questions regarding unwanted sexual contact in 2006, the WGRA has been both widely cited and widely criticized.[130] Critics commonly argue that WGRA survey data is misused or misinterpreted. Although the WGRA is administered as a public health survey, its survey results of unwanted sexual contact are often inappropriately compared against actual sexual assault reporting statistics. Data extrapolated from the WGRA include a wide range of non-criminal behavior, yet WGRA data are often misinterpreted as indicating the number of incidents of criminal sexual assault in the military. According to one sexual violence survey expert, the design used in the WGRA is "not the optimum design for assessing levels of rape and sexual assault."[131] Data received from the WGRA provides important information about attitudes and perceptions, but the survey was not intended to, and does not, accurately measure the incidence of criminal acts committed against Service members.

As a public health survey, the WGRA can assess behaviors that emotionally impact respondents, barriers to reporting, other factors related to retaliation, satisfaction with victim services, and other public health concerns. DoD leadership can appropriately use this data to assess and shape education, behavioral health, or prevention efforts, for example. They should not use the survey to estimate incidence of sexual assault crimes. *Congress and the Secretary of Defense should utilize results from the WGRA for its intended purpose—to assess attitudes, identify areas for improvement, and revise workplace policies as needed—rather than to estimate the incidence of sexual assault within the military. [RSP Recommendation 2]*

Studies such as the 2012 WGRA collect a large amount of data that is useful as public health information and for analysis to provide DoD leadership with better insight into areas of concern, patterns and trends in behavior, and victim satisfaction. Sexual assault survivors often experience "physical injury, mental health consequences such as depression, anxiety, low self-esteem, suicide attempts, and other health consequences."[132] Prevalence rates obtained through the WGRA can be used to measure the trend of the increase or decrease in the number of victims of sexual assault. Knowing these trends, the survey results can provide DoD with public health information and insight into the overall readiness and health of the force to inform policies and plan services.

If used correctly, data obtained through the WGRA can aid leaders in better evaluating readiness, assessing the health of the force, identifying patterns and trends in behavior, directing prevention and response efforts to sexual assault and sexual harassment across the force, and assessing victim satisfaction. Additionally, *the spectrum of behaviors included in "unwanted sexual contact" should be studied to inform targeted prevention efforts as well as analyzing environmental factors such as time in service, location, training status, and deployment status as potential markers for increased risk. [RSP Recommendation 6]*

4. Developing a Crime Victimization Survey

One concern with the WGRA is that the definition of "unwanted sexual contact" used in WGRA surveys does not match definitions used by either DoD SAPRO or the UCMJ. Currently, DoD SAPRO evaluates the scope of unreported sex offenses by contrasting (a) prevalence data of the number of victims who experienced unwanted sexual contact extrapolated from the WGRA with (b) reported sexual assault incidents and sexually based crimes under the UCMJ, in hopes of developing an incidence rate or the rate of unreported sexual assaults in a given year. However, the better measure of incidence rate would be a crime victimization survey designed to account for the number of criminal sexual assault incidents.

Variations in the definitions of terms used in the WGRA compared to the UCMJ lead to differences in assessments of the magnitude and nature of crimes of sexual violence. In 2009, the Defense Task Force on Sexual Assault in the Military Service (DTFSAMS) observed that the discrepancy in definitions was detrimental to any meaningful analysis; nonetheless the "terms, questions, and definitions of 'unwanted sexual contact' have been consistent throughout all of the WGRA surveys since 2006."[133] In June 2013, the Senate Armed Services Committee (SASC) Report on the FY14 NDAA noted that "[u]sing the imprecise terms 'sexual assault' and 'unwanted sexual contact' to refer to a range of sexual offenses creates confusion about the types of unwanted sexual acts that are being perpetrated against members of the military."[134] The SASC then directed the DoD to "modify language used in the annual SAPRO report and the [Workplace and Gender Related Survey (WGRS)] to clearly report the number of instances of each type of unwanted sexual act, to include rape, sexual assault, forcible sodomy, and attempts to commit those acts."[135]

In order to accurately understand the extent of the crime problem, researchers must accurately measure both the incidence and prevalence of sexual violence.[136] *To enable comparison of incidence data in and out of the military, the Secretary of Defense should direct the development and implementation of a military crime victimization survey, in coordination with the Bureau of Justice Statistics, that relies on the best available research methods and provides data that can be more readily compared to other crime victimization surveys than current data. [RSP Recommendation 1] This crime victimization survey should be developed using the UCMJ definitions of sexual assault offenses, including: rape, sexual assault, forcible sodomy, and attempts to commit these acts. [RSP Recommendation 8]* Crime victimization surveys must be designed to mirror law enforcement reporting practices and legal definitions of crimes so that data can be analyzed, compared, and evaluated in order to assess the relative success of sexual assault prevention and response programs. Developing questions based on standard definitions and specifically designed to capture data about a uniform set of behaviors would provide a more accurate picture about sexual assault crimes in the military.

A tailored crime victimization survey, carefully designed with best practices from the Bureau of Justice Statistics (BJS), could improve the accuracy of DoD's estimates of sexual assault underreporting. Recently, the National Academy of Sciences (NAS) National Research Council studied the NCVS to determine how well it assessed national crime victimization in the areas of rape and sexual assault. Following that study, the NAS recommended that the BJS "should develop an independent survey—separate from the [NCVS]—for measuring rape and sexual assault."[137]

5. Improving the Workplace and Gender Relations Survey

The WGRA's response rate also creates concern about the survey's reliability. The DMDC reported an overall weighted response rate of 24% for the 2012 WGRA,[138] a low response rate compared to other civilian public health surveys.[139] As a result, the WGRA's data are at greater risk for sampling bias and may be, therefore, less reliable. Low response rates, while not uncommon, may indicate biases or other problems with the survey instrument.[140] To minimize potential bias, the Office of Management and Budget requires a bias-analysis plan prior to authorizing any government survey with an anticipated response rate of less than 80%.[141] *The Secretary of Defense should direct that unanalyzed data collected from all surveys related to workplace environments and crime victimization be analyzed by independent research professionals to assess how DoD can improve responses to military sexual assault. [RSP Recommendation 6]* The WGRA and other "web-based surveys are kind of akin to mail-in surveys, they tend to have a lower response rate than in-person or telephone surveys."[142] Evidence presented to the Panel highlighted that Service members complete numerous surveys and that too many surveys may result in "survey fatigue," leading to lower response rates.[143] *The Secretary of Defense should account for these factors and seek to improve response rates to all surveys related to workplace environments and crime victimization in order to improve the accuracy and reliability of results. [RSP Recommendation 9]*

To improve the WGRS, the combined WGRA and Workplace and Gender Relations Survey of Reserve Component Members (WGRR), the Secretary of Defense has already directed a non-DoD entity, the RAND Corporation, to develop, administer, collect, and analyze all data for the 2014 versions of both surveys.[144] RAND will partner with Westat, which works with BJS on survey administration, for survey expertise assistance.[145] DoD SAPRO indicated to the Panel that the 2014 WGRS will include larger survey samples of approximately 500,000 people, nearly one-third of the Total Force, giving 100% of female Service members and 25% of male Service members the opportunity to take the survey.[146] RAND will also review current WGRS methodology and attempt to increase response rates and reduce non-response bias.

These efforts to improve the 2014 WGRA are encouraging, but the Department needs additional assessment measurements. As previously noted, public health surveys are not designed or intended to measure the incidence of criminal activity accurately. Surveying and collecting data on sexual assault victimization is challenging and costly, but DoD has a significant interest in obtaining accurate information about the scope of sexual assault crimes in the military and associated levels of reporting. Accurately assessing underreported crime is essential in order to accurately evaluate DoD's SAPR programs, victim services, and judicial responses.

DoD and the RAND Corporation should leverage the experience of NAS and BJS personnel, as well as the results of their studies and surveys, to develop the best possible survey instruments and practices. In addition, *the Secretary of Defense should direct the creation of an advisory panel of qualified experts from the Bureau of Justice Statistics and the National Academy of Sciences' Committee on National Statistics (CNSTAT) to consult with RAND and any other agencies or contractors that develop future surveys of crime victimization or workplace environments, to ensure effective survey design. [RSP Recommendation 7]*

Chapter Three:
COMMANDER AND CONVENING AUTHORITY CONCEPTS AND OVERVIEW OF MILITARY JUSTICE RESPONSE TO SEXUAL ASSAULT

A. COMMANDERS

Military commanders are a select group, comprising approximately one percent of military Service members.[147] 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.[148] The commander is the head of a military organization and is primarily responsible for ensuring mission readiness and maintaining good order and discipline within the unit. Several commanders serve as part of the "chain of command," the succession of commanders from superior to subordinate that exercise command authority.[149]

Military officers at various ranks and experience levels may serve in command positions. Title 10 of the U.S. Code and Service regulations vest commanders with specific responsibilities including:

- implementing the sexual assault prevention and response program;
- creating a culture of prevention through risk reduction, education, and training of Service members;
- maintaining response capabilities;
- providing victim support;
- promptly responding to sexual assault reports; and
- holding offenders appropriately accountable by exercising a range of judicial, non-judicial, and administrative options.

Commanders spend much of their time attending to the prevention and victim support duties, as authorized by provisions within the UCMJ. Ultimately, the commander can utilize his or her authority in the military justice system to hold offenders accountable and appropriately dispose of cases.

B. CONVENING AUTHORITY

Criminal charges may warrant disposition at trial by court-martial. Unlike standing federal courts created by Article III of the Constitution, the military justice system convenes ad hoc courts, called courts-martial, only as needed. The individual that has the authority to convene a court-martial is the convening authority. Except for the President, Secretary of Defense, and Service Secretaries,[150] only commanders may convene courts-martial, and only a select few have that authority.

The authority to convene a court-martial is distinct from command authority. Articles 22, 23, and 24 of the UCMJ provide the statutory authority for convening authorities,[151] which attaches to certain positions and designations.[152] These are:

- **General Courts-Martial Convening Authorities** (GCMCA) may convene general courts-martial, as well as lesser forms of court-martial – e.g., special courts-martial. General courts-martial may impose any lawful punishment on a guilty party, including, where authorized, confinement for life without parole and death.[153] GCMCAs are typically two-star general or flag officers or higher, with upwards of twenty-five years of command experience.[154]

- **Special Courts-Martial Convening Authorities** (SPCMA) may convene special courts-martial, but may not convene general courts-martial. Special courts-martial are statutorily limited to imposing no more than confinement for up to one year, a bad conduct discharge and a variety of lesser punishments, regardless of the crime alleged.[155] An officer will not typically serve in a command position with SPCMCA until he or she is promoted to the grade of O-6—Colonel in the Army, Air Force, and Marine Corps or Captain in the Navy and Coast Guard. Officers serving as SPCMCAs generally have at least 20 years of service.[156]

The following table 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:[157]

	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	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. COMMANDER AND CONVENING AUTHORITY TRAINING

Professional development to prepare officers for this responsibility often begins before commissioning and continues through the junior officer grades as the Services prepare military officers for command positions.[158] At the earliest opportunity to command, normally at the company or platoon level, commanders receive training and guidance on command, 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.[159] Each Service has a command and staff college where a command-tracked officer spends "an entire year learning about and studying command."[160] As the Services prepare and develop officers for command, officers attend additional training courses and leadership schools which offer instruction on the commander's legal roles and responsibilities.[161]

Senior commanders also receive legal training to prepare them for the quasi-judicial role of convening authority. The legal training provided to senior commanders through resident and on-site Service JAG School

hosted courses varies significantly among the Services. 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.[162] NJS offers courses to Navy and Marine Corps commanders through on-site training at various Navy installations.[163] TJAGLCS offers resident courses in Charlottesville, Virginia. Formal Air Force legal training for senior commanders is less robust and incorporated into group and wing commander courses hosted by Air University at Maxwell Air Force Base, Alabama.[164]

Senior commander training should be uniform, to the greatest extent possible, and a prerequisite to assuming command. Further, considering DoD's recent "initial disposition authority" policy that withholds authority over the most serious sexual assault offenses to senior commanders (explained *infra* at Chapter 8, Section B), *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 for the military justice responsibilities, particularly as the "initial disposition authority," assigned to them under the UCMJ. [RSP Recommendation 38]*

D. OVERVIEW OF THE MILITARY JUSTICE RESPONSE TO SEXUAL ASSAULT CRIMES

The military justice system is designed to hold offenders accountable for criminal acts, "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."[165] All Service members (including National Guard and Reservists on active Federal duty or in Title 10 status) are subject to the UCMJ, which sets forth both procedural and substantive military criminal law.[166] Historically, the military commander has always been at the center of the military justice system.

Summary of the Military Justice Process for Sexual Assault Cases

The military justice system affords commanders administrative, non-judicial, and judicial tools to achieve good order and discipline. Commanders generally have discretion to choose which tools to use for a given instance of misconduct, with the advice and counsel of judge advocates.[167]

Nonjudicial punishment under Article 15 of the UCMJ is the lowest formal resolution available through the UCMJ. The nature of nonjudicial punishment depends on the rank of the commander imposing punishment and that of the Service member receiving punishment. In its most severe form, nonjudicial punishment may include restrictions on liberty short of confinement by, for example, being restricted to the unit area for up to sixty days, working additional duty hours, the loss of rank, and the loss of pay.

Commanders may also administratively separate Service members from military service. Administrative separations do not require courts-martial and are generally not considered punitive in nature. However, involuntarily administratively separated Service members suffer the loss of employment, may lose federal and state benefits, including veteran's benefits, and may be precluded from federal and state government employment, if separated with a negative characterization of service.

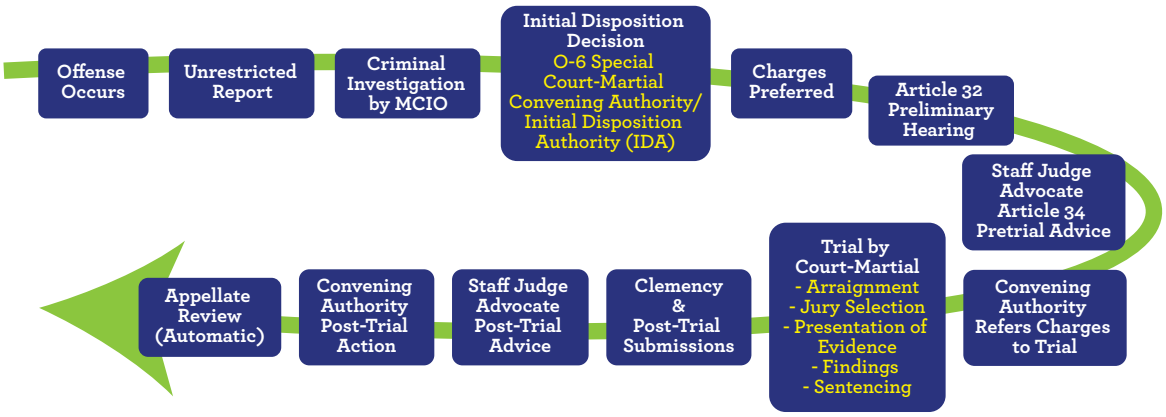
For allegations that warrant trial by court-martial, the UCMJ authorizes three options: (1) summary court-martial; (2) special court-martial; and (3) general court-martial. A summary court-martial, described in Articles 20 and 24 of the UCMJ, provides commanders a more severe forum to impose discipline than nonjudicial punishment or administrative options. Depending upon the rank of the accused, a summary court-martial may impose imprisonment for up to one month, loss of liberty for up to sixty days, the reduction of rank, and the forfeiture of pay.

Special and general courts-martial are judicial forums that may be convened pursuant to Article 18 and 19 of the UCMJ. A Service member convicted in one of these forums suffers a federal criminal conviction and,

accordingly, a criminal record. General courts-martial are colloquially referred to as the military's felony forum because only a general court-martial may impose any lawful punishment on a guilty party.[168] Special courts-martial are colloquially referred to as the military's misdemeanor forum because, regardless of the crime alleged, the maximum punishment that may be imposed is statutorily limited to confinement for up to one year, a bad conduct discharge and a variety of lesser punishments.[169] The convicted Service member's record permanently records a guilty finding at any level of court-martial.

Figure 4 illustrates how an unrestricted report of sexual assault is resolved by court-martial under the military justice system. Requirements for reporting, investigating, and resolving sexual assault allegations through the military justice process are described and assessed in detail in Chapters 6 - 8 of this report.

FIGURE 4 – Military Justice Process for Sexual Assault[170] Cases[171]



E. CONVENING AUTHORITY DECISIONS TO REFER SEXUAL ASSAULTS TO COURTS-MARTIAL

The DoD SAPRO's annual report to Congress includes individual Service reports with detailed information about military justice actions commanders and convening authorities take in response to sexual assault reports.[172] These reports identify the percentage of cases in which a convening authority directed a court-martial over time.[173] DoD SAPRO's FY13 report noted that from Fiscal Year 2007 to Fiscal Year 2013, "commanders' preferral of court-martial charges against military subjects for sexual assault offenses increased from 30 percent . . . to 71 percent." During this same period, the report also indicated a substantial decrease in the percentage of reports of sexual assault that resulted in commanders imposing less severe nonjudicial and administrative actions.[174]

Significant analysis of prosecution trends in sexual assault cases, however, is difficult. Representatives of the Service Judge Advocate General Corps told the Panel they agree that the current system for calculating prosecution and conviction rates in the military "is not the model of clarity" and that the system "is ripe for recommendations" for improvement.[175] While the Services regularly collect and report a considerable amount of data on military justice results for sexual assault cases, the data is not standardized, comparable, or useful for the purpose of drawing meaningful conclusions.[176]

1. Standardizing Prosecution and Conviction Rate Methodologies

Judge advocate representatives from the Services testified to the Panel that the data they must provide to DoD SAPRO on prosecution and conviction rates is, at best, not useful and, at worst, misleading. One representative

called DoD's method for tracking prosecution and conviction rates "flawed," [177] noting several specific concerns:[178]

- Service data reflect a snapshot in time and therefore must account for pending cases. However, currently, cases pending investigation and disposition are improperly counted as "no action taken" for prosecution rate purposes.
- DoD data do not separate out the cases in which the offender is unknown or is a civilian beyond the military's jurisdiction.
- Service data include restricted reports for which investigation is prohibited and there can be no disposition.
- Service data cover a wide spectrum of eight separate offenses, from rape to unwanted touching, which distorts the representation of disposition decisions.

At the Panel's request, Dr. Cassia Spohn, an expert on criminal justice statistics and analysis, evaluated the Services' prosecution rates and compared them to civilian prosecution rates. She determined that the Services' use different definitions of what constitutes an "unfounded" case and their varied calculation procedures impact overall military prosecution and conviction rates.[179] The standard, nation-wide definition of "unfounded" means "false or baseless,"[180] but the Services use different procedures and definitions to "unfound" cases.[181]

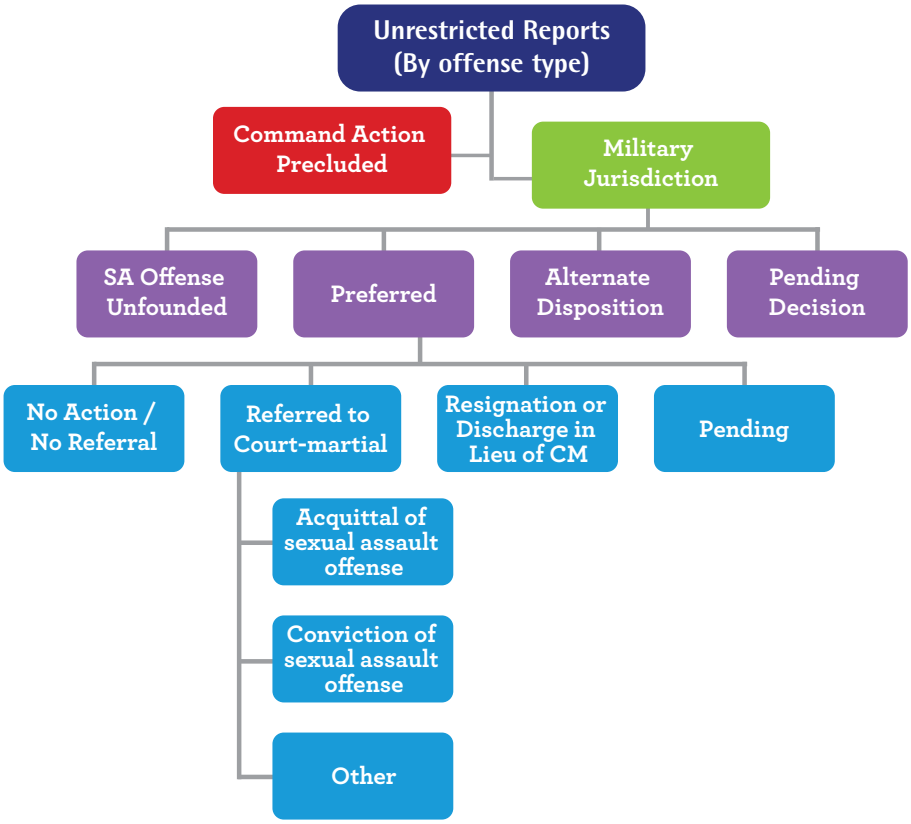
Differences among the variables the Services use to calculate prosecution rates and reports also make comparing prosecution and conviction rates difficult. For example, one Service may include the total number of unrestricted reports in calculating the prosecution and conviction rates. This yields a lower prosecution and conviction rate, because this calculation does not exclude unknown subjects or those outside the military.

Additionally, most conviction rate information from the Services does not specifically represent the number of convictions for sexual assault. Instead, conviction rates reflect convictions for any offense in cases that included a charged sexual assault. For example, in FY11, DoD reported an 80% conviction rate in sexual assault cases.[182] Eighty percent of Service members charged with a sexual assault offense were convicted of some offense, but not necessarily convicted of a sexual assault offense. Dr. Spohn estimated the Services' true conviction rate averaged about 50%.[183]

In sum, DoD and the Services do not currently use standardized methods to calculate prosecution or conviction rates in sexual assault or other cases.[184] In addition to different procedures, the Services also use different definitions, which make meaningful comparisons of prosecution and conviction rates for sexual assault across the Military Services difficult. In the absence of a standardized methodology, any attempt to compare military prosecution or conviction rates for sexual assault among the Services or between military and civilian jurisdictions is apt to be misleading.

The Secretary of Defense should direct the Service Secretaries to use a single, standardized methodology to calculate prosecution and conviction rates.185 Figure 5 shows a suggested methodology, based on the current Army model, which will provide accurate and comparable rates by tracking the number and rates of acquittals and alternate dispositions in sexual assault cases. [RSP Recommendation 3-A]

FIGURE 5 – "Waterfall" Calculations to Standardize Prosecution and Conviction Rates



Once the Services standardize definitions, procedures, and calculations for reporting prosecution and conviction rates in sexual assault cases, the Secretary of Defense should direct a highly qualified expert in the field, external to the military, to study the disposition process in sexual assault cases. Specifically, a study should assess the following:

- *the rate at which the Services unfound sexual assault reports using the Uniform Crime Reporting Program definition and the characteristics of such cases in order to determine whether any additional changes to policies or procedures are warranted;*
- *the rates at which referral of cases to courts-martial against the advice of the Article 32 investigating or hearing officer resulted in acquittal or conviction; and*
- *the role victim cooperation plays in determining whether to refer or not refer a case to court-martial, and whether the case results in a dismissal, acquittal or conviction. [RSP Recommendation 3-B]*

2. Reporting Mandates Must Track Actual Disposition of Cases

Other inconsistencies between the disposition of sexual assault cases and reporting requirements also limit the value of current information. DoD and the Services must comply with several mandates to report sexual assault data to multiple sources, including Congress, with each report containing different requirements, calculations, and definitions. Section 1631 of the FY11 NDAA[186] mandates an annual report to Congress with a full synopsis

of substantiated cases of sexual assaults committed against Service members.[187] The term "substantiated" is not otherwise used by DoD or the Services through the investigative or disposition decision process in sexual assault cases, resulting in confusion and inaccuracy in the reports to Congress.

Congress should enact legislation to amend Section 1631(b)(3) of the FY11 NDAA and the related provisions in FY12 NDAA and FY13 NDAA to require the Service Secretaries provide the number of "unfounded cases," cases deemed false or baseless, as well as a synopsis of all other unrestricted reports of sexual assault with a known offender within the military's criminal jurisdiction. Eliminating the requirement to provide information about "substantiated cases" will result in DoD and the Services providing information that more accurately reflects the disposition of all unrestricted reports of sexual assault within the military's jurisdiction. [RSP Recommendation 5]

The standardized "waterfall" analysis described above in Figure 5 would present useful information. This reporting methodology would indicate:

- the number of cases that fall within the military's jurisdiction;
- the number of cases that result in court-martial;
- the number of convictions and acquittals; or
- the number of cases that result in alternate dispositions, which can be further broken down by nonjudicial punishment, resignation or discharge in lieu of courts-martial, or other adverse action.

In addition to meaningful data, percentages and statistics could be calculated to facilitate comparison of results each year to identify trends, problems, and improvements. These changes would increase confidence in data reporting and allow Congress, the Services, and the public to draw more informed conclusions about military sexual assault.

3. Comparing Military and Civilian Prosecution Statistics

Congress directed the Panel to conduct a comparison of civilian and military prosecution rates and state reasons for any differences.[188] However, as previously described, differences in civilian and military definitions, statutes, calculations, and procedures make comparing results extremely difficult. Any results from comparisons may be misleading.[189]

Civilian and military prosecution rates are not comparable because of fundamental differences in the systems, such as the discretion vested in civilian police to dispose of a case and the alternate disposition options available under the military justice system. Additionally, military and civilian jurisdictions also use different definitions, follow different procedures, and apply different criteria throughout the process.[190] For example, national data collection through the Uniform Crime Reporting (UCR) Program traditionally focused on forcible rape of women, although beginning in January 2013, the definition of rape was expanded to include gender-neutral nonconsensual penetrative offenses.[191] The UCR also collects data about some other sex offenses which some civilian police agencies may classify as assault. In contrast, DoD includes data on all reported penetrative and contact sexual offenses ranging from unwanted touching to rape.

Accordingly, *Congress and the Secretary of Defense should not measure success solely by comparing military and civilian prosecution and conviction rates. [RSP Recommendation 4]*

Chapter Four:

SEXUAL ASSAULT PREVENTION IN THE MILITARY

Experts and leaders agree that commanders preventing sexual assault is paramount to the success of our military, and first-line supervisors are central to DoD's prevention efforts. The DoD's recently released sexual assault prevention strategy[192] stresses the importance of leaders' responsibilities in prevention efforts.

A. PREVENTION STRATEGIES, INITIATIVES, AND TECHNIQUES

Preventing instances of sexual assault is important to both the civilian sector and the military. As one civilian expert explained, "stopping perpetration is the only guaranteed way" to eliminate sexual violence.[193] Senior DoD leaders similarly observe that prevention "is the first and best option."[194]

1. Leading Practices in Sexual Assault Prevention Strategies

Members of the Panel heard testimony and received information from the Division of Violence Prevention of the Centers for Disease Control and Prevention (CDC), various practitioners, and academic researchers outlining the best available practices on preventing sexual violence. From these sources, the Panel gained valuable insight into the risk and protective factors for sexual violence, as well as effective prevention strategies and how best to implement them.

As explained below, DoD's prevention policies and requirements adopted since 2012 reflect Department efforts to coordinate with the CDC and leading private organizations like the National Sexual Violence Resource Center (NSVRC). Moreover, installation-level initiatives described to the Panel largely reflect prevention best practices.[195] For example, the Services have increased focus on bystander intervention and alcohol policy. However, the Services must ensure that prevention programs do not convey or promote common misconceptions or overgeneralizations, as described below.

a. Public Health Approach to Sexual Assault Prevention

The CDC classifies sexual assault as a public health problem. The CDC's public health approach translates strategic elements into a workable model for sexual violence prevention. As part of its public health approach to prevention, the CDC employs the social-ecological model prevention framework. This model recognizes four distinct levels or settings at which risk factors can occur: (1) the individual; (2) family/peer; (3) community; and (4) societal. This comprehensive approach creates a "surround sound" effect, such that people hear the same message in multiple ways from multiple influencers.[196]

In 2008, DoD SAPRO published its first comprehensive blueprint for DoD's prevention efforts.[197] DoD's 2008 Prevention Strategy was based on the CDC's social-ecological model and stressed the requirement of a coordinated set of interventions at the cultural, organizational, community, family, and individual levels.[198] DoD's most recent prevention strategy, the 2014-2016 Sexual Assault Prevention Strategy, further refines its

adaptation of the CDC's social-ecological model by recognizing the essential role of leadership as a distinct sphere of influence for prevention efforts.[199]

To leverage partnerships, DoD SAPRO's 2008 Prevention Strategy recognized that "sexual assault prevention cannot solely be the responsibility of victim services personnel on a military base or in a combat theater."[200] 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.[201] *DoD must further develop local coordination requirements both on and off the installation. Installation commanders should be coordinating with victim support agencies in their surrounding local communities. [RSP Recommendation 73]*

b. Correcting Myths and Popular Misconceptions

According to the CDC, some sexual violence prevention strategies reflect incorrect popular beliefs and common misunderstandings that impede an accurate, scientifically based assessment of sexual violence issues. In particular, the CDC warns against prevention strategies that suggest to participants common misconceptions about sexual violence such as that sexual violence is perpetrated by relatively few men; that perpetrators of sexual violence tend to fit a certain profile; or that all perpetrators re-perpetrate.[202]

The Department of Defense should review its bystander intervention programs to ensure they do not rely upon such 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. [RSP Recommendation 18]

c. Mitigating Current Gaps in Research

A recent CDC review of 191 research studies determined certain areas of sexual assault prevention are particularly under-researched.[203] For example, there is "very little work" that examines the risk and protective factors affecting male-on-male sexual violence.[204] In addition, the CDC acknowledges 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 military-specific factors, such as deployment (in particular, multiple deployments and combat deployments), as a potential military-specific risk factor as well as several military-specific positive protective factors, such as having at least one fully employed family member and access to health care, stable housing, and family support services.[205]

The Department of Defense must enhance its understanding of these distinct risk and protective factors that take on greater importance in the context of sexual assault in military populations. In particular, DoD should fund research on and seek expert assistance to understand the risk and protective factors unique to male-on-male sexual assault in the military.[206]

2. Crafting Department of Defense and Service Sexual Assault Prevention Efforts

a. Evolution of DoD's Prevention Efforts

The Department of Defense revised its strategic SAPR policy in January 2012 to reflect that sexual assault prevention programs should be standardized across the Services and supported by all commanders.[207] The uniformed leadership expressed its commitment to preventing sexual assault in the military with its Strategic Direction to the Joint Force, published in May 2012. In it, the Joint Chiefs of Staff described prevention as vitally important to developing better command climates and a more professional culture.[208] In addition, on April 17, 2012 and September 25, 2012, the Secretary of Defense directed the Services to enhance training for

military leaders;[209] develop core competency training; and develop methods of assessment for the individual prevention programs.[210]

In May 2013, the Secretary of Defense directed implementation of a new SAPR strategic plan covering five "lines of effort": prevention, investigation, accountability, advocacy/victim assistance, and assessment.[211] The SAPR Strategic Plan identified commanders and first line supervisors as the center of gravity of DoD SAPRO's prevention efforts, directed an update to the 2008 strategy,[212] and identified high-priority prevention tasks such as education, training, and implementation of mitigation policies.[213] With the release of the 2013 Strategy, DoD SAPRO also conducted focused assessment of prevention strategies and programs[214] through coordination with CDC sexual violence experts and outside experts on alcohol.[215]

The Secretary of Defense introduced DoD's 2014-2016 Sexual Assault Prevention Strategy on May 1, 2014.[216] The updated prevention strategy shifts "emphasis to enhancing DoD/Service and Leader's [sic] capabilities.[217] This will ensure that leaders are prepared to establish a climate that supports sexual assault prevention while placing renewed emphasis on institutionalizing sexual assault prevention policies and practices."[218] The 2014-2016 Strategy stresses peer-to-peer mentorship, accountability, organizational support, community involvement, deterrence, communication, incentives, harm reduction, and training as successful prevention program elements.[219] The Secretary of Defense directed the immediate implementation of certain measures, such as advancing and sustaining appropriate culture, evaluating commander SAPR training, reviewing alcohol policies, improving reporting for male victims, developing collaborative forums for sexual assault prevention methods, and developing standardized and voluntary surveys for victims/survivors, to further strengthen the shared approach to prevention.[220]

Implementing the kind of robust prevention efforts described above requires great care by commanders to avoid creating the appearance of unlawful command influence.[221] Commanders must remember that, in addition to protecting Service members from sexual assault and responding appropriately to incidents when they occur, they have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes. By executing prevention programs in a balanced way, commanders can avoid creating the appearance of unlawful command influence. In particular, *prevention programs should emphasize 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. In addition, prevention programs 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. [RSP Recommendation 80]*

Consistent with the comprehensive approach recommended by the CDC, DoD must apply a range of strategies that target Service members and organizations in various ways. For example, in addition to the prevention strategies described below, DoD should consider general deterrence strategies, such as publicizing findings and sentences adjudged at courts-martial for sexual assault offenses.

Historically, the Services primarily implemented DoD prevention policies and initiatives through training. As part of Service training efforts, *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. [RSP Recommendation 14]* A brief explanation of the current efforts of commanders follows in Section B below; a detailed description can be found in the Role of the Commander Subcommittee Report, included in the Annex to this report.

b. DoD Assessment of Effectiveness of Prevention Efforts

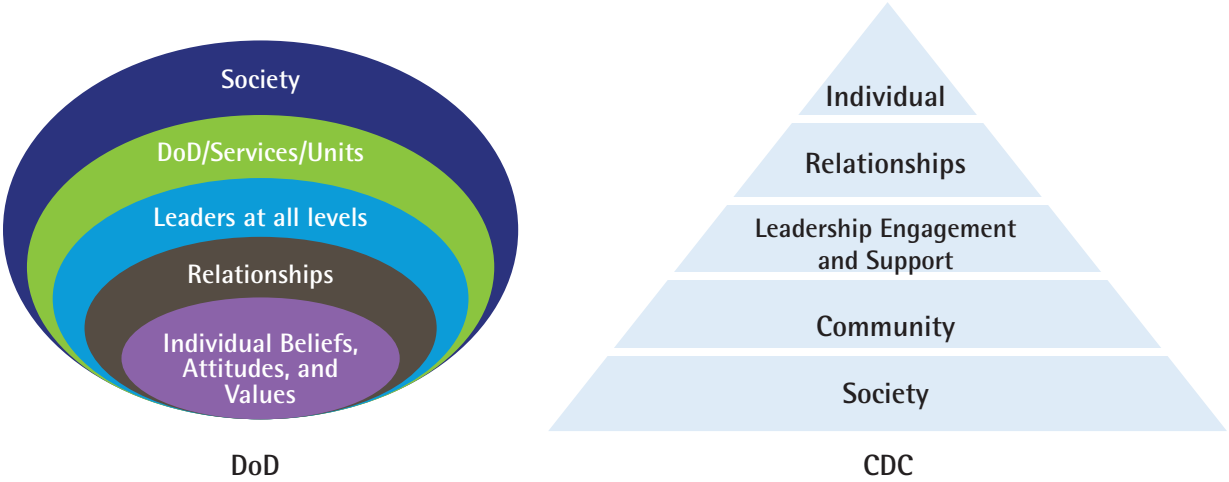
In 2012, DoD revised its strategic SAPR policy document to mandate that the Under Secretary of Defense for Personnel and Readiness develop metrics for compliance and effectiveness of individual SAPR programs.[222]

In addition, 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.[223] Pursuant to the President's directive, DoD SAPRO recently developed eleven new assessment metrics that are in addition to the six metrics currently tracked.[224] Several of these new metrics, which are in early development and use, focus on prevention efforts.[225] In the shorter term, DoD SAPRO will focus on other assessment measures such as surveys, research studies, and on-site visits.[226]

3. Effective Prevention Practices and Techniques

According to the CDC, 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.[227] For example, an effective public health approach might simultaneously target: *individuals,* by teaching them conflict resolution and emotion regulation; *peer groups* through bystander intervention education; *leaders,* by training them to be engaged and supportive; *the community,* by executing a campaign to change social norms and by monitoring locations reported to feel unsafe; and *the surrounding society,* by introducing alcohol restrictions and enforcing victim protection measures. Such a comprehensive approach employs cohesive and complementary skills and messages, creating a "surround sound effect" that permeates the environment.[228] The military has adopted this approach, as Figure 6 below illustrates:

FIGURE 6 – DoD and CDC Comprehensive Public Health Approach Models



a. Bystander Intervention

College campuses increasingly use bystander intervention education. Scientific studies show the military can effectively adopt it. Bystander intervention programs teach peer group members how to be "an engaged bystander," defined by the National Sexual Violence Resource Center 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."[229] The approach shifts prevention responsibility from the potential perpetrator or potential victim to everyone in the community.[230] Effective bystander intervention programs encourage peer groups to guard against attitudes, beliefs, and behaviors that contribute to a climate where sexual violence is more likely to occur.[231] This includes language and behaviors such as sexist comments, sexually objectifying jokes, and vulgar gestures. Studies show bystander intervention programs can be effective among both men and women.[232]

Particularly among men, however, fear of retaliation for interrupting and/or reporting offenses remains a distinct challenge for bystander intervention education.[233]

If primary prevention strategies like bystander intervention education are to succeed in the military, programs must educate Service members to guard against retaliation toward peers who intervene and/or report. Policies and requirements must ensure protection from retaliation of not just victims, but also the peers who speak out and step up on their behalf. [RSP Recommendation 19]

b. Alcohol Policy

The CDC identifies alcohol policy as a second additional domain where promising programs may be appropriate in military settings.[234] Alcohol policy strategies encompass laws and regulations at the local, state, and national level intended to regulate or modify the production, sale, and consumption of alcohol.[235] The CDC has also identified pricing strategies, outlet density, and restrictions on availability as promising strategies based on evidence from available studies.[236] While the studies focused on civilian universities, the CDC believes they may be similarly promising in military settings, given demographic and risk factor similarities.[237]

The DoD's 2008 Prevention Strategy first called for education on the interplay of alcohol and sexual assault,[238] and as a result, installations have begun implementing certain alcohol mitigation initiatives.[239] Department of Defense strategic documents, however, have not mandated any of the alcohol mitigation strategies emphasized as promising by the CDC, such as pricing strategies, outlet density, and restrictions on availability.[240] *The Department of Defense should work with researchers to determine the best means of implementing these promising, evidence-based strategies across the Services, not just at isolated installations. [RSP Recommendation 15]*

c. 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 their lives.[241] Nineteen percent of men and 45% of women who indicated on the 2012 WGRA survey that they experienced unwanted sexual contact in the Armed Forces also said they also experienced unwanted sexual contact prior to entering the military.[242] Programs focusing on survivors of prior sexual assault are a "secondary prevention" strategy.[243] In order for participants to be receptive to such programs, they must teach risk-reduction techniques in a way that avoids unintentional victim-blaming messages.[244]

The Department of Defense has only begun to address strategies that target populations at heightened vulnerability; increased consideration and emphasis on these populations are warranted.[245] 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 being victimized again. *Through training, DoD has increased focus on special populations that may require targeted interventions, but it should do more to further develop targeted risk-management programs. [RSP Recommendation 16]*

While the CDC focuses on "primary prevention" techniques that target potential perpetrators before a sexual assault occurs, it recognizes that strategies geared toward different or wider audiences may be effective, depending on particular risk and protective factors involved.[246] Thus, DoD should not restrict prevention strategies to those emphasizing primary prevention. Instead, DoD should maintain victim-focused programs that educate Service members on important risk factors that are unique to the military, such as disparity in rank. Further, *DoD SAPRO should consult with the CDC and other appropriate agencies to develop and expand services for military members who have previously experienced sexual abuse, and to develop strategies*

to encourage utilization of these services in order to prevent re-victimization and develop or maintain skills necessary to fully engage in military activities and requirements. [RSP Recommendation 17]

B. TRAINING OF PERSONNEL IN SEXUAL ASSAULT PREVENTION AND RESPONSE

Training and education play a significant role in DoD and Service prevention efforts. DoD has established comprehensive mandatory training requirements designed to ensure all personnel receive tailored training on SAPR principles, SAPR roles and responsibilities, and current prevention policies and strategies. DoD SAPRO has also established core SAPR training competencies with tailored instruction requirements for commanders, senior leaders, first responders, and SAPR personnel. While the current training requirements are in-depth and address most, if not all, of DoD's prevention policies, plans, and initiatives, some areas of prevention training could be improved.

1. General Personnel Training

One of the key objectives of the various DoD prevention policies is to "mentor, develop skills, and educate Service members to promote healthy relationships and intervene against inappropriate or unacceptable behaviors."[247] Section 585 of the FY12 NDAA required the Service Secretaries to develop a sexual assault prevention training curriculum for Service members, in consultation with outside experts.[248] The training is required to explain the differences between sexual assault and sexual harassment and that both are unacceptable forms of behavior. To illustrate the unique military setting, the training is required to ensure Service members encounter "scenario-based, real-life situations to demonstrate the entire cycle of prevention, reporting, response, and accountability procedures."[249]

Pursuant to Section 574 of the FY13 NDAA[250] and current DoD policy, all of the Services now provide SAPR training to Service members within the first two weeks of initial entrance on active duty.[251] Initial training includes information on DoD policies on prevention, available resources and procedures to obtain those resources, and bystander intervention training.[252] Following initial training, the Services now provide Service members with: prevention resources via newcomers' orientation, posters, brochures, and business cards; scenario-based training familiarizing Service members with the importance of bystander intervention and alcohol; and workshops focused on sexual assault prevention.[253] In addition to the training received during initial entry, DoD policy also requires Service members to receive tailored SAPR training at various points throughout their careers, including annual training, professional military education and leadership development, pre- and post-deployment, and prior to taking any command position.[254]

While the current prevention curriculum is expansive and prevention centric, some improvements and enhancements are necessary to ensure Service members are receiving the most effective prevention training at the earliest possible opportunity. For example, all new recruits should receive initial information and training before they enter basic training. Accordingly, the *commanders of Military Entrance Processing Stations (MEPS) should determine how to best provide sexual assault prevention information to new recruits immediately upon entry into the Service. The information should include the definition of sexual assault, possible consequences of a conviction for a sexual offense, and information about resources such as the Safe Helpline.255 [RSP Recommendation 21]*

In addition, *the Secretary of Defense should continue to develop and implement training for all Service members emphasizing that retaliation or harassment by Service members violates good order and discipline. [RSP Recommendation 23]* Harassment and retaliation against a victim in response to an allegation of sexual assault erodes unit cohesion, and the fear of harassment and retaliation deters victims from coming forward to report instances of sexual assault. Although the current DoD policy requires commanders and senior leaders to

receive training on recognizing and preventing retaliation towards a victim of sexual assault, the policy does not expressly provide that Service members receive such training.[256]

The ingrained notion of subordination of the individual to the mission that is unique to a military environment may deter Service members from reporting sexual assault and may encourage retaliation by peers against victims who come forward. As such, *the Secretary of Defense should direct DoD SAPRO to establish training for all Service members emphasizing that reporting incidents of sexual assault is essential for good order and discipline and protects rather than undermines morale. [RSP Recommendation 22]* It is also essential that the training emphasize the importance of the investigative and adjudicative process in the military justice system.

Further, there have been instances where officials and other Service members have ignored or retaliated against victims when the offender is a stellar performer or a superior offending against a subordinate.[257] To combat such retaliation, *Service member training should also emphasize that although the military ethos stresses subordination to orders, proposals by superiors for sexual interactions, whether implicit or explicit, are not lawful orders, should not be obeyed, and violate military conduct. [RSP Recommendation 24]*

Recent policies and training initiatives have sought to identify special populations within the military to prevent sexual assault. However, male victims of sexual assault are often left out of conversations about how sexual assault occurs in the military. This omission is a lost opportunity to validate and encourage male victims to come forward and may even deter some male victims from reporting sexual assault. *DoD 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. They 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 are not tolerated and may constitute punishable offenses. DoD SAPRO should fund research on, and 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. [RSP Recommendation 13]* Additionally, *the Secretary of Defense should continue to develop and implement training for Service members with examples of male-on-male sexual assault, including hazing and sexual abuse by groups of men. The training should also emphasize the psychological damage done by sexual assault against male victims. [RSP Recommendation 20]*

The Department of Defense has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on SAPR principles, reporting options and resources for victims, the roles and responsibilities of commanders and SAPR personnel, prevention strategies, and report documentation requirements. In addition, DoD SAPRO has established core SAPR training competencies with tailored instruction requirements for: accessions training, annual refresher training, pre- and post- deployment training, professional military education, senior leadership training, and response personnel training. Congress directed the Panel to assess whether, in addition to current training requirements, "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 for addressing those issues within the Armed Forces."[258] *Due to the current training requirements, at this time, the Department of Defense should not promulgate an additional formal statement of what accountability, rights, and responsibilities of a member of the Armed Forces has with regard to matters of sexual assault prevention and response. [RSP Recommendation 25]*

2. Commander Training on Prevention

The Secretary of Defense has directed enhanced prevention training and assessment programs for new military commanders and senior leaders; subsequently, the Services have created specific prevention training efforts for commanders and leaders.[259] These efforts include sexual assault prevention training tailored to specific leadership positions, integrating prevention training into critical Senior Leadership Schools and curriculums,

and establishing training emphasizing the role of the commander and senior leaders in preventive efforts.[260] DoD has also required the Services 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.[261]

Further, effective February 12, 2014, DoD policy required a SAPR training module for training new or prospective commanders at all levels. Tailored to the commanders' 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."[262]

The Services implement DoD prevention training for commanders and leaders in significantly different ways:

- 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, victim service personnel receive training on how to support commander efforts to prevent sexual harassment and sexual assault.

- Air Force commanders receive training at the Wing Commanders' Course, the Squadron Commanders' Course, and throughout their time in command from their staff judge advocates and servicing legal offices. Further, as officers, these commanders received various levels of professional military education, including training and discussions of many of the personnel and command issues they face. These courses include Squadron Officer School as a junior officer, Staff College as a mid-grade officer, and War College as a senior officer.

- The Navy and Marine Corps integrate SAPR training into critical leadership training, including the Senior Enlisted Academy and Command Leadership School. Sexual Assault Prevention and Response training for Navy and Marine Corps 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. Annual Coast Guard sexual assault specific training includes prevention and bystander intervention education, and is offered to victim advocates and SARCs.[263]

Chapter Five:

COMMAND ACCOUNTABILITY IN SEXUAL ASSAULT PREVENTION AND RESPONSE

A. ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Defining, assessing, and improving command accountability for incidents of sexual violence is central to reducing sexual assault and sex-related offenses. The Panel received overwhelming evidence that indicates the climate commanders establish in their units 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 reducing sexual violence, the DoD and Congress have sought to ensure those selected for command are appropriately trained for 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. *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. [RSP Recommendation 31]*

1. Training and Selection of Commanders

Military commanders comprise approximately one percent of the active military service.[264] 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.[265] 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.[266]

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.[267]

Throughout their careers, 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."[268] As officers develop and are prepared for command, they attend additional training courses and leadership schools, with each Service offering instruction in legal roles and responsibilities.[269] 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.[270]

In January 2012, the Secretary of Defense directed a DoD-wide evaluation of pre-command SAPR training.[271] 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."[272] In May 2012, DoD SAPRO completed its final evaluation, with 13 recommendations to sustain and improve pre-command SAPR training.[273] Notable among DoD SAPRO's recommendations was the proposal to create a standardized SAPR curriculum across the Services, expand training time to ensure there is ample opportunity for quality instruction, and assess training participants to ensure mastery of key SAPR concepts.[274] In a January 2013 report to the Secretary of Defense, the Under Secretary of Defense for Personnel and Readiness noted that the Services would be implementing training enhancements which included: standard core competencies, learning objectives, and methods for assessing training effectiveness, for both pre-command and senior enlisted leader training.[275]

2. Recent Legislation and Department of Defense Initiatives on Accountability

a. Department of Defense Efforts at Enhancing Accountability of Commanders

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. In the words of one retired general officer, "Command without accountability is a failed model. It absolutely will not work."[276] 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 adding a SAPR module in training for new or prospective commanders and requiring commanders to conduct regular climate assessments.[277]

In May 2013, the Secretary of Defense directed the Services to implement the 2013 DoD SAPR Strategic Plan. The Secretary also announced several additional measures to address sexual assault in the military, two of which focused on commander accountability.[278] In particular, he directed the Services to develop methods to hold military commanders accountable for command climates and required the next-superior commander to receive copies of annual command climate surveys from subordinate commanders.[279]

To ensure military leaders clearly understand their duties and responsibilities, DoD SAPRO and the Service Secretaries must ensure SAPR programs and initiatives are clearly defined and establish objective standards when possible. [RSP Recommendation 34] For example, the Navy has adopted a definition for "positive command climate" that extends beyond sexual assault prevention to include professionalism, dignity and respect, and efforts to oppose improper discrimination, sexual harassment, hazing, and other inappropriate conduct.[280] In addition, the Navy has 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.[281]

b. Assessing Commander Performance in Sexual Assault Prevention and Response

Performance evaluation reporting systems now include commander effectiveness in sexual assault prevention and response to sexual assault allegations.[282] 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."[283]

Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance. As described previously, command climate surveys are a principal method used by DoD to evaluate climate factors and assess a commander's performance in sustaining an appropriate unit climate. 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. To ensure accurate assessment of subordinate command climate, commanders at all levels must be continuously engaged with subordinate commanders and their units. *The Service Secretaries should ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys. [RSP Recommendation 33]*

Moreover, 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. Problems related to a commander's tenure may not be known until after the 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.

Section 3(c) of the Victims Protection Act of 2014, which mirrors the sense of Congress expressed in Section 1751 of the FY14 NDAA, would further expand assessment of SAPR support on all performance appraisals and would require assessment of a commander's sexual assault response efforts.[284] Although 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, Section 3(c) would not require performance appraisals to specifically address how a commander performs his or her sexual assault prevention responsibilities.[285]

c. Enhancing Accountability of Subordinate Leaders

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."[286]

The Secretary of Defense's May 2013 directive to the Services required each Service to develop methods and metrics for enhancing commander accountability, tailored to Service needs and structure.[287] Thereafter, each of the Services reported modification of performance evaluations as a primary initiative. 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. While performance appraisals in each Service directly impact promotion potential and future assignments, including command selection, the evaluation scope and level of detail of consideration of command climate and SAPR issues required vary among the Services.[288] Differences among the Services' requirements for SAPR performance assessment 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, noncommissioned officers, and civilian

supervisors. [RSP Recommendation 32] 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."[289]

3. 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.[290] Commanders serve at the discretion of their superior commanders and leaders.[291] 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."[292]

Other provisions of law and policy provide additional accountability. Section 1701 of the FY14 NDAA authorizes disciplinary sanctions against members who willfully or wantonly fail to comply with victim rights requirements under the recently enacted Article 6b of the UCMJ.[293] Punitive sanctions may also be imposed for illegal conduct during an investigation or trial.[294] Lesser means are also available to hold commanders accountable for SAPR performance.[295]

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.

Senior leaders' sexual misconduct or failure to take appropriate action in response to sexual assault reports often 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 and the public. Command accountability is a critical concern which needs to continually be monitored, with consistency in actions taken against members, regardless of their rank, and transparency in those disposition decisions.[296]

It is important to continue to leverage accountability mechanisms that encourage commanders to set a positive command climate that contributes to sexual assault prevention and appropriate response to sexual assault allegations. 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.

B. COMMAND CLIMATE ASSESSMENT

The Department of Defense and the Services have developed tools for individual commanders and senior leaders to assess the climate within commands for sexual assault prevention and response. Congress, DoD, and the Services established baseline requirements for conducting and reporting climate assessment surveys that seek to ensure commanders are attuned to and accountable for the SAPR climate within their unit. Surveys may provide helpful information about positive or negative climate factors, but surveys alone do not provide a comprehensive assessment of the climate in an organization. *The Department of Defense and the Services must develop and implement other means to assess and measure institutional and organizational climate for sexual assault prevention and response. [RSP Recommendation 28]*

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, whether or not they validate or disprove DoD's own internal assessments, would provide useful feedback to the Department and the public on SAPR programs, initiatives, and effectiveness. [RSP Recommendation 78]*

1. 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 (DSAID). 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 SAPR personnel; fifteen additional metrics are in development.[297] DoD SAPRO and the Services also use information from the biannual Workplace and Gender Relations Surveys, as well as the Defense Equal Opportunity Management Institute (DEOMI) Equal Opportunity Climate Surveys (DEOCS) to assess DoD and Service effectiveness in sexual assault prevention and response.[298]

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 or 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.

2. Command Climate Surveys

DEOMI conducts command climate surveys for DoD organizations. The original command climate survey was a questionnaire designed to provide leaders with information about how assigned personnel perceived "Equal Opportunity" issues in their unit. The survey—now called the Defense Equal Opportunity Climate Survey (DEOCS)—has since evolved and expanded to address a wide variety of human relations issues, including sexual assault, sexual harassment, hazing, and bullying.[299] The DEOCS is now the primary vehicle for assessing command climate for all military commanders at all levels of command.[300] The most recent version of DEOCS, Version 4.0, includes 95 questions that assess 23 workplace climate factors, including SAPR.[301]

DEOCS Version 4.0 assesses the following factors, which impact the SAPR climate in any individual command:

- perceptions of safety;
- chain of command support;
- publicity of SAPR information;
- unit reporting climate;
- perceived barriers to reporting;

- unit prevention climate/bystander intervention; and
- knowledge of restricted reporting.[302]

While commanders are ultimately accountable for their unit's performance and climate, 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.[303] Therefore, *assessment of command climate must accurately assess and evaluate the effectiveness of subordinate organizational leaders in addition to commanders. [RSP Recommendation 26]* Additionally, commanders must pay particular attention to the critical role noncommissioned officers, subordinate leaders, and supervisors play. 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.

3. 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 conduct a climate assessment of the command within 120 days after assuming command and at least annually thereafter.[304] 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.[305] 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.[306]

In addition, DoD mandated in July 2013 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.[307] 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.[308] The Services have since established policies in accordance with DoD's guidance for survey frequency and result reporting requirements.[309]

DEOMI's leadership notes that 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."[310] 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.[311]

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.[312] In addition to superior commanders 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 next higher-level commander, who must then approve the plan prior to implementation.[313] While other Services recently implemented similar policies for climate assessment action plans and reporting,[314] such *action plans should be mandated by all Services and should outline the steps the command will take to validate or expand upon survey information. [RSP Recommendation 27]*

In addition to personnel surveys, DoD, the Services, and commanders should identify other resources for feedback on SAPR programs and local command climate. [RSP Recommendation 29] 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.

Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations. However, they must ensure they do not seek out or use information that is otherwise confidential or protected. *Commanders should be trained in methods for monitoring a unit's SAPR climate and should be held accountable for monitoring their command's SAPR climate outside of the conduct of periodic surveys. [RSP Recommendation 35]*

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.[315]

As described above, 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.

The recent dramatic increase in the use and frequency of surveys administered by DEOMI last year raises concerns about 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 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. [RSP Recommendation 10]*

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.

The Panel recommends that Congress not adopt Section 3(d) of the Victims Protection Act. [RSP Recommendation 30] 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 sexual assault crime. Additional survey requirements increase concerns about survey fatigue and the accuracy of the information collected.

Instead, 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.). 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.

Chapter Six:

SEXUAL ASSAULT REPORTING, VICTIM SERVICES, AND RESOURCES

A. PERSONNEL AND PROGRAMS ENGAGED IN SEXUAL ASSAULT RESPONSE

The DoD's sexual assault response systems include the commander, victim services personnel, special victim counsel, medical and behavioral health personnel, prosecutors, law enforcement investigators, and others. This chapter describes options for sexual assault victims to report the incident and additional services available for victims in both the military and civilian sector. This chapter further describes a DoD and civilian best practice—the multidisciplinary approach to sexual assault.

The table below provides a synopsis of personnel and programs engaged in DoD and civilian response systems to adult sexual assault.

Sexual Assault Prevention and Response Personnel and Programs	Purpose[316]
The Family Advocacy Program (FAP)	A program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence, including sexual violence. The Family Advocacy Programs across the Services consist of coordinated efforts designed to prevent and intervene in cases of family distress and promote healthy family life.[317]
The Special Victim Counsel Program and Special Victim Counsel (SVC)	The Special Victim Counsel Program was created by the Services and mandated by Congress to support sexual assault victims and enhance their rights within the military justice system while neither causing unreasonable delay nor infringing upon the rights of an accused.[318] The Navy and Marine Corps term for this attorney is victim legal counsel (VLC). A special victim counsel's primary duty is to represent their clients' rights and interests during the investigation and court-martial process.[319] In general, special victim counsel services include, but are not limited to: accompanying and advising the victim during interviews, examinations and hearings, advocating to government counsel and commanders on behalf of the victim, and advising the victim on collateral civil matters which stem from the alleged sexual assault.[320] Special victim counsel are also able to advise a victim on the difference between a restricted and unrestricted report and on what to expect if they decide to make an unrestricted report and their case is referred to court-martial. Special victim counsel may coordinate with the sexual assault response and victim witness assistance personnel on available resources.[321]

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.[322]
Sexual Assault Response Team (SART)	A multidisciplinary team that provides specialized immediate response to victims of recent sexual assault. The team typically includes health care personnel, law enforcement representatives, victim advocates, prosecutors (usually available on-call to consult with first responders, although some may be more actively involved at this stage), and forensic lab personnel (typically available to consult with examiners, law enforcement, or prosecutors, but not actively involved at this stage).[323]
Sexual Assault Victim Advocate (VA) or Sexual Assault Prevention and Response Victim Advocate (SAPR VA)	Provides non-clinical crisis intervention and on-going support in addition to referrals for adult sexual assault victims. Support includes providing information on available options and resources to victims. Provides liaison assistance with other organizations and agencies on victim care matters and reports directly to the SARC when performing victim advocacy duties.[324]
Domestic Abuse Victim Advocate (DAVA)	Victim advocates in the Family Advocacy Program who provide assistance to victims of spousal or intimate partner domestic abuse, including sexual abuse and child sexual abuse.
Special Victim Capability (SVC)	A multidisciplinary, coordinated approach to investigating, prosecuting, and providing victim support for sexual assault offenses. DoD policy requires that the capability include: specially trained investigators, specially trained prosecutors, victim witness assistance personnel, and paralegals.
Specially Trained Investigators or Special Victim Unit Investigator (SVUI)	A distinct recognizable group of appropriately skilled investigators who investigate allegations of sexual assault, domestic violence involving sexual assault, and child abuse involving sexual assault.[325] DoD uses the term special victim unit investigator to refer to the MCIO agent or investigator supporting the Special Victim Capability. The MCIOs, however, refer to the military personnel as agents and civilian personnel as either agents or investigators, depending on their hiring status.
Detective	Civilian law enforcement based investigator, generally assigned to conduct investigations subsequent to a patrol officer's first response.
Investigator	A trained criminal investigator employed by prosecution or defense office to provide investigative support specifically to that office.
Victim Coordinator	An individual from the civilian law enforcement agency providing victim support through the investigative process.
Sexual Assault Nurse Examiner (SANE)	A registered nurse who receives specialized education and fulfills clinical requirements to perform the sexual assault medical forensic exam.[326]

Sexual Assault Medical Forensic Examiner (SAMFE)	Medical personnel who are clinically trained to perform a sexual assault exam and have obtained an additional forensic certification to collect forensic evidence from sexual assault victims. Often, the SAMFE is a SANE nurse who has completed the forensic certification.[327]
Specially Trained Prosecutors or Special Victim Prosecutor (SVP)	Specially trained and experienced judge advocates detailed by Service TJAGs, the SJA to the Commandant of the Marine Corps (CMC), or other appropriate authority to litigate or assist with the prosecution of special victim cases and provide advisory support to MCIO investigators and responsible legal offices as part of the Special Victim Capability. Before specially trained prosecutors are detailed, their Service TJAG, SJA to CMC, or other appropriate authority has determined they have the necessary training, maturity, advocacy, and leadership skills to carry out those duties.[328] DoD uses the term specially trained prosecutors. The Army uses the term special victim prosecutor, while the Air Force and Navy refer to this person as senior trial counsel. The Marines use complex trial teams for serious sexual assault cases and rely on the regional trial counsel to provide the support for the Special Victim Capability.
Victim Witness Liaison (VWL)	An individual who works within the civilian prosecutors' office or with the military prosecutors' office to assist victims throughout the trial process. In the military, the VWL is part of the Victim Witness Assistance Program and coordinates efforts to ensure systems are in place at the installation level to provide information on available benefits and services. Assists victims and witnesses in obtaining those benefits and services.
The Victim Witness Assistance Program (VWAP)	A program designed to coordinate efforts and ensure that systems are in place at the installation level to provide information to victims and witnesses on available benefits and services and to provide assistance in obtaining those benefits and services. VWAP applies to all crime victims and witnesses. The local responsible official (in charge of the installation level program) establishes oversight procedures to ensure the establishment of an integrated support system capable of providing services to victims and witnesses. Ensures victims and witnesses are informed on the military justice process and available medical and social services.[329] A program that provides policies and responsibilities for assisting victims and witnesses of crimes committed in violation of the UCMJ or in violation of the law of another jurisdiction if any portion of the investigation is conducted primarily by a DoD component.[330]

B. OVERVIEW OF VICTIM SERVICES

The DoD SAPR Program is the military's flagship program devoted to preventing and responding to the crime of sexual assault "in order to enable military readiness and reduce – with a goal to eliminate – sexual assault from the military."[331] Since its inception in 2004, the DoD SAPR program has been the single source for sexual assault policy across DoD.[332]

Since 2005, DoD policy has provided a restricted reporting option for sexual assault victims who want to obtain services while maintaining confidentiality; mandated baseline and pre-deployment sexual assault prevention training for Service members and first responders (e.g., healthcare providers, victim advocates, law enforcement, criminal investigators, judge advocates, chaplains); and required SARCs and victim advocates to provide services specifically for active duty Service members and their adult dependents who are sexually assaulted. SARCS are also responsible for prevention training, management of victim advocates, maintaining reporting data, and maintaining a 24 hours per day, seven days per week capability.[333] Appendix I describes the current scope and structure of each Service's SARC and SAPR victim advocate program.

Since the inaugural DoD sexual assault policy in 2005, Congress has directed an ongoing and increasingly long list of substantial changes, additions, and improvements to DoD SAPR programs.[334] As an Army Sexual Harassment/Assault Response and Prevention Program manager commented to the Panel, "I see a real difference in the way the commanders understand the issues of sexual assault and sexual harassment. I see a 100 percent increase in the amount of attention paid to the education of all soldiers about the crime."[335]

However, Congress mandated many of the changes and new programs in such rapid succession that SAPR personnel have had to begin implementing new initiatives before fully implementing previously required programs. Due in large part to the speed with which these programs and initiatives have been adopted, DoD has not performed a thorough assessment and evaluation of all current programs to determine their effectiveness, the extent to which they may be duplicative, and conclude which programs should be continued or expanded.[336]

Therefore, *DoD SAPRO should conduct a thorough evaluation and assessment of all programs and initiatives dealing with sexual assault and measure the effectiveness of each to determine which programs and initiatives are effective, which should be continued, expanded, and preserved and how best to allocate funding for the effective programs and initiatives. [RSP Recommendation 77]*

C. REPORTING SEXUAL ASSAULTS IN THE MILITARY

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

1. Options for Reporting

DoD policy provides that sexual assault victims may choose to make a restricted or unrestricted report of the incident. DoD implemented restricted reporting in 2005 "before [the option] was even an item of discussion" in civilian jurisdictions.[337] A restricted report is confidential and will not result in notification of law enforcement or the victim's chain of command.[338] A victim can only make a restricted report to a SARC, SAPR victim advocate or healthcare personnel.[339] Restricted reports allow victims to report confidentially and obtain the support of healthcare treatment and services of a SARC or SAPR victim advocate without being forced to initiate a criminal investigation. This option is intended to maximize support for victims without requiring them to choose between obtaining support or retaining their privacy.

After receiving a restricted report a SARC or SAPR victim advocate is required to report the fact of the assault to the installation commander,[340] but the report will not contain personally identifiable information and may not be used for investigative purposes.[341] Accordingly, the identities of the victim and the offender, if known, remain confidential in a restricted report.[342] 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.[343]

Victims can make unrestricted reports of sexual assault to SARCs, SAPR victim advocates, and healthcare personnel, as well as chaplains,[344] judge advocates, and military or civilian law enforcement personnel.[345] Victims may also report an assault to a supervisor or their chain of command, but they are not required to do so. Under current law and practice, unrestricted reports of sexual assault must be referred to, and investigated by, MCIOs that are independent of the chain of command.[346] Service members may always call civilian law enforcement or other civilian agencies to report a sexual assault if they are not comfortable notifying military authorities.

Though several categories of military personnel are trained as initial responders to sexual assault reports, only SARCs and SAPR victim advocates are responsible for formally documenting reports.[347] The following table 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[349]
- Legal Personnel
- Chain of Command
- Law Enforcement – Military Police or Military Criminal Investigative Organizations

Restricted Reporting Resources[348]

- Sexual Assault Response Coordinators (SARCs)
- Victim Advocates (VAs)
- Health Care Professionals or Personnel
- Chaplains[350]
- Legal Assistance Attorneys[351] and Special Victims Counsel

2. Ensuring Service Members Understand Reporting Options

Reporting options are 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.[352] 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.[353]

Although reporting options are well publicized, it is not clear that all members of the military fully understand them. Recent surveys conducted by DEOMI indicated that 71% of DoD personnel surveyed correctly understood restricted reporting options.[354] Junior enlisted personnel scored lowest on understanding their options for filing a restricted report, with nearly 50% of survey respondents incorrectly answering that "anyone in my chain of command" could take a restricted report of sexual assault. *Sexual assault reporting options should be 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. [RSP Recommendation 65]*

Special victim counsel are particularly qualified to help victims of sexual assault understand reporting options. Military sexual assault victims who make either restricted or unrestricted reports, and are otherwise entitled to legal assistance, are eligible for special victim counsel representation.[355] However, a special victim counsel

is not listed as an entity that takes restricted reports. It is unclear if a victim may seek special victim counsel advice prior to making an official report.[356] *The Secretary of Defense should develop and implement policy that, when information comes to military police about an instance of sexual assault by whatever means, the first step in an investigation is to advise the victim that she or he has the right to speak with special victim counsel before determining whether to file a restricted or unrestricted report, or no report at all. [RSP Recommendation 62]*

3. Resolving Collateral Misconduct in Sexual Assault Reporting

As noted in Chapter 2 of this report, collateral misconduct by a sexual assault victim is a significant barrier to reporting because of the victim's fear of punishment.[357] Military sexual assault victims may anticipate they will face negative consequences for collateral misconduct such as underage drinking, fraternization, disobeying orders, and other military-specific offenses.[358] Under current DoD policy, commanders can defer action on victims' collateral misconduct until final disposition of the case, if appropriate, so as to encourage reporting of sexual assault and continued victim cooperation.[359] Only a general court-martial convening authority can grant immunity in the military justice system; the authority to grant immunity may not be delegated.[360] The lack of automatic immunity for minor collateral misconduct in sexual assault cases may contribute to reluctance among sexual assault victims to report their victimization.

Some civilian police agencies reported they usually take no action against victims for minor violations associated with a sexual assault incident. For example, in Philadelphia, the police department follows a District Attorney's Office policy not to pursue charges against victims for low-level drug or alcohol violations. For more serious offenses, such as prostitution, prosecutors will sometimes grant immunity.[361]

The Services do not support a universal immunity policy for victims who may have committed some collateral misconduct.[362] The Services cited the lack of empirical evidence that a collateral misconduct immunity policy would increase reporting and expressed concerns that it might weaken the credibility of the victim witness and increase false reporting.[363]

Previous studies also expressed concern that blanket immunity could undermine discipline and have the unintended consequence of causing alienation of the victim, especially if others are held accountable for similar misconduct.[364] These concerns about collateral misconduct require further consideration. *The Panel recommends an expedited study of what may constitute low-level collateral misconduct in sexual assault cases and examination of whether a procedure for granting limited immunity should be implemented in the future. [RSP Recommendation 60]*

4. Maintaining Offender Information from Restricted Reports

The DoD uses the DSAID, a secure, web-based tool to gather information to compile sexual assault statistics for required reports to Congress and to support Service SAPR program management.[365] DSAID contains information input by SARCs about both restricted and unrestricted sexual assault reports involving members of the Armed Forces. However, current DoD policy prohibits inputting personal identifying information of the alleged offender in a restricted report.[366] Consequently, incidents reported through the restricted reporting option may allow possible serial offenders to go undetected.

The FY14 NDAA required the Panel to assess "the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators."[367] DoD policy allows information from a restricted report to be released when "necessary to prevent or mitigate a serious and imminent threat to the health or safety of the victim or another person; for example, multiple reports involving the same alleged suspect (repeat offender) could meet this criteria."[368] *Policy and procedures should be developed for SARCs to enter alleged offender information from restricted reports in DSAID with*

appropriate safeguards to protect this personally identifiable information and control its release to MCIOs. [RSP Recommendation 67] The Services noted concern that placing information from a restricted report into an MCIO's criminal intelligence database "could result in proactive or inadvertent actions by investigators searching that database that could jeopardize the confidentiality of a restricted report."[369]

5. Allowing Victims to Meet with Military Law Enforcement Investigators Prior to Selecting Reporting Option

The Panel recommends the Secretary of Defense direct DoD SAPRO, in coordination with the Services and DoD IG, to change restricted reporting policy to allow a victim who has made a restricted report the option to voluntarily provide information to an MCIO agent without the report automatically becoming unrestricted and triggering a law enforcement investigation. However, victims must have their SARC, victim advocate, or special victim counsel present during any conversation with investigators to use this option and have voluntarily decided to speak to the MCIO agent. This would allow investigators to document information for criminal intelligence purposes,[370] while developing a rapport with victims, which may in turn, encourage them to file an unrestricted report. *The policy should prohibit MCIOs from using information obtained in this manner to initiate an investigation or title an alleged offender as a subject, unless the victim chooses, or changes, his or her preference to an unrestricted report. The Secretary of Defense should require this information be provided the same safeguards as other criminal intelligence data to protect against misuse of the information. [RSP Recommendation 63]*

D. SPECIAL VICTIM COUNSEL PROGRAM

Following an Air Force pilot program and a mandate from the Secretary of Defense to the Services to create special victim counsel programs, Congress codified the Special Victim Counsel[371] Program to "strengthen . . . support of victims of sexual assault and enhance their rights" within the military justice system "while neither causing unreasonable delay nor infringing upon the rights of an accused."[372] An independent special victim counsel represents the interests of and advocates for the victim.[373] An overarching goal of the Special Victim Counsel Program is to instill confidence in victims so that more victims come forward and report incidents of sexual assault.[374] Appendix J describes the current scope and structure of each Service's Special Victim Counsel Program.

A special victim counsel's primary duty is to represent the clients' rights and interests during the investigation, pre-trial investigation proceedings and negotiations, including plea agreements, and the court-martial process.[375] In general, special victim counsel services include, but are not limited to, accompanying and advising the victim during interviews, examinations and hearings, advocating to government counsel, commanders, and the convening authority on behalf of the victim, and advising the victim on collateral civil matters which stem from the alleged sexual assault.[376] Special victim counsel are also able to advise a victim on reporting options and their potential outcomes.[377] Special victim counsel may coordinate with the sexual assault response and victim witness assistance personnel to ensure the victim is informed of all available services and assist victims with obtaining available resources. Following the enactment of Article 6b of the UCMJ, which codifies certain military victim rights, the special victim counsel is also responsible for ensuring the victim is aware of his or her rights within the military justice system and advocating to ensure that the victim's rights are enforced by all persons involved in the court-martial process.[378] Additionally, special victim counsel may represent the victim in courts-martial, as permitted by law, and assist victims with any post-trial submissions to the convening authority.[379]

1. Eligibility for Services

The FY14 NDAA codified the right of sexual assault victims to obtain legal services through a special victim counsel.[380] Currently, to be eligible for special victim counsel assistance, a sexual assault victim must make an unrestricted or restricted report of sexual assault under the UCMJ and otherwise be entitled to legal assistance under 10 U.S.C. § 1044e.[381] Further, pursuant to Service policy, an eligible victim must be offered special victim counsel services as soon as he or she reports an alleged sex-related offense or when he or she seeks assistance from a SARC, a victim advocate, military criminal investigator, VWL, trial counsel, healthcare provider, or any other designated personnel.[382] Appendix K describes the scope and nature of services provided to victims according to each Service's Special Victim Counsel Program.

Many sexual assault victims may not know they may seek the advice of a special victim counsel before reporting or when choosing not to report; current policy is unclear at this point. To clarify this issue and to ensure sexual assault victims receive timely advice, *DoD should develop and implement policy providing sexual assault victims the right and ability to consult with a special victim counsel before deciding whether to make a restricted or unrestricted report, or no report at all. Communication made during this consultation would be confidential and protected under the attorney-client privilege. [RSP Recommendation 61]* Such a policy will also assist with alleviating the fear of damage to one's career after making an official report by providing the victim with accurate information about potential courses of action and their consequences.

2. Selection of Special Victim Counsel

Pursuant to the FY14 NDAA, special victim counsel are required to meet the same qualifications as other legal assistance attorneys (i.e., judge advocate or a civilian attorney who is a member of the bar of a Federal court or of the highest court of a State) and be certified as competent to be designated as a special victim counsel by the Service Judge Advocate General.[383] In addition to these statutory requirements, the staff judge advocate, Service Judge Advocate General, or Special Victim Counsel Program officer in charge look to additional factors, such as previous military justice experience, maturity and sound judgment, and a desire to serve in the position.[384]

Although not expressly required in every Service, it is preferred that the counsel have experience as both defense and trial counsel before serving as special victim counsel.[385] The length of time the individual served in a military justice position varies throughout each Service; it is unclear if actual trial experience is required across the Services. *The Services should implement additional selection criteria for their Special Victim Counsel programs that require appropriate trial experience, whenever possible, prior to being selected as a special victim counsel. [RSP Recommendation 47]*

3. Assignment Length and Duration of Representation

Based on Service policy, the duration of an officer's special victim counsel assignment varies. In general, a special victim counsel will serve a minimum of one year and not more than two years.[386] If a Naval Reserve officer is activated to serve as a special victim counsel, the assignment may last three years.[387] Air Force special victim counsel remain non-deployable for the duration of their assignment.[388] The Army does not have the same limitation but provides, "[s]pecial consideration should be given to ensure that continuity is not broken between a [special victim counsel] and the victim represented. Thus, care must be [taken] when making deployment determinations that involve a [special victim counsel] who is actively representing victims."[389]

According to individual Service policies, the special victim counsel and victim have a privileged attorney-client relationship from their initial meeting through the final disposition[390] of a case or transfer of the special victim counsel to another duty station.[391] However, following final action or transfer of counsel, a right of the victim may still exist and be at issue. Therefore, *the Secretary of Defense should direct the Services to extend*

the opportunity for special victim counsel representation, although not necessarily with the same special victim counsel, to a victim so long as a right of the victim exists and is at issue. [RSP Recommendation 44]

4. Assessments of the Special Victim Counsel Program

Members of the Panel had the opportunity to hear from military sexual assault victims who were assigned a special victim counsel. Each witness who had been assigned a special victim counsel testified that the special victim counsel was critical to his or her ability to understand the process and participate effectively as witnesses against their accuser.[392] The outcome of an acquittal in some of the cases did not lessen the value the victim placed on the special victim counsel's representation.[393] Initial survey results from the Air Force, the only Service to have currently implemented a victim satisfaction survey, revealed responses were overwhelmingly positive and show the effectiveness of the Special Victim Counsel program.[394] Ninety-two percent of those surveyed indicated they were "extremely satisfied" with the advice and support the [special victim counsel] provided during the court-martial process.[395]

Members of the Panel also heard testimony from trial and defense counsel, SARCs, and victim advocate personnel regarding their relationships with special victim counsel. The witnesses stated they have positive working relationships with special victim counsel, but foresee potential issues such as privilege, confidentiality, and delays which could affect the relationships.[396] Therefore, in addition to assessing victim satisfaction with the Special Victim Counsel program, *the Service Secretaries should survey convening authorities, staff judge advocates, prosecutors, defense counsel, military judges, and investigators to assess the effects of the program on the administration of justice. [RSP Recommendation 48]*

To evaluate the cost and effectiveness of the program, the Army, Navy, and Marine Corps are developing surveys modeled on the Air Force victim impact survey;[397] the Judge Advocate General of the Army has tasked the Army Special Victim Counsel Program manager with gathering information about the first twelve months of the Army's Special Victim Counsel Program.[398] However, the Services have neither universally defined what "effective" means nor developed any standardized method of evaluating program effectiveness.[399] To ensure the program remains effective, *the Service Secretaries should develop a standard evaluation mechanism, in consultation with an independent evaluator, with appropriate metrics to determine the effectiveness of the Special Victim Counsel program on an annual basis. This includes annually evaluating the effectiveness of the organizational structure of the Service Special Victim Counsel programs and assessing the individual Service policies on eligibility requirements for obtaining a special victim counsel. [RSP Recommendation 51]*

Due to early evidence of the program's success, Congress appropriated $25 million for the DoD in the FY14 NDAA to assist the Services with the cost of implementation, staffing, and operations for their individual Special Victim Programs.[400] However, for the upcoming fiscal year and beyond, each Service anticipates significant operating costs and increased staffing requirements to sustain effective Special Victim Counsel Programs.[401] Therefore, *to ensure the Services are able to sustain a robust Special Victim Counsel program, Congress should appropriate sufficient funds and personnel authorizations annually to DoD. [RSP Recommendation 49]*

E. ADDITIONAL VICTIM SERVICES IN THE MILITARY AND CIVILIAN COMMUNITIES

1. Select Military Sexual Assault Response Practices and Initiatives

a. Eight Day Report

DoD policy requires the SARC to inform the installation commander within 24 hours of either a restricted or unrestricted report of sexual assault being filed.[402] The FY14 NDAA enhanced this requirement by directing the Secretary of Defense to establish a policy requiring a written incident report that details the actions taken and services offered or provided to the victim to the installation commander, if any, the first general officer, and first officer in the grade of O-6 in the chains of command of the victim and the alleged offender within eight days of a Service member filing an unrestricted sexual assault report.[403] This "eight day" report allows the chain of command to ensure that unrestricted reports of sexual assault are being investigated, that any requests for expedited transfer or military protective orders are being processed, and that the sexual assault victim is referred for any necessary care and support.[404]

However, because the FY14 NDAA does not include the same requirement for restricted reports, senior officers within the chain of command and on an installation are not provided with follow-up information on whether the victim filing the restricted report is receiving assistance and necessary support. To increase awareness, oversight, and accountability for restricted reports, *DoD should develop and implement a process to provide the installation commander, the first O-6 and first general or flag officer in the victim's chain of command with information on the status and services provided to victims filing restricted reports of sexual assault within eight days of a report. When restricted reports are made, DoD SAPRO should work with the Services to ensure adequate measures are in place to protect the identity of the victim while providing sufficient information to track the victim's care. [RSP Recommendation 68]*

b. Expedited Transfer

Victims who make an unrestricted report of rape or sexual assault in violation of Article 120(a) or (b) of the UCMJ, and forcible sodomy in violation of Article 125 of the UCMJ, have the ability to request an expedited transfer from their assigned command or base and the Panel received positive feedback about this option.[405] Commanders also indicated that in some situations, they may exercise the option to transfer the alleged offender rather than the reporting victim.[406]

The SARC, victim advocate, or the Service member's commanding officer must notify the Service member of the option to request a temporary or permanent expedited transfer from their assigned command or installation at the time of the report, or as soon as practicable.[407] Once the victim makes the request and the commander determines that the sexual assault report is credible, the commander must process the transfer request within 72 hours.[408] If a commander denies the request for transfer, it must go to the first general officer in the chain of command, who will endorse the transfer or forward the request to a higher level to make the final determination.[409] Representatives from each Service told the Panel that the individual Services approved 99 to 100% of expedited transfer requests.[410]

Although expedited transfers are a positive option for those who file unrestricted reports, DoD policy does not permit victims who file a restricted report of a sexual assault to request a temporary or permanent expedited transfer from their assigned command or installation, or to a different location within their assigned duty or living location.[411] There is currently no mechanism that permits a sexual assault victim to maintain his or her restricted report and request an expedited transfer.

Law and DoD policy mandate that if the commander knows or learns actionable information about a sexual assault, the report becomes unrestricted, even if the victim filed or intended to file a restricted report. The

commander must immediately notify the MCIO and an investigation must be opened.[412] Because an expedited transfer requires the commander's authorization, he or she will inevitably know the identity of the individual requesting such transfer. By nature of their duties, a request for a transfer on behalf of another Service member from a SARC or SAPR victim advocate provides the commander with the information that a sexual assault has taken place and the identity of the victim. Under current policy, the commander will be obligated to notify the MCIO, and the report will become unrestricted, even if the victim intended the report to stay restricted.

To reconcile the notification and investigation requirements under current law with the Panel's recommendation to provide victims who file restricted reports the option of requesting an expedited transfer, the Panel considered alternate protected avenues by which Service members may currently be reassigned from their units or duties. Commanders have the inherent authority to transfer Service members or place them on limited duty status due to medical conditions. Current DoD policy permits health care personnel to convey adverse duty impacts related to the victim's medical condition and prognosis to the victim's unit commander, even when the sexual assault report is restricted.[413] Because the communication made in connection with a restricted report is confidential, communication related to the sexual assault may not be disclosed to the commander.

The psychological health impact of daily contact with, or worse, being under the supervision of, one's attacker could understandably cause an adverse impact on a Service member's duty readiness. Therefore, to avert the problem, *Service Secretaries should create a means by which sexual assault victims who file a restricted report may request an expedited transfer without having to make their report unrestricted. [RSP Recommendation 69]*

Training for medical personnel, SARCs, and victim advocates should include the options that a commander has available to make or effect transfers when an unrestricted report is made. [RSP Recommendation 70] Options for proposing and arranging a transfer of a victim who files an unrestricted report were not well known among medical personnel, SARCs, or victim advocates who met with Panel representatives.[414]

c. Department of Defense Safe Helpline

The DoD contracted with the Rape, Abuse, and Incest National Network (RAINN) to develop and staff a 24-hour secure and anonymous phone line for military sexual assault victims.[415] The DoD Safe Helpline, established in April 2011, is accessible worldwide and provides active duty, Reserve, and National Guard Service members, and their adult dependents who are sexual assault victims, immediate one-on-one crisis support 24 hours per day, seven days per week.[416] Service members also may log on to the DoD Safe Helpline website to receive live, one-on-one confidential help with a trained professional through a secure instant-messaging platform.[417] DoD Safe Helpline personnel provide information about reporting and accessing victim services and offer a number of online resources specifically designed for Service members.[418] DoD Safe Helpline responders can transfer callers directly to installation-based SARCs, or on-call SAPR victim advocates, as well as community rape crisis centers, Military OneSource, and to other various victim service entities.

As required by DoD policy, military installations advertise the DoD Safe Helpline. However, many also operate and advertise their own installation numbers, which may be listed as a hotline. The local lines may be displayed more prominently than the DoD Safe Helpline, or together with it, and do not distinguish which is staffed twenty-four hours per day, causing confusion for Service members seeking assistance.[419] An advertisement from the Army's Fort Bragg, North Carolina Installation website illustrates the issue:

FIGURE 7 – Fort Bragg SHARP Advertising

Unlike the DoD Safe Helpline, which is staffed twenty-four hours per day, seven days per week, victims who call a local line may receive a pre-recorded message asking them to leave a phone number instead of speaking to a live person.[420]

The contact information provided to the DoD Safe Helpline is not always adequate or accurate to ensure that every caller can be connected to local victim service personnel (e.g., an installation's SARC or victim advocate) by the DoD Safe Helpline staff when requested, despite audits conducted by DoD Safe Helpline staff members.[421]

Because of the importance of ensuring timely, accurate contact information for victims, *the Panel recommends that clear guidance is set forth that the DoD Safe Helpline is the single military 24-hour sexual assault crisis hotline for Service members and establish an easily remembered number similar to its website name of SafeHelpline.org. The Department of Defense should also require the Services to provide the DoD Safe Helpline with sufficient contact information at each installation or deployed location so that local victim service providers can be reached on a 24 hours per day, seven days per week basis. [RSP Recommendations 71-A through C]*

d. Psychological Healthcare

Access to quality mental health care is a critical component of a robust response system for military sexual assault. Uniform and civilian psychiatrists, psychologists, mental health nurses, social workers and mental health technicians provide military mental health services to sexual assault victims and many others.[422] Mental health services are available to military sexual assault victims through mental health clinics located within military treatment facilities and imbedded within military units, Family Support Centers (FSCs), from military chaplains, or from off-base providers.[423] Unlike the FAP, which employs its own clinicians specializing in domestic and sexual violence and provides non-medical counseling services, SAPR personnel provide victim advocacy support without a professional clinical component.[424]

Despite the variety of mental health professionals who work with military Service members, sexual assault victims who appeared before the Panel described having difficulty obtaining timely mental health appointments and difficulty receiving consistent care from mental health providers.[425] Victims also described concerns that mental health counseling may negatively impact their careers; fear of damage to one's military career can deter a victim from reporting a sexual assault.[426] While evidence of the Services developing recent programs to embed counselors within units to facilitate better access to care was provided, the Panel was not able to evaluate whether the practice is a successful method to alleviate the difficulties victims experience in obtaining timely mental health, obtaining consistent therapeutic services, or reducing concern about negative impact on military careers.

The Service Secretaries should evaluate the availability of, and access to, adequate and consistent mental healthcare for victims of sexual assault and the option of incorporating counselors in the SAPR program in a manner similar to the FAP. [RSP Recommendation 72] The Department also should establish policies that protect

victims of military sexual assault from suffering damage to their military careers (including but not limited to weakened performance evaluations or lost promotions, security clearances, or personnel reliability certifications) based on having been a victim of sexual assault, having reported sexual assault, or having sought mental health treatment for sexual assault. [RSP Recommendation 64]

2. Coordinating Victim Services among Victim Assistance Personnel

Victim assistance personnel are available to military sexual assault victims through a number of different programs, including SAPR, FAP, VWAP, and special victim counsel. To provide the most effective services and support to victims, it is important that the various victim assistance organizations and personnel work in concert with each other.

In 2013, DoD issued Instruction 6400.07 "Standards for Victim Assistance Services in the Military Community," based on standards established by the National Victim Assistance Standards Consortium. The purpose of the Instruction was to establish a baseline of service standards for the victim services provided under the SAPR Program, FAP, VWAP, and the Military Equal Opportunity Program, and to ensure that uniform, quality victim assistance services are provided across the Services.

Each of the victim service programs was established independently, at different times, and with somewhat different objectives. However, outside of this instruction, there are no additional policies or requirements that require the identification of gaps or redundancies in victim services, or which recognize the services and support provided by the Special Victim Counsel Program, which is under the cognizance of the Service Judge Advocate Generals, or, in the Marine Corps, the Staff Judge Advocate to the Commandant.

DoD SAPRO or the DoD IG should assess the roles and responsibilities of SARC, SAPR victim advocates, VWL, and FAP personnel to ensure advocacy personnel are effectively utilized, that their roles are properly delineated to allow for excellence, overlap is minimized, that sufficient positions are designated and to determine whether their roles should be modified, and whether all current victim assistance related programs should be sustained in this resource constrained environment. [RSP Recommendation 79]

3. Civilian Jurisdiction Support of Sexual Assault Victims

In civilian communities, non-lawyer victim advocates primarily provide support for sexual assault victims. Unlike sexual assault victims in the military, only a small percentage of sexual assault victims in civilian jurisdictions across the United States are represented by legal counsel during criminal justice proceedings. In jurisdictions where victim counsel is available, victim advocates may work in conjunction with victim's counsel to provide support to sexual assault victims.[427]

Various entities, from nonprofit organizations to police departments and the prosecutors' offices, provide victim advocate services.[428] Services vary from state to state, and even from jurisdiction to jurisdiction within a state.[429] According to BJS, one in four sexual assault victims utilize services provided either by nonprofit or funded victim advocate organizations.[430] In the military, each victim is assigned a government paid victim advocate (military or civilian).

a. Community-Based Advocates

Advocates from community agencies (often known as rape crisis centers) may provide a variety of services, from hotlines to support, counseling, shelter, community outreach, and education.[431] Victim support personnel are available to meet with a victim prior to a victim making a report to law enforcement in many locations. For example, The Cottage, located in Athens, Georgia, meets the victim's immediate needs through crisis counseling and providing support when discussing whether to report the offense to law enforcement or having

a SAFE without police involvement.[432] The Cottage also provides short-term counseling and referrals to more in-depth counseling and group therapy.[433]

The YWCA in Grand Rapids, Michigan provides another example of a community based advocacy service that, like DoD, offers services regardless of whether a victim files a report with law enforcement.[434] The YWCA provides support services, including a 24-hour crisis line, SANE exams, and "soft" rooms for victims to speak to law enforcement personnel in a comfortable environment.[435] Short term counseling and group therapy services are also available[436] A victim's spouse or family member may also receive some services[437] such as short term counseling.

b. Hospital Victim Advocates

Victim advocacy services may co-locate in hospitals or other locations where victims might make an initial report of sexual assault.[438] For example, in New York City, Mount Sinai Hospital's "hundreds of volunteer advocates" staff the victim advocate program.[439] Prosecutors, police, and doctors train volunteer advocates who are available to victims at the hospital anytime.[440] A prosecutor told the Panel that "[t]he ER advocates are trained and wonderful, and they hand off the case to a specially trained social worker once they get to the DA's office. [T]hat combination of help helps victims and guides them through what, as you can imagine, is a very confusing and intimidating process."[441] She credited Mount Sinai's services in helping victims through the process, calling it a "wonderful program."[442]

c. Law Enforcement Victim Advocates

Some law enforcement agencies, including the FBI, employ non-lawyer victim advocates to provide advocacy services beginning when a victim reports a sexual assault.[443] Others team with community advocacy agencies that provide these initial victim advocacy services through contract or other agreement with a law enforcement agency.[444]

d. Prosecution Victim Advocates

Prosecution based advocates can provide a number of services, varying by jurisdiction, but generally include advising the victim of his or her rights, advocating for the victim's rights to be enforced, advising victims about and during court proceedings, and ensuring the victim receives necessary services throughout the process.[445] They also assist prosecutors during discussions with victims when a case that has been referred by police will not be charged.[446]

F. SPECIALIZED MILITARY TRAINING FOR PERSONNEL PERFORMING SEXUAL ASSAULT PREVENTION AND RESPONSE DUTIES

1. SARC and Victim Advocate Training

A sexual assault response program can only be as successful as the training and experience of the service providers. Congress and DoD have recognized the critical need for qualified victim advocates. In the FY12 NDAA, Congress emphasized the importance of SARC and victim advocate training by codifying a requirement for the Secretary of Defense to establish a professional and uniform training and certification program for SARCs and victim advocates.[447] To fulfill this requirement, SAPRO established the DoD Sexual Assault Advocate Certification Program (D-SAACP) to standardize and professionalize the roles of SARCs and victim advocates across the Services in 2012.[448] Currently, over 20,000 SARCs and victim advocates have completed the training. D-SAACP certification requires a minimum of 40 hours of approved training and continuing education every two years.[449] However, unlike many civilian training programs for victim service personnel, it does not require any hands-on, job shadowing, or other experiential training.[450]

DoD SAPRO conducted an initial evaluation of each of the Services' SARC and victim advocate training sessions in 2012.[451] These evaluations, while providing useful information about the Services' training programs, did not use consistent criteria for evaluation across the Services; DoD SAPRO did not assess the uniformity of the programs across the Services. To evaluate whether the Services are providing quality, standardized training to victim Service personnel, it is important that the evaluation be consistent across the Services. Therefore, *DoD should conduct periodic evaluations of training provided for the Services' SARCs and victim advocates that include an assessment of whether the training and curriculum across the Services is uniform, effective, and reflects all existing initiatives, programs, and policies. [RSP Recommendation 75]*

2. First Responder Training

To standardize services throughout DoD in 2014, all "first responders" in sexual assault cases are now required to receive the same baseline training, in addition to annual SAPR training.[452] DoD policy indicates that first responders include SARCs, SAPR victim advocates, healthcare personnel, law enforcement personnel, judge advocates, chaplains, and emergency personnel.[453] These individuals are required to receive training focused on sexual assault policies and current critical issues, the role of SAPR personnel, and an explanation of initiatives directed at special populations, including those likely to be re-victimized.[454] Additionally, training required for SARCs and SAPR victim advocates includes scenario based interactive sessions, an explanation of the roles and responsibilities of SAPR personnel and commanders in preventing sexual assault, the ability to conduct SAPR training for Service members when requested by a commander, and identification of reprisal or retaliation towards a victim.[455]

3. Experiential Training for Civilian Victim Support Personnel

Victim support personnel in many civilian agencies receive both formal and experiential training before being assigned to support a sexual assault victim on their own. The length of training varies from jurisdiction to jurisdiction, often depending on the type of agency.[456] For instance, advocates who work in prosecution and police agencies understand the criminal justice system and procedures in the jurisdiction in which they work. They can explain the jurisdiction's processes and procedures to the victim.[457] Some prosecutor's offices require that victim advocates have either a bachelor or master's degree with majors in criminal justice, social work, or a similar "helping profession."[458] In New York, where social workers provide clinical counseling support, they are required to have a master's degree in social work or an equivalent profession.[459]

4. Utilization and Experiential Training for Military Victim Advocates

Many military victim advocates never handle an actual sexual assault case because there are far more victim advocates than reports of sexual assault in the military.[460] Some part-time, uniformed SAPR victim advocates may not ever serve a victim because they are assigned to units in which there are few or no reports of sexual assault. Victim advocates who handle few to no sexual assault cases feel unprepared to actually handle a case and provide the proper support to a sexual assault victim.[461] It is difficult for victim advocates who do not regularly assist victims of sexual assault to develop or maintain proficiency in providing victim support.

To maximize the value and usefulness each certified victim advocate provides to the Services, *DoD SAPRO should determine necessary victim advocate staffing for each Service and appropriate caseload for each victim advocate to ensure that victim advocates become, and remain, proficient in their duties. Victim advocate duties and training should include partnering with or observing other professionals who provide victim services (including community providers) or other experiential work to gain further practical skills and confidence while awaiting assignment to a case. [RSP Recommendation 74]*

5. Special Victim Counsel Training

Pursuant to the FY14 NDAA, the Service Secretaries are now statutorily required to provide "in-depth and advanced training" for all special victim counsel.[462] Currently, the Air Force and the Army offer specialized special victim counsel courses at their legal centers and schools.[463] The Army also established a JAG University website for special victim counsel to access a document library and collaborate with other Army attorneys.[464] Program managers also routinely reach out to one another on an informal basis to discuss issues and best practices for dissemination to practicing special victim counsel[465] and on a more formal basis, in accordance with the Secretary of Defense's guidance,[466] the Special Victim Counsel Program managers meet monthly to discuss a variety of special victim counsel issues and share information. These discussions include lessons learned and best practices generated by the individual Services.[467] However, no standards or requirements have been established outlining how and when these best practices should be shared.[468]

While the Air Force and Army have created special victim counsel training courses, the Special Victim Counsel Program is still a relatively new program and even the most experienced special victim counsel has limited experience as an advocate for victim rights. Further, because the program is in its infancy, limited case law exists to guide special victim counsel in their practice. To ensure special victim counsel receive all relevant and necessary information to best assist their clients, *the Panel recommends the Service Secretaries establish and disseminate collaborative methods for special victim counsel between, and among, the Services, including an inter-Service website where special victim counsel may access resources and training materials, and receive training on best practices including the provision of advice and resources to sexual assault victims for issues related to negative personnel actions encountered as a result of being a victim or seeking treatment. [RSP Recommendation 50]*

In addition, *the Panel recommends the Secretary of Defense establish an inter-Service working group to assess the practices of all Service Special Victim Counsel programs. The inter-Service working group should discuss, deliberate, and decide upon the best practices being utilized by all the Services. The working group should then ensure each Service implements the best practices of the Special Victim Counsel programs. The working group should consist of, at a minimum, the Special Victim Counsel program heads from each Service. The first meeting should occur within twelve months from the date of this report. Thereafter, the working group should meet at least annually. [RSP Recommendation 52]*

G. THE MULTIDISCIPLINARY RESPONSE TO INVESTIGATE AND PROSECUTE SEXUAL ASSAULT REPORTS

The best practice to respond to sexual assault reports in both the civilian sector and military community is a multidisciplinary approach, which requires cooperation and communication among law enforcement personnel, medical professionals, victim advocates and victims' counsel, prosecutors, paralegals, and others in the community who provide support to sexual assault victims.

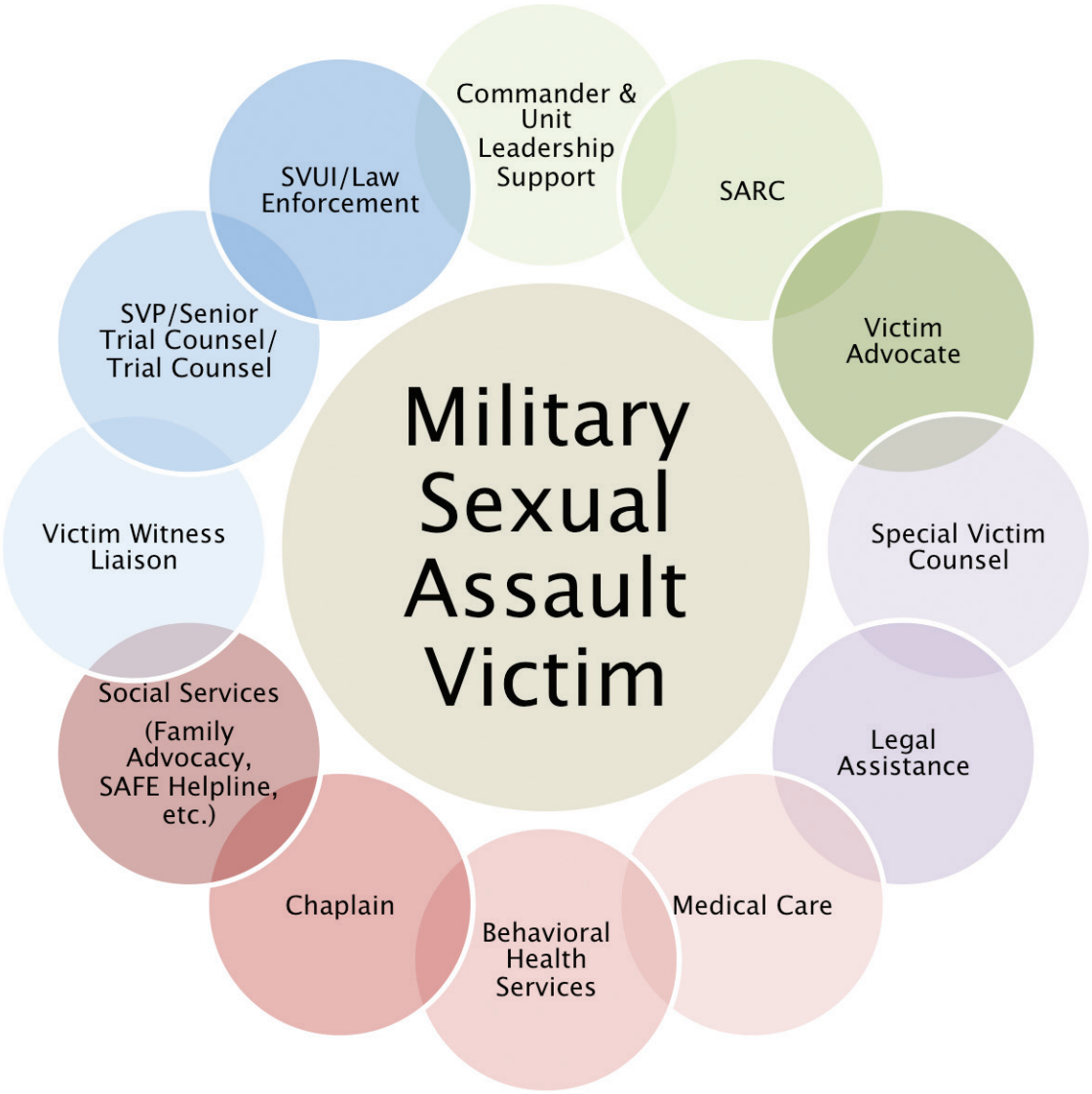
1. The Special Victim Capability and Victim-Centric Approach in the Military

In the FY13 NDAA, Congress required DoD and the Services to implement a Special Victim Capability to enhance the investigation and prosecution of sexual assault cases in the military. "The [Special Victim Capability] represents a multidisciplinary, coordinated approach to victim support and offender accountability."[469] DoD policy states that "[a]t a minimum, the [Special Victim Capability] will provide for specially trained prosecutors, victim witness assistance personnel, paralegals, and administrative legal support personnel who will work collaboratively with specially trained MCIO investigators."[470] It also requires that the "[d]esignated Special Victim Capability personnel will collaborate with local Military Department SARCs, SAPR victim advocates, Family Advocacy Program managers and domestic abuse victim advocates during all

stages of the investigative and military justice process to ensure an integrated capability, to the greatest extent possible."[471]

Figure 8 illustrates the victim-centric nature of the military response to sexual assault. Participants include: (1) the command and unit leadership; (2) the sexual assault response coordinator (SARC) and victim advocate; (3) the special victim counsel and legal assistance counsel provided by the military; (4) medical care and behavioral health services personnel, chaplains, and social services on and off post; and (5) those who are part of the Special Victim Capability—the special victim unit investigator, special victim prosecutor, and the victim witness liaison who works in concert with the staff judge advocate and prosecutor's office.

FIGURE 8 – The Military Victim-Centric Approach[472]



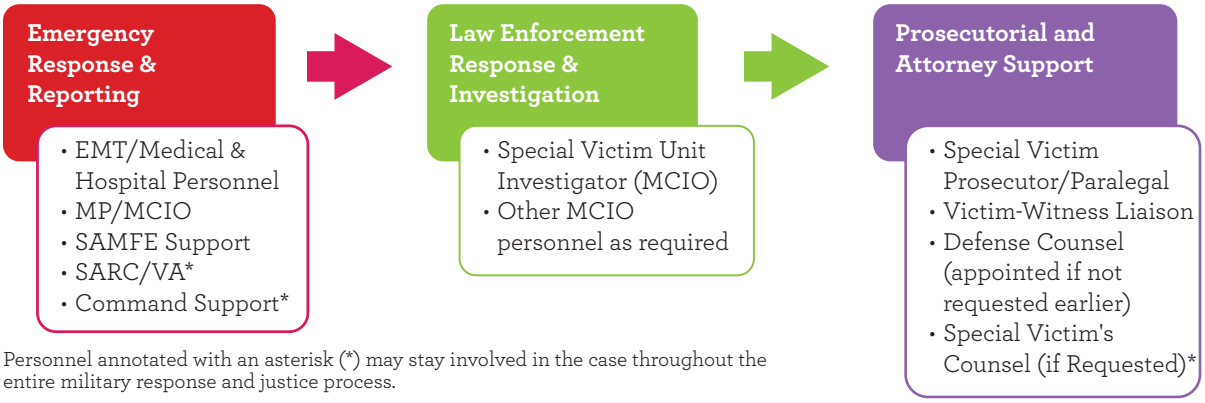
2. Comparison of Department of Defense and Civilian Sexual Assault Response Personnel and Resources

Figures 9 and 10 below depict the resources and personnel involved at the different stages of sexual assault response in the civilian sector and the military.

FIGURE 9 – Primary Personnel Responsibilities in Civilian Sexual Assault Response[473]

Personnel annotated with an asterisk (*) may stay involved in the case throughout the entire military response and justice process.

FIGURE 10 – Primary Personnel Responsibilities in Military Sexual Assault Response



Personnel annotated with an asterisk (*) may stay involved in the case throughout the entire military response and justice process.

Support resources are generally similar in the civilian and military systems—with one major exception. As discussed, the military offers specialized counsel to victims who file sexual assault reports to help them navigate through the military justice process, a service available in very few civilian jurisdictions. In most civilian jurisdictions, victims can report sexual assaults through hospitals, police agencies, or non-profit organizations such as rape crisis centers. Some civilian communities create a sexual assault response team composed of various response personnel, including a coordinator for victim support services, non-profit victim advocates, law enforcement representatives, prosecutors (who may also have victim advocates in their offices), and medical personnel to improve communication and centralize the response effort. Victims in the military have several avenues to make a sexual assault report, including civilian resources in the local community. All reports received through military resources are channeled to the SARC.

Naming conventions vary from jurisdiction to jurisdiction in the civilian community and each Service uses differing terms to describe its personnel. Terminology used to describe victim advocate and support personnel, prosecuting attorneys, attorneys who represent victims in the criminal process, police department sexual assault investigators, and in-house investigators should be standardized across DoD to prevent confusion, redundancy, and inefficiency. Therefore, *the Secretary of Defense should require standardization of the duty titles for personnel involved in sexual assault prevention and response to reduce confusion and enable comparability of Service programs, while permitting the Service Secretaries to structure the capability itself in a manner that fits each Service's organizational structure. [RSP Recommendation 108]*

Chapter Seven:

INVESTIGATING SEXUAL ASSAULT REPORTS

A. INVESTIGATION MANDATES

All unrestricted reports of sexual assault must be immediately reported by the receiving party to an MCIO, regardless of the severity of the crime alleged.[474] A commanding officer who receives a report of a sex-related offense involving a Service member in his or her chain of command must immediately report it to the MCIO.[475] A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.[476] Section 1743 of the FY14 NDAA requires the SARC provide 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.[477]

MCIOs are assigned to an independent chain of command from the accused and his or her special court-martial convening authority and must independently report all sexual assault accusations to their Service Secretary and Chief of Staff.[478] According to DoD policy, investigations of unrestricted reports of sexual assault must be conducted by specially trained MCIO investigators, not the victim's immediate commander or chain of command. 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.[479] The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports.[480] Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and the victim's access to services.[481]

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. The investigation may be worked jointly by the MCIO and the civilian agency, or the civilian agency may accept investigative responsibility if the MCIO declines.[482] 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.[483]

In sexual assault investigations where the MCIO is the lead investigating agency, DoD policy requires implementation of Special Victim Capabilities, described in more detail in Chapter 9 of this report.[484] MCIOs investigating sexual assault allegations must collaborate with respective Special Victim Capability partners regularly for periodic investigative case reviews and to ensure all aspects of the victim's needs are met.[485] Commanders are provided updates on significant developments in criminal investigations, but may not impede an investigation or the use of investigative techniques.[486] Once an investigation is complete, the case is provided to the appropriate military commander (the initial disposition authority, described below, for the accused) for consideration of "some form of punitive, corrective, or discharge action against an offender."[487]

Historically, Army Criminal Investigation Command (Army CID) investigated all adult sexual assault cases for the Army,[488] while the Naval Criminal Investigative Service (NCIS) and Air Force Office of Special Investigations (AFOSI) often referred some non-penetrative (e.g., unwanted touching) sexual assault offenses

to Marine Corps Criminal Investigation Division (Marine Corps CID) agents and Air Force Security Forces investigators, respectively. Since the January 2013 policy change requiring that all adult sexual assault cases be investigated by the MCIOs, cases previously investigated by Marine Corps CID and Air Force Security Forces investigators have shifted to NCIS and AFOSI, significantly increasing their case loads.[489]

Fully accredited Marine Corps CID agents are trained at the MCIO level and many attend the Special Victim Unit Investigators Course.[490] A representative from Marine Corps CID told the Comparative Systems Subcommittee that its investigators are fully qualified to handle sexual assault investigations, especially the "touching offenses."[491] AFOSI similarly indicated that Security Forces investigators could effectively continue to investigate these types of offenses, under the supervision of a trained AFOSI agent.[492] AFOSI and NCIS representatives indicated the additional caseload has been detrimental to other felony investigations.[493] As such, *the Panel recommends Marine Corps CID agents, military police investigators, and/or Security Forces investigators should be authorized to assist in the investigation of some non-penetrative sexual assault cases, under the supervision of SVU investigators. [RSP Recommendation 89]*

B. INVESTIGATIVE PROTOCOLS

The Services have worked to improve their investigative and law enforcement response to sexual assault. The military law enforcement community has developed specialized teams to handle sexual assault investigations and advanced training to prepare investigators. A civilian expert commented that "DoD ha[s] done an incredible amount of work in a short amount of time combating sexual assault and violence against women .... We have never seen that kind of change in a civilian community and I just wish more people would recognize that fact."[494]

1. Special Investigators and Sexual Assault Investigations

In many large civilian and military jurisdictions, SVUs are organized and detailed to investigate sexual assault, domestic violence, and child abuse cases.[495] Currently, NCIS, Army CID, and AFOSI have organized SVUs at installations with large military populations.[496] At smaller installations and in smaller civilian police agencies, there may be too few investigators available to specialize. Smaller locations without an SVU often have a specially trained detective to investigate sexual assaults and the ability to coordinate with larger offices for assistance and guidance,[497] but these investigators may not be as experienced as investigators serving in SVUs at larger, busier jurisdictions. *The Secretary of Defense should direct commanders and directors of the MCIOs to require special victim investigators not assigned to a dedicated SVU to coordinate with a senior SVU agent on all sexual assault cases. [RSP Recommendation 90]* Such oversight will likely increase the accuracy, reliability, and thoroughness of investigations.

Military and civilian systems use differing protocols for the initial police response to a sexual assault report. Historically, in many civilian jurisdictions, a police officer responding to a reported sexual assault would determine how to document the call.[498] If the officer did not believe the individual was a victim of a sexual assault, it was not documented as such and no follow-up occurred.[499] In several major cities, responding officers dismissed a high percentage of incidents reported as sexual assault in 911 calls. In the remaining cases, detectives also often dismissed a large number of incidents referred to them before presenting the cases to the prosecutor.[500]

More recently, several civilian agencies have changed their initial report protocols to reduce mishandling of sexual assault cases.[501] In some jurisdictions, patrol officers still retain some discretion, but a supervising officer generally must review their decisions and officers consult with detectives about how to classify complaints.[502] For example, in Baltimore, Maryland, a patrol officer can no longer dismiss a sexual assault complaint without an SVU detective's approval.[503] Other civilian agencies have similar, or even more restrictive, protocols.[504]

DoD policy requires military police patrol officers who receive or respond to a sexual assault report it to the MCIO.[505] Responding patrols must remain with the victim, ensure evidence is not destroyed, assess the victim's need for immediate medical attention, and obtain enough information to determine the identity and location of the alleged assailant, if the victim can identify him or her.[506]

2. Advising Victims of Their Rights when Collateral Misconduct is Suspected

Unlike MCIO agents, investigators in civilian jurisdictions have discretion in deciding whether to advise crime victims, including sexual assault victims, of their rights against self-incrimination under the Fifth Amendment. Rights advisements are only required in civilian jurisdictions during custodial interrogations. Article 31 of the UCMJ affords Service members greater protection from self-incrimination than the U.S. Constitution and civilian case law. Any time an investigator or any other party engaged in a law enforcement or disciplinary investigation reasonably suspects that any person subject to the UCMJ, including a victim being interviewed, committed an offense under the UCMJ, the investigator must stop the interview and advise the victim of his or her rights under Article 31(b), including the right to remain silent.

MCIOs indicated the requirement "to advise victims of their rights for collateral misconduct . . . chill[s] a relationship between the investigator and the victim."[507] As a result, concerns about collateral misconduct are seen as a complication in the investigative process, as well as a barrier to reporting.[508] Interrupting an interview to advise a victim of his or her rights may negatively impact the investigator's ability to build trust and rapport with the interviewee who may terminate the interview, although special victim counsel – who are often present at the interviews – did not report this occurred.

Although Article 31 warnings are not discretionary, MCIOs do not follow the same practices regarding the legal requirement to advise Service members of their Article 31 rights for minor collateral misconduct during an interview. For example, NCIS investigators told the Comparative Systems Subcommittee that NCIS has an unwritten policy that investigators will not read victims Article 31(b) rights for minor collateral misconduct, regardless of the law's requirements.[509] The NCIS investigators justify this policy by noting that minor offenses, such as drinking and fraternization, are outside the "felony-level" purview of NCIS.[510] Navy investigators noted anecdotally that the policy improves their ability to establish a rapport and more thoroughly investigate cases from victims who have already chosen to report. *DoD procedures regarding the requirement for MCIO investigators to advise victim and witness Service members of their rights under Article 31(b) for minor misconduct uncovered during the investigation of a felony should be standardized to ensure there is a clear process that complies with law. [RSP Recommendation 88]*

3. Pretext Phone Calls and Text Messages

Pretext phone calls and texts are an important investigative technique commonly used to corroborate victim complaints and obtain incriminating or exculpatory statements by suspects.[511] Depending on state law, unbeknownst to suspects, investigators can be present with victims during phone calls and typically record them.[512] Civilian detectives indicated they have no difficulty obtaining permission for pretext calls and texts, if permitted by state law.[513]

In contrast, the Services have different procedures to approve recorded pretext phone calls and text messages, based on differing interpretations of legal standards. NCIS has procedures to expedite processing of pretext phone call requests.[514] Army CID and AFOSI agents testified, however, that requirements to obtain approval for pretext phone calls and text messages hampered sexual assault investigations.[515] *The Secretary of Defense should direct a review of the Services' procedures for approving MCIO agent requests to conduct timely pretext phone calls and text messages as well as a standardized procedure to facilitate and expedite MCIOs' use of this investigative technique, in accordance with law. [RSP Recommendation 91]*

4. Forensic Evidence and Examinations

The Defense Forensic Science Center (DFSC) / United States Army Criminal Investigation Laboratory (USACIL) is a fully accredited facility that provides forensic laboratory services to the MCIOs, other DoD investigative agencies, and other Federal law enforcement agencies. In the summer of 2013 and the "government shutdown" in October 2013, MCIO investigators, SARCs, victim advocates, and other sexual assault support personnel were exempt from federal government furloughs. This exemption facilitated continued investigation of sexual assault cases. However, DFSC/USACIL personnel were not exempt from these furloughs, which created backlogs at the lab and increased DNA processing times.[516] *DNA and other DFSC examiners should be exempted from future furloughs, to the extent allowed by law, consistent with the exemption of other critical civilian members of the criminal investigative process from prior furloughs. [RSP Recommendation 100]*

The current Department of Justice protocol for the collection of hair samples from victims and subjects in sexual assault investigations notes that many jurisdictions do not routinely collect plucked head and pubic reference samples as part of SAFEs.[517] Military and civilian laboratory examiners and medical forensic examiners told the Comparative Systems Subcommittee that the taking of plucked hairs was of little probative value.[518] Therefore, *the Panel recommends elimination of the requirement to collect plucked hairs as part of a SAFE. [RSP Recommendation 92]*

5. Oversight and Review of Sexual Assault Investigations

Within civilian police departments, senior investigators or patrol officers typically review case files. This is also true in the military. Each MCIO has an internal inspector general and policies regarding the review of sexual assault cases.[519] Additionally, DoD IG reviews MCIO cases on a periodic basis.[520]

The DoD IG develops policy for the MCIOs to oversee sexual assault investigations and provides oversight of sexual assault training within the DoD investigative community.[521] In July 2013, DoD IG completed an evaluation of MCIO sexual assault investigations, reviewing their adequacy in accordance with DoD, Service, and MCIO policies and procedures.[522] The evaluation did not, however, apply external standards for case quality.

Following criticism of the handling of civilian sexual assault cases in certain cities, external agencies conducted audits of closed case files at several police departments to assess transparency and ensure confidence in the police response.[523] Civilian lawyers and victim advocates participated in audits in Baltimore and Philadelphia and provided results to the mayors and police departments. *The Secretary of Defense should similarly direct an audit of sexual assault investigations by persons or entities outside DoD specifically qualified to conduct such audits. [RSP Recommendation 95]*

C. DECISIONS TO UNFOUND SEXUAL ASSAULT REPORTS

The Department of Defense does not use a standard definition for "founded" or "unfounded" in sexual assault investigations.[524] Department of Defense policy defines an unfounded case as, "a complaint that is determined through investigation to be false or baseless. In other words, no crime occurred. If the investigation shows that no offense occurred, procedures dictate that the reported offense must be coded unfounded."[525] Determining a report to be "unfounded" because it is false or baseless is the same standard used by the Department of Justice and FBI.[526] The Department of Defense's 2013 Annual SAPRO Report, however, used a different definition of unfounded: "When an MCIO makes a determination that available evidence indicates the individual accused of sexual assault did not commit the offense, or the offense was improperly reported or recorded as a sexual assault, the allegations against the subject are considered to be unfounded."[527]

While conceptually the various DoD definitions meet the same intent as the "false or baseless" definition of unfounded used by the UCR Program, the Services apply the term inconsistently or use additional or different definitions. The Air Force, Navy, and Marine Corps use a "false or baseless" standard to unfound allegations, allowing accused Service members' commanders in the grade of O-6 or above, who are special court-martial convening authorities,[528] in consultation with judge advocates, to make final determinations.[529] The Navy and Marine Corps consider "false or baseless" to include cases where the allegations "do not meet all the legal elements of any of the SAPR sexual assault offenses."[530] The Army defines an unfounded offense as "a determination, made in consultation with the supported prosecutor that a criminal offense did not occur. A lack of evidence to support a complaint or questioning of certain elements of a complaint is not sufficient to categorize an incident as unfounded."[531] Conversely, the Army's definition of a "founded" offense relies on a probable cause determination made by the investigating agent and supporting trial counsel that an offense was committed and the accused committed the offense.[532]

Civilian police agencies follow the Federal Bureau of Investigation (FBI)'s UCR Program incident clearance guidance on unfounding a complaint: "Occasionally, an agency will receive a complaint that is determined through investigation to be false or baseless . . . . The recovery of stolen property, the low value of stolen property, the refusal of the victim to cooperate with prosecution, or the failure to make an arrest does not unfound a legitimate offense. Also, the findings of a coroner, court, jury, or prosecutor do not unfound offenses or attempts that law enforcement investigations establish to be legitimate."[534]

Processes for closing cases vary in civilian police departments.[535] In some jurisdictions, detectives may unfound cases that are not strong enough to support prosecution without review by the prosecutor,[536] with or without approval of a supervisor.[537] Departments may also consider cases closed and investigations complete when referred to the prosecutor, [538] or they may be closed or placed in a suspended status when victims decline to cooperate. Likewise, unsolved cases are usually inactive, but not closed.[539] A best practice among civilian agencies requires the supervisor of the SVU to review all unfounded cases, and if the percentage of cases that are unfounded rises above a certain baseline average, the supervisor reviews patterns and investigative practices to ensure only those cases that are false or baseless are unfounded.[540]

In the Army, commanders do not currently determine whether to unfound cases because Army CID makes the decisions after coordinating with the trial counsel.[541] However, in the Air Force, the Navy, and the Coast Guard, commanders make unfounding determinations, not the MCIOs.[542] AFOSI and NCIS indicated they do not make any case determination decisions once a case is initiated, but instead report their investigative findings to the commander.[543]

The Secretary of Defense should direct the Service Secretaries to standardize the process for determining if a case is unfounded. The decision to unfound reports should apply the UCR Program standard to determine if a case should be unfounded. Only those reports determined to be false or baseless should be unfounded.[533] *[RSP Recommendation 93]*

The table below illustrates the disparity in procedure and application among the Services, as well as the Panel's recommended process:

Comparison of Procedures to Review Investigations Prior to Disposition Decision

	Air Force, Navy, Marines, Coast Guard	Army	Panel Recommendation
Unfounding Determinations	Unfounding determinations not made by investigators.	Unfounding determination made by investigators, in consultation with trial counsel.	DoD standardize the process for determining if a case is unfounded. Unfounded needs to be clearly defined as only those reports which are false or baseless.
MCIO Determination and JAG Coordination	Investigators do not determine if case is founded, substantiated, or that probable cause exists. No annotation made in case file.	Investigators consult with a trial counsel, who provides opinion whether probable cause exists to believe suspect committed offense, prior to presenting case to commander. Investigators annotate trial counsel's opinion in case file. If probable cause exists, case file is presented to commander for disposition decision.	Trial counsel and investigator should not opine whether probable cause exists. MCIO agents should coordinate with trial counsel to review all evidence, and annotate in case file that trial counsel agrees all investigation has taken place, before presenting case report to commander.
Cases Presented to the Commander for Disposition Decision	In FY12, 100% of cases were presented to commander for case determination and disposition decision.	In FY12, 75% of cases were presented to commander for disposition decision; 25% of cases were not presented to commanders because MCIO/ prosecutor determined report lacked probable cause.	Present all cases to commander.

Probable Cause Assessments in Sexual Assault Investigations

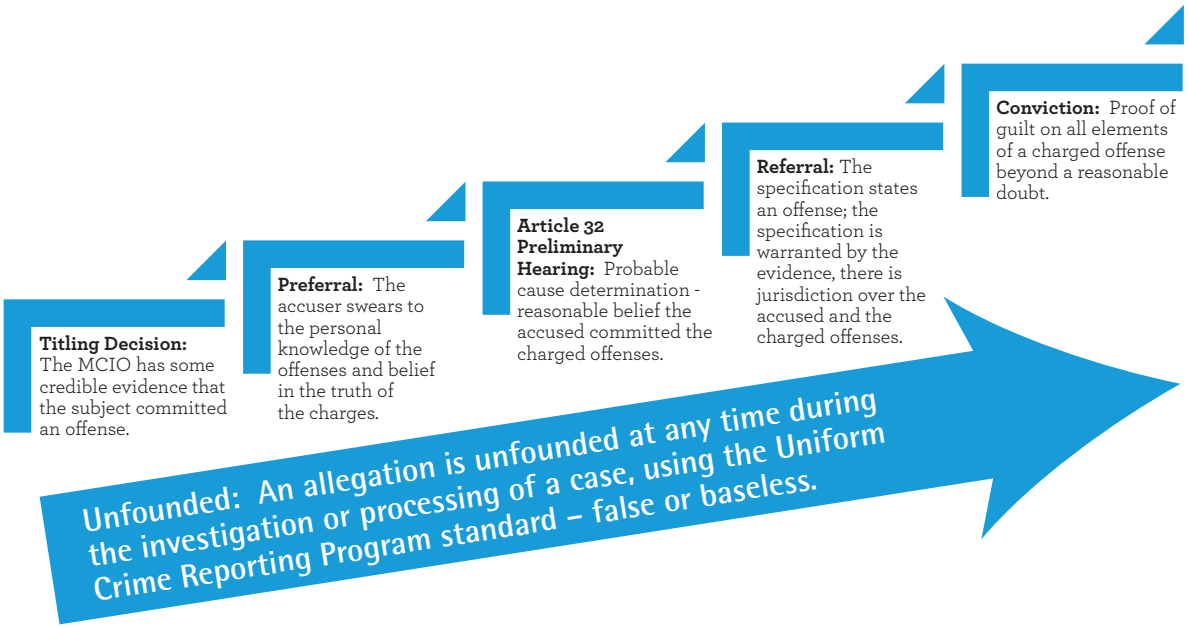
Prosecutors may provide opinions about the existence of probable cause as part of their advice to commanders or investigators. For example, a trial counsel may tell an investigator that further investigation is needed to establish probable cause. Moreover, commanders making disposition decisions may want the trial counsel's opinion on whether probable cause exists in the case. The Navy, Air Force, Marines and Coast Guard do not filter cases for lack of probable cause; instead, all cases are presented to commanders, who consult with the trial counsel to determine case disposition. However, unlike the Army, there is no requirement that agents formally coordinate with trial counsel, obtain an opinion on whether probable cause exists in order to found the offense, or annotate coordination in case files.[544]

Army CID is required to coordinate reports of investigation with the trial counsel to determine whether there is probable cause that an offense was committed, whether the subject committed the offense, and whether there is sufficient evidence to support action.[545] The trial counsel issues an opinion to the investigator or agent, which

is reflected in the case file.[546] To prevent prosecutors from making premature probable cause determinations or MCIOs from closing cases prior to providing them to a commander to review, this opinion should only assess whether the investigation has been exhausted and if the case is ready to present to the commander.

Figure 11 illustrates the progression of proof standards, noting that probable cause determinations are made by investigating officers at Article 32 hearings. Staff judge advocates also advise convening authorities prior to referral whether "there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it."[547]

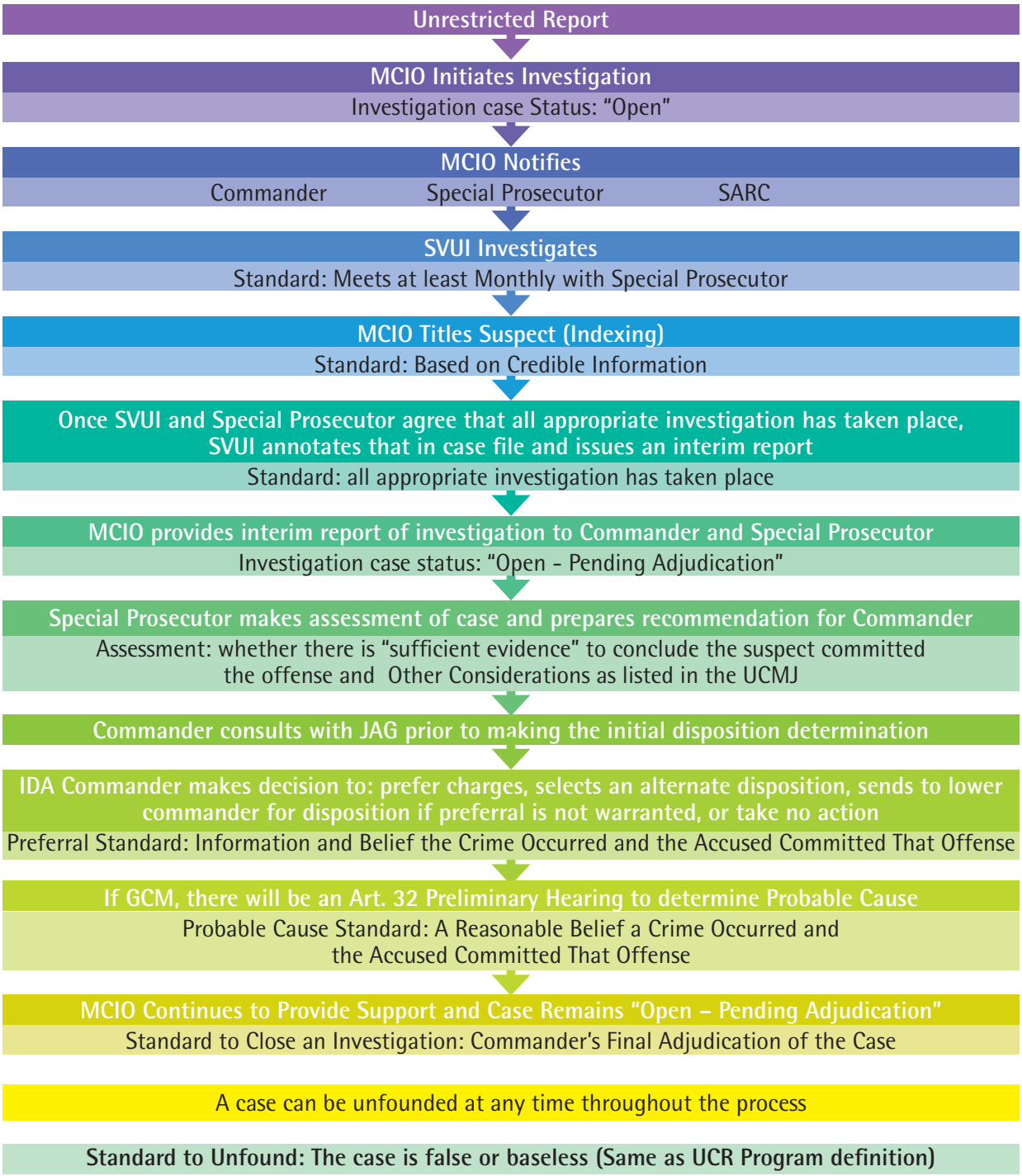
FIGURE 11 – Progression of Proof Standards in Military Criminal Justice Cases



Where an MCIO is the lead investigative agency, DoD policy states the MCIO may not close a sexual assault investigation without written disposition data from the subject's commander.[548] According to MCIO agents, investigators complete thorough investigations, following all logical leads prior to reaching any conclusions.[549] Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary.[550] Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review and that it is difficult to "reopen" cases for further investigation.[551]

The Secretary of Defense should direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with the trial counsel to review all of the evidence, and to annotate in the case file that the trial counsel agrees all appropriate investigation has taken place before providing a report to the appropriate commander for a disposition decision. Neither the trial counsel, nor the investigator, should be permitted to make a dispositive opinion whether probable cause exists. [RSP Recommendation 94-A] To ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further investigation until final disposition of the case. [RSP Recommendation 94-B] Figure 12 illustrates recommended investigative processing for unrestricted sexual assault reorts.

FIGURE 12 – Recommended Investigative Processing for Unrestricted Sexual Assault Reports



Chapter Eight:

THE MILITARY JUSTICE PROCESS FOR SEXUAL ASSAULT REPORTS AND VICTIM RIGHTS

Following the investigation, prosecution decisions are made within the chain of command of the accused Service member. Unlike civilian courts, courts-martial are designed to be deployable to any location where U.S. Forces operate.[552] For this reason, nearly all resources necessary to constitute courts-martial belong to certain commanders entrusted to convene courts-martial (i.e., convening authorities).[553] This flexibility affords deployed commanders the ability to ensure that investigation, prosecution, and adjudication of wrongdoing takes place in the deployed environment, which may be the geographic location of witnesses and evidence.[554]

A. HISTORICAL EVOLUTION OF THE UNIFORM CODE OF MILITARY JUSTICE

The authority to convene and manage courts-martial has been vested in U.S. military commanders since the colonial period.[555] Indeed, until after World War II, commanders enjoyed "virtually unfettered" discretion in determining whether to try soldiers and sailors by court-martial.[556] Reviews in the years following World War II challenged the commander's discretion in convening courts-martial. 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,[557] 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."[558] 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.[559]

Today, 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, in Article 34(a) the UCMJ initially provided 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.[560] In 1983, Congress changed Article 34(a) to state that the convening authority may not refer such a charge "unless 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.[561]

There have been other significant changes and revisions to the UCMJ since its enactment. Most recently, the FY14 NDAA modified several provisions of the UCMJ related to commander authority and responsibility, as well as the prosecution of sexual assault crimes.[562] As a military historian told the Panel, "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."[563]

B. INITIAL DISPOSITION AUTHORITY IN SEXUAL ASSAULT CASES

Both military authorities and civilian prosecutors exercise "tremendous discretion over the decision" to send a case to trial.[564] Unless otherwise limited by a higher authority, military commanders generally have "discretion to dispose of offenses [committed] by members of [his or her] command."[565] On April 20, 2012, the Secretary of Defense issued a policy establishing the minimum level of command that may decide whether or not to proceed to courts-martial for an allegation of sexual assault.[566] 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 all allegations of rape and sexual assault in violation of Article 120 of the UCMJ, forcible sodomy in violation of Article 125 of the UCMJ, and attempts to commit those offenses, in violation of Article 80 of the UCMJ.[567] This policy applies to all other alleged offenses arising from or relating to the same incident, whether committed by the alleged perpetrator or the alleged victim.[568] 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 trial counsel, and determines the appropriate disposition of the case.[569]

Initial disposition authorities consult with their trial counsel, special victim prosecutor, or if applicable, staff judge advocate before determining how to proceed. Commanders rely on the prosecutors' legal expertise to determine the proper charges, draft the charges for the commander to consider, and recommend an appropriate disposition.[570] In advising commanders, including initial disposition authorities and convening authorities, 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.[571]

The decision to charge a person with a criminal offense, in particular a sexual assault offense, is a complex one requiring the initial disposition authority and trial counsel advisor to weigh many factors. The Discussion to Rule for Courts-Martial 306 provides a non-exclusive list of factors military commanders should consider when deciding how to dispose of an allegation, including whether to charge a Service member with an offense.[572] Civilian prosecutors also consider a variety of factors in determining whether or not to charge someone with a criminal offense, many of which are similar to military factors.[573] Ultimately, both military and civilian authorities determine how to dispose of an allegation based upon the specific facts of each case. However, the minimum threshold in the military to charge a Service member with an offense does not require the party preferring charges to consider the provability of the charges, which differs from civilian jurisdictions.

Previously, the discussion accompanying Rule for Courts-Martial 306 listed character and military service of the accused as factors commanders should consider when determining case disposition.[574] But, with the enactment of Section 1708 of the FY14 NDAA, Congress directed the Discussion be amended by striking "the character and military service of the accused from the matters a commander should consider in deciding how to dispose of an offense."[575] Since the amendment does not prohibit an initial disposition authority from considering this factor, however, it is unlikely to affect charging or disposition decisions in sexual assault or other cases.[576]

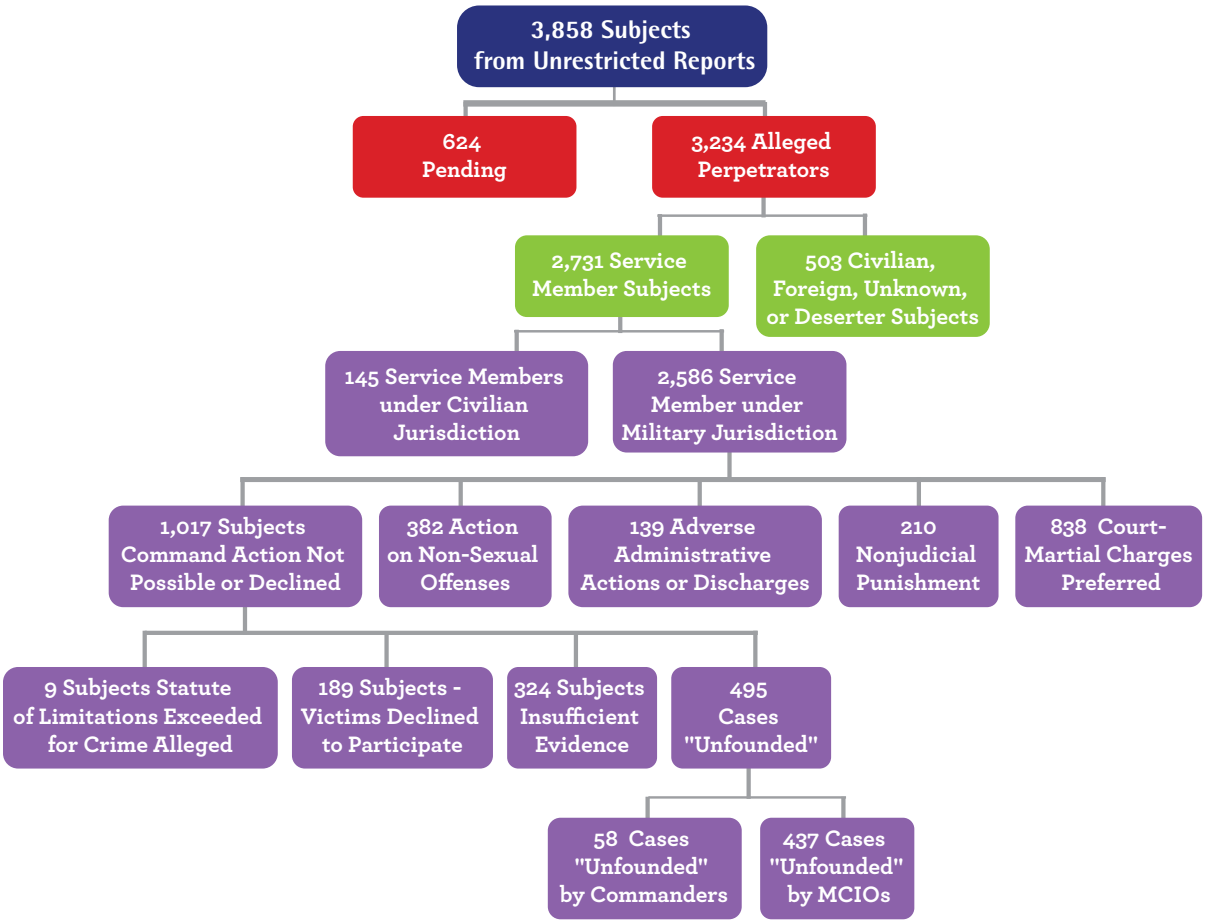
In sexual assault cases, the initial disposition authority, in consultation with the trial counsel or special victim prosecutor, considers the factors in the discussion to Rule for Courts-Martial 306 prior to preferral and referral of charges. The initial disposition authority may dispose of allegations by preferring charges and later referring any or all of them to a court-martial he or she is authorized to convene, forwarding any or all of the charges to the next higher convening authority, dismissing some or all of the charges, or choosing an alternate disposition of the case.[577]

These options align with alternatives in civilian prosecutions.[578] Civilian prosecutors face similar initial disposition decisions as trial counsel and convening authorities, ranging from taking no action to going

forward with a view towards trial.[579] Civilian prosecutors may also pursue options other than trial, but those are usually uniquely tailored to the specific circumstances of the case.[580]

To address lower level offenses, commanders and convening authorities have many tools that may not be available in civilian jurisdictions. The UCMJ and military regulations provide several options for alternate dispositions, including no action or dismissal of charges, administrative action (counseling, admonition, reprimand, administrative withholding of privileges, etc.), nonjudicial punishment, forwarding to a superior or subordinate authority for disposition, or preferral and/or referral of charges to courts-martial.[581] Commanders rarely choose nonjudicial punishment or other administrative adverse actions to dispose of penetrative sexual assault offenses.[582] The misperception that commanders use options other than courts-martial to dispose of these offenses may be due to the wide breadth of conduct that is categorized as "sexual assault" under the UCMJ.

FIGURE 13 – FY13 DoD Disposition of Subjects in Unrestricted Sexual Assault Reports[583]



C. PRETRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES: PREFERRAL TO REFERRAL

Unlike standing federal or state courts, courts-martial are *ad hoc* proceedings convened to resolve specific allegations against an accused. Convening authorities have the authority to convene courts-martial, but only after specific statutory requirements are met. This process begins when charges are "preferred"[584] against an accused, subsequent to the initial allegation and investigations of criminal wrongdoing.

The convening authority, in conjunction with the military judge, is responsible for ensuring a military member is brought to trial. "Referral" is the act of ordering a charge to be tried by court-martial. Referral, therefore, in conjunction with a court-martial order (explained below in Part D of this chapter), creates the court.

Pursuant to Article 32 of the UCMJ, no charge may be referred to a general court-martial until the completion of a pretrial investigation.[585] Unless limited by Service regulation, any convening authority may order the Article 32 investigation;[586] however, by DoD regulation, alleged sexual assaults must be directed to a convening authority that qualifies as an initial disposition authority.[587] The convening authority who orders the Article 32 investigation also appoints the Article 32 investigating or hearing officer.[588]

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."[589] However, Section 1702(a) of the FY14 NDAA, in conjunction with other amendments, 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.[590] These changes take effect on December 27, 2014.[591] Beyond changes to the scope and quality of the evidence that will be considered by the Article 32 hearing officer, it is unclear how Article 32 investigations, which will be called "preliminary hearings," will change after this law takes effect.

Section 1702 of the FY14 NDAA also mandates that crime victims cannot be compelled to testify at the proceeding and will be deemed unavailable for the purposes of the hearing. This may result in requests by the defense counsel to depose victims and other witnesses because depositions may be ordered where witnesses are unavailable at the Article 32 proceeding.[592] Under current practice, "[a] convening authority who has the charges for disposition, or after referral, the convening authority or the military judge may order that a deposition be taken on request of a party."[593]

Civilian jurisdictions have differing approaches to victim testimony before trial. In Philadelphia, for example, victims must testify at preliminary hearings with limited exceptions; in Washington State, either party may request to interview material witnesses under oath before trial.[594] While cross examining or questioning the victim is permissible in some civilian jurisdictions, it is unclear whether substituting a deposition for Article 32 testimony, if requests are approved, will potentially expose the victim to the same line and type of questioning Congress was trying to prevent by enacting Section 1702 of the FY14 NDAA. Therefore, *the Judicial Proceedings Panel should assess the use of depositions in light of changes to the Article 32 proceeding, and determine whether to recommend changes to the deposition process, including whether military judges should serve as deposition officers. [RSP Recommendation 115]*

Once the Article 32 investigation is complete, the investigating officer provides findings and recommendations to the convening authority who ordered the Article 32 investigation take place.[595] If the convening authority who ordered the Article 32 investigation is a special court-martial convening authority and determines the evidence supports the charged offenses, then the charges and the Article 32 investigating officer's report, recommendations of subordinate commanders, and any documents accompanying the charges will be

forwarded to the general court-martial convening authority. Alternatively, the charges may be referred to a subordinate commander for action if the convening authority does not believe the evidence supports referral to a general court-martial, or the convening authority may dismiss the charges if the evidence does not support them.[596]

As of June 24, 2014, Section 1705 of the FY14 NDAA amended Article 18 of the UCMJ to restrict jurisdiction for trial 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 to general courts-martial.[597] Once a matter has been forwarded to the general court-martial convening authority following an Article 32 investigation, he or she must comply with certain statutory requirements prior to referring a case to trial. The general court-martial convening authority must ensure the Article 32 investigation was properly conducted,[598] and before he or she may refer charges to a general court-martial, the staff judge advocate[599] must provide, in writing, his or her own legal opinion expressing whether the charges state an offense, whether the charges are warranted[600] by the evidence in the Article 32 investigation report, and whether a court-martial would have jurisdiction over the individual and the offense.[601]

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.[602] So long as the staff judge advocate advises that the charge meets the requirements for referral, 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.[603]

Information presented to the Panel indicates that convening authorities and staff judge advocates agree on disposition in the overwhelming majority of cases.[604] When disagreements between the staff judge advocate and convening authority arise, however, the UCMJ includes checks to provide review by higher authorities. For example, 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, who may withdraw the matter from the subordinate commander) or with the Judge Advocate General of his or her Service if he or she disagrees with the convening authority's decision.[605]

Staff judge advocates who testified before the Panel stressed that convening authorities weigh factors differently than lawyers when assessing whether cases should be tried by court-martial. 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 one hundred cases where civilian prosecutors had declined to prosecute.[606] "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."[607] The Judge Advocate General of the Army described seventy-nine 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."[608] Legal advisors said commanders consider factors, including responsibility for good order and discipline and accountability to the organization, which legal advisors may not.[609]

Given that there are checks in place and that military justice ensures appropriate discretion for convening authorities in the oversight of good order and discipline within their command, convening authorities should generally retain referral discretion and should not be bound by the recommendations of an Article 32 investigating officer in all circumstances. *The Secretary of Defense should direct the Military Justice Review Group or Joint Service Committee to evaluate if there are circumstances when a general court-martial convening*

authority should not have authority to override a recommendation from an investigating officer against referral of an investigated charge for trial by court-martial. [RSP Recommendation 116] For example, if a military judge is appointed the Article 32 preliminary hearing officer, the convening authority should, perhaps, be bound by the determination that there is no probable cause, but further study is required.

To ensure more rigorous scrutiny of a convening authority's decision not to refer a case to court-martial, Section 1744 of the FY14 NDAA imposed a new review requirement for any such decision for charges of rape, sexual assault, forcible sodomy, or attempts of those offenses.[610] However, Section 1744 of the FY14 NDAA and pending language in the Victim's Protection Act of 2014 (VPA)[611] may place inappropriate or unlawful influence to aggressively prosecute sexual assault cases by requiring the higher general court-martial convening authority, or in some cases the Service Secretary, to review convening authority decisions not to refer such charges to trial.

The FY14 NDAA proposes two scenarios that would require higher review: (1) If both the staff judge advocate and convening authority agree the case should not be referred to court-martial, the next higher level convening authority must review the case file; or (2) If the staff judge advocate recommends referral to court-martial and the convening authority decides not to refer the case to court-martial the Service Secretary must review the case file.[612] Section 2 of the VPA would further require the next higher convening authority or Service Secretary to review a case if the senior trial counsel disagreed with the SJA's recommendation against referral or the convening authority's decision not to refer a sexual assault case.[613]

Establishing an elevated review of convening authority decisions not to refer certain sexual assault charges may deter convening authorities from exercising independent professional judgment when deciding whether to refer cases. The elevated review may impose undue pressure on staff judge advocates and convening authorities to refer sexual assault cases. Convening authorities are better positioned to make informed referral decisions than a higher-level general court-martial convening authority or Service Secretary. They receive advice from their staff judge advocate, are less removed from the alleged perpetrator and victim, and are more aware of the offense's impact on the unit and good order and discipline. The Service Secretaries do not currently have a criminal law support structure and generally lack experience and training that informs referral decisions.

Accordingly, *Congress should repeal Section 1744 of the FY14 NDAA, which requires a convening authority's decision not to refer certain sexual assault cases to be reviewed by a higher general court-martial convening authority or the Service Secretary, depending on the circumstances, due to the real or perceived undue pressure it creates on staff judge advocates to recommend referral, and on convening authorities to refer, in situations where referral does not serve the interests of victims or justice. [RSP Recommendation 39]*

If Congress does not repeal Section 1744 of the FY14 NDAA, and the requirement for elevated review of non-referred case files continues, the Secretary of Defense should direct a standard format be developed for declining prosecution in a case, modeled after the contents of civilian jurisdiction written declination statements or letters. [RSP Recommendation 40] Section 1744(e)(6) of the FY14 NDAA requires written declination statements,[614] not a current practice.[615] There are no formal requirements for military investigators, judge advocates, or commanders to provide written opinions or justifications when declining to pursue criminal cases, including allegations of sexual assault, at any stage in the trial process.[616] Staff judge advocates provide written advice to the convening authority prior to his or her decision whether to refer a case to general court-martial.[617] In the past, if a convening authority dismissed charges or declined to prosecute a case after referral, the convening authority generally did not write a justification or declination statement.[618] DoD has not published guidance to date as to what that declination memorandum must contain or who must write it.

Civilian offices vary in their practices for recording decisions to decline cases. If prior to indictment, the common procedure is for the prosecutor to send the case back to the investigator to be closed. If the prosecutor declines a case after indictment, some offices informally include a note in the file, others complete a standard form, but none provide lengthy written justifications. [619] When civilian government offices decline to prosecute a case, there usually is no other alternate disposition or adverse action taken against the suspect. Several civilian jurisdictions, including the DOJ, document the declination decision in writing. When the DOJ closes a case without prosecution, the case file reflects the action taken and rationale.[620]

DoD should coordinate with the DOJ or with state jurisdictions that are more familiar with the sensitive nature of sexual assault cases to develop a standard format for use by all Services. Any such form should require a sufficient explanation without providing too much detail so as to ensure the written reason for declination to prosecute does not jeopardize the possibility of a future prosecution or contain victim-blaming language. [RSP Recommendation 40]

D. ROLE OF CONVENING AUTHORITIES AND MILITARY JUDGES

Convening authorities have responsibilities related to courts-martial prior to referral and throughout trial. Before referring charges to court-martial, the convening authority must issue a court-martial convening order, which directs the court-martial,[621] by detailing personnel to serve as voting members of the court-martial, normally referred to as panel members (i.e., jurors).[622] The convening authority's discretion is not, however, absolute. The convening authority must detail members who are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[623] But as a senior commander, the convening authority also assesses different and sometimes competing operational priorities, including operational requirements, readiness considerations, and individual hardships in determining whether a member is available for service on a court-martial panel.[624]

The convening authority funds witness and travel costs; most defense requests for production of witnesses are approved or disapproved by the trial counsel.[625] 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. This means the convening authority is responsible for authorizing the production of witnesses, experts, documents, and other resources.

Article 46 of the UCMJ requires that the trial counsel, defense counsel, and the court-martial have equal opportunity to obtain witnesses and evidence.[626] Military defense counsel are currently required to submit requests to the convening authority for witnesses, experts, and resources through the trial counsel and the staff judge advocate.[627] Depending on Service practice, the trial counsel, as the representative of the convening authority in a court-martial, may determine whether to grant or deny defense witness requests, other than expert witness requests that require the convening authority's personal decision. Military trial counsel request and obtain resources and witnesses without notifying the defense or disclosing a justification and, in most instances, without a specific request for the convening authority's personal decision.[628] This leads to a perception that trial counsel have unlimited access to obtain witnesses and resources and that the process for obtaining witnesses and other evidence is imbalanced in favor of the government.

In the civilian sector, some public defenders have subpoena power or request subpoenas through the judge.[629] Military defense counsel do not have subpoena power.[630] In contrast, military trial counsel have nationwide subpoena power with rare judicial oversight.

Prior to referral, there is no process for the defense to challenge a convening authority's denial of witnesses, expert assistance, or resources requested in preparation for trial.[631] If the convening authority denies the request, the defense counsel must wait until the case is referred to submit the request to the military judge. [632]

No similar practice is found in civilian jurisdictions.[633] This practice requires defense counsel to disclose more information to the trial counsel sooner than their civilian counterparts in public defender offices, requiring them to reveal information about defense witnesses and theory of the case to justify the requests, which may hinder the ability of defense counsel to provide constitutionally effective representation to their clients.

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.[634] If a trial counsel notifies a defense counsel of the name of an alleged victim of a 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 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."[635]

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.[636] The military judge for a court-martial is detailed, in accordance with Service regulations, by a senior military judge directly responsible to the Service TJAG or TJAG's designee.[637] Accordingly, the military judge exists entirely outside the chain of command of the convening authority.[638]

After referral, the defense may file a motion requesting the military judge to compel production of a witness. If the military judge grants a motion to compel a defense witness, the trial counsel must produce the witness. A military judge may also order the Article 32 investigation be re-opened to cure a convening authority's denial of the witness or expert or for other reasons. If the convening authority persists in the refusal to produce the witness, the military judge may abate the proceedings or take other appropriate action.[639]

Civilian judges or magistrates control proceedings in preliminary matters from the time of indictment or arrest of the defendant, whichever is earlier. Military judges do not usually become involved until a convening authority refers charges to a court-martial which can cause or result in inefficiencies in the process and ineffective or inadequate remedies for the government, accused, and victims.

It is the sense of the Panel that military judges should be involved in the military justice process at an earlier stage in order to better protect the rights of victims and the accused. Accordingly, the Panel recommends that the Secretary of Defense direct the Military Justice review Group or Joint Services Committee to evaluate the feasibility and consequences of doing so. [RSP Recommendation 118] Giving military judges an enhanced role in pretrial proceedings would be a systemic change that would affect the prosecution of all cases, not only sexual assault cases. Therefore, further study is appropriate to fully assess what positive and negative impacts would result from changing some pretrial and trial responsibilities of convening authorities.[640]

E. PRETRIAL AGREEMENTS IN SEXUAL ASSAULT CASES

"As in the civilian community, the military justice system depends heavily on the ability of a convening authority and an accused to enter into a pretrial agreement. Those agreements typically require the accused to enter a plea of guilty in return for reduction of charges, dismissal of some of the charges, or a sentence limitation."[641]

The process for military plea agreements and plea hearings differs from most civilian jurisdictions.[642] In civilian jurisdictions, most plea agreements between a prosecutor and defendant[643] are for an agreed upon sentence, which the judge accepts or rejects entirely. Some jurisdictions use plea deals that consist of agreements to sentences within a range; the judge then determines the exact sentence within that range.

In the military justice system, an accused Service member may negotiate a pretrial agreement with the convening authority, through the staff judge advocate, that places a limit or "cap" on the maximum sentence the accused will serve in exchange for a guilty plea. The sentencing authority does not know the agreed limit prior to adjudging the sentence. The accused gets the benefit of whichever is lower, the adjudged sentence or the cap agreed to with the convening authority.[644]

Pretrial agreements developed out of the convening authority's clemency power. 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, which the convening authority may do pursuant to Article 60 of the UCMJ. However, Section 1702 of the FY14 NDAA, which took effect on June 24, 2014, restricts a convening authority's Article 60 clemency authority.[645] Under the new framework, convening authorities cannot agree to disapprove a punitive discharge entirely under a pretrial agreement, but they may still agree to commute a mandatory minimum dishonorable discharge to a bad-conduct discharge, which is a lesser form of punitive discharge.[646]

Accused Service members plead not guilty in a large majority of military sexual assault cases, possibly due to evidentiary challenges, issues in proving sexual assault charges beyond a reasonable doubt, and the requirement to register as a sex offender if convicted.[647] Therefore, adjustments to the mechanics of military plea deals may not have a significant impact on the majority of sexual assault cases.

Other recent changes, including the creation of special victims' counsel and increased protection for victim rights, may raise additional issues that will impact the plea agreement process. The Panel concluded that a change to the military plea process in sexual assault cases is not necessary at this time, but *the Judicial Proceedings Panel should further study whether the military plea bargaining process should be modified. [RSP Recommendation 117]*

F. VICTIM RIGHTS IN SEXUAL ASSAULT PROSECUTIONS UNDER THE UNIFORM CODE OF MILITARY JUSTICE

1. Overview of Military Crime Victims' Rights

The FY14 NDAA incorporated eight rights for all crime victims in the military justice process as Article 6b of the UCMJ. Article 6b codified and, in some cases, expanded existing DoD policy regarding victims' rights to notice, to be reasonably heard, to confer with counsel for the government, to be present at public hearings, to have proceedings free from unreasonable delay, to be treated with fairness and respect, to receive restitution, and to be reasonably protected from the accused.

Prior to the FY14 NDAA, the Victim Witness Assistance Program (VWAP) policy primarily granted rights to crime victims in the military. The VWAP was developed in 1994 to protect the rights of all victims and witnesses located at DoD installations worldwide.[648] The crime victim rights set forth in DoDI 1030.01, originally modeled after the Victims' Rights and Restitution Act of 1990 and updated to roughly parallel the rights contained in the Federal Crime Victims' Rights Act (CVRA),[649] remain in effect even concurrent with the new Article 6b rights. DoD indicated that DoD policy and the UCMJ are being updated to more closely parallel the rights currently afforded to federal crime victims in the CVRA and provide enforcement mechanisms to receive and investigate complaints and provide a range of disciplinary sanctions for failure to comply with requirements relating to victims' rights.[650]

While assessing the adequacy of military systems and proceedings "to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes," the Panel also considered

the feasibility and appropriateness of extending the rights and legal standing to enforce them provided to crime victims in civilian proceedings under the CVRA[651] to crime victims covered by the UCMJ.[652] The Panel generally concluded that to the extent possible, accounting for differences in the military system due to the role of the commander and convening authority, the military justice system can, and should, afford crime victims the same rights as crime victims protected in civilian legal proceedings by the CVRA.

2. Comparing Victim Rights in Department of Defense Policy, the Federal Crime Victims' Rights Act, and Statutory Military Victims' Rights[653]

Comparing crime victims' rights under the CVRA with those recently codified in Article 6b of the UCMJ and DoD policy reveals that while Article 6b incorporates many CVRA rights into the UCMJ, some differences remain. Department of Defense policy, while similar to both the CVRA and the new rights guaranteed by Article 6b, provides no right for victims to be reasonably heard at a public proceeding involving release, plea, sentencing, or parole. Neither DoD policy nor Article 6b rights provide the victim a right to be heard regarding a plea agreement prior to the time the convening authority and the accused reach an agreement and the accused enters a guilty plea.[654]

a. Victim's Right to Confer

DoD policy, the CVRA, and the newly enacted Article 6b provide a crime victim the right to confer with the attorney for the government in the case.[655] In the military justice system, a victim may confer with trial counsel on matters such as whether to pursue court-martial, nonjudicial punishment or administrative action in the case.[656] If the initial disposition authority decides to proceed with a court-martial, a victim may confer with the military prosecutor regarding what level of court-martial may be appropriate for the particular charges. [657] However, the right to confer with the attorney for the government under the CVRA is not equivalent to the right to confer with trial counsel (military prosecutor) under the military justice system.

Since the convening authority, not the prosecutor, makes decisions on how to dispose of cases under the UCMJ, a victim's right to confer with the trial counsel in the military justice system is not directly analogous to the CVRA right to confer with the prosecutor. In practice, the trial counsel typically relays the victim's concerns and preferences to the convening authority. However, *to protect each victim's rights, DoD must establish formal mechanisms to ensure the convening authority hears the victim's concerns prior to making a decision about case disposition. [RSP Recommendation 55]*

b. Victim's Right to be Heard on the Plea

Article 6b grants the right to be reasonably heard at a public hearing regarding continuing confinement prior to the accused's trial, a sentencing hearing relating to the offense, and a public proceeding of the Service clemency and parole board relating to the offense, but is silent on the right to be heard on the plea.[658] Neither Article 6b nor DoD policy include the victim's right to be reasonably heard on the plea before the accused and the convening authority come to an agreement.[659]

The military justice system handles pretrial agreements differently than the civilian system, so using the civilian process for a victim's right to be heard on the plea would not be analogous in the military. The analogous opportunity to be heard arises before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement submitted by an accused, and the right is to be heard by the convening authority.

Modifications should be made to the Manual for Courts-Martial and appropriate regulations to provide crime victims a right to be heard regarding a pretrial agreement. The modifications should provide victims the right to be heard by the convening authority regarding a plea, with appropriate consideration to account for military

pretrial agreement practice. The recommended changes must ensure that the right to be heard occurs before the convening authority decides to accept, reject, or propose a counteroffer to a pretrial agreement offer submitted by an accused. The convening authority should retain discretion to determine the best means to comply with this right and consider the victim's opinion (e.g., submission in writing, in person). [RSP Recommendations 54-A through C]

c. Victim's Legal Standing to Enforce Rights

The FY14 NDAA neither addressed the victim's legal standing nor specified enforcement mechanisms for the rights set forth in Article 6b. Rather, the FY14 NDAA requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe appropriate regulations to implement mechanisms to ensure enforcement of such rights, including mechanisms for application of such rights and for consideration and disposition of applications for such rights.

The CVRA expressly provides legal standing for victims to assert their rights in the district court in which the alleged offender is being prosecuted and, if the offender has not yet been charged, the asserted claim should take place in the district where the crime occurred to seek enforcement of the rights listed in the CVRA. The district court will then immediately decide any motion asserting a victim's right. The CVRA also expressly provides for an expedited review of any trial court decision on a victim's right and allows a victim to petition the court of appeals for a writ of mandamus as well as appellate court review within seventy-two hours of the filing of the petition.

Rights guaranteed by Article 6b of the UCMJ should be similarly enforceable. *The Secretary of Defense should clarify that victims have legal standing to enforce their rights listed in Article 6b of the UCMJ at any relevant time in the proceedings, including before, during and after trial. [RSP Recommendation 53]*

d. Victim's Right to be Heard Through Counsel

The FY14 NDAA codified the right of a sexual assault victim to obtain legal services through a special victim counsel and defines the nature of the relationship between a special victim counsel and a victim as "an attorney and a client."[660] The scope of representation permitted under the statute is expansive and includes legal consultation related to the military justice system and any military justice proceedings in which the victim may appear as either a victim or a witness.[661]

The Court of Appeals for the Armed Forces has addressed the issue of whether a victim has the right to be heard through counsel on certain issues.[662] However, the scope of representation set forth by the FY14 NDAA is more expansive than the issues addressed by the Court of Appeals for the Armed Forces in case law.[663] Litigation about a victim's right to be heard through counsel will likely continue unless DoD issues formal clarification. *Therefore, changes to the Manual for Courts-Martial and appropriate regulations should clarify that a victim's right to be heard includes the right to be heard on legal issues through counsel. [RSP Recommendation 46]*

Providing information and records to a special victim counsel representing a victim requires further study. A special victim counsel's right to access records is no greater than his or her client's access rights. Currently, the government trial counsel may, but is not expressly required to, disclose information and records to the special victim counsel. Further, when disclosing information, the Freedom of Information Act and the Privacy Act limit the trial counsel. *The Judicial Proceedings Panel and the Joint Service Committee should review and clarify the extent of a victim's right to access information that is relevant to the assertion of a particular right. [RSP Recommendation 45]*

e. Victim Rights Notification and Enforcement

The CVRA requires prosecutors and investigators to use their "best efforts" to see that crime victims are notified of, and accorded, the rights under the CVRA. The court is responsible for ensuring that crime victims are afforded the rights guaranteed under the CVRA. The FY14 NDAA did not place a similar requirement on military investigators, prosecutors, or courts. Instead, the legislation requires the Secretary of Defense to recommend changes to the Manual for Courts-Martial and to prescribe regulations to see that victims are notified of and accorded their rights. *The Secretary of Defense should prescribe appropriate regulations to ensure that military investigators, prosecutors and other DoD military and civilian employees engaged in the detection, investigation, or prosecution of crime are also required to use their best efforts to notify and accord victims the rights specified in Article 6b, UCMJ. [RSP Recommendation 58]*

As previously discussed, Congress and the Military Services have established various points in the judicial process where military crime victims have the right to confer or consult with trial counsel. These requirements mirror the discussions civilian prosecutors routinely engage in with victims in sexual assault cases. In some civilian jurisdictions, the trial judge asks the prosecutor, on the record, if he or she has conferred with the victim and to present the victim's opinions to the court, even if the victim's opinions diverge from the government's position. *To ensure trial counsel have complied with their obligations to afford military crime victims the rights set forth in Article 6b of the UCMJ and DoD policy, the Service Secretaries should require military judges to inquire, on the record, whether trial counsel complied with statutory and policy requirements during courts-martial proceedings. [RSP Recommendation 57]*

3. Investigating Violations or Failures to Accord Victim Rights

To promote compliance, the CVRA directed the U.S. Attorney General to establish regulations that designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of crime victims' rights. The Department of Justice established the Office of the Victims' Rights Ombudsman to receive and investigate complaints filed by crime victims against its employees.

Similarly, the FY14 NDAA requires the military to designate an authority within each Service to receive and investigate complaints relating to the provision or violation of such rights. Designating a separate authority within each Service to receive and investigate complaints could result in disparate procedures, rules, and standards for making and investigating complaints relating to a failure to comply with crime victims' rights. Therefore, *the Panel recommends the Secretary of Defense assess the effectiveness of the processes to receive and investigate complaints relating to violations of or failures by military and civilian employees from all of the Services to provide the rights guaranteed by Article 6b of the UCMJ and to determine whether a more uniform process is needed. [RSP Recommendation 59]*

G. SENTENCING

In courts-martial, sentencing proceedings usually begin immediately after the announcement of a guilty verdict, whether in a guilty plea or contested trial.[664] This promptness allows the military to deliver swift punishment, quickly remove an offender from the unit, and return court-martial panel members to operational or training duties.[665] In Federal civilian courts, sentencing usually occurs weeks or months after trial.[666] This illustrates a fundamental difference between the military and civilian philosophies that drive sentencing proceedings.

1. Improving Sentencing Data Quality and Availability

Improving the quality of information about sentencing in sexual assault convictions and improving access to that information is particularly important. Currently, the lack of uniform, offense-specific sentencing data from

military courts-martial makes meaningful comparison and analysis of sentencing outcomes in military and civilian courts difficult, if not impossible. Compounding this lack of uniformity is the relative unavailability of data, which limits impartial examination and fosters misunderstanding and confusion. Making sentencing data available in an intelligible, predictable manner could serve to educate the public about the military justice process, strengthen confidence in the system, and dispel concerns about the outcomes in controversial cases.

The DoD's Annual SAPRO Report to Congress includes individual Service reports, which contain a large amount of case information—offenses alleged, location, grade of the subject and victim, military status of the victim, and some disposition information—about every unrestricted report filed in a given fiscal year.[667] This data, while useful in identifying trends and risk patterns, does not contain sufficient sentencing information to fully analyze sentencing in courts-martial. For instance, the reports detail the "most serious offense" of which the accused was convicted, but they do not indicate all convicted offenses. The reports only indicate whether the accused received certain punishments, such as confinement, forfeitures, or reduction in rank, but not the length of confinement or the amount of the forfeiture.[668] Without access to more detailed data, including all convicted offenses and the exact sentence adjudged, critically evaluating military sentencing data will remain challenging.

Sentencing data in the different Services is not easily accessible to the public. The Military Services use different systems to internally report data from installations around the world. If the Services' software programs and data fields (in DSAID, for example) were modified to include sentencing information, it would not be overly burdensome for the Services to provide this data to DoD. Accordingly, *the Secretary of Defense should direct the Service Secretaries to provide sentencing data, categorized by offense type, particularly for all rape and sexual assault offenses under Article 120 of the UCMJ, forcible sodomy under Article 125 of the UCMJ, or attempts to commit those acts under Article 80 of the UCMJ, into a searchable DoD database, in order to: (1) conduct periodic assessments, (2) identify sentencing trends, or (3) address other relevant issues. This information should be posted to a website or made available in a format easily accessible to the public. [RSP Recommendation 11]*

The public has an interest in military justice case outcomes, especially in adult sexual assault cases. In 2013, the Navy began publishing the results of all Special and General Courts-Martial in the Navy Times on a monthly basis.[669] *The Secretary of Defense should direct the Services to release sentencing outcomes in all cases on a monthly basis to increase transparency and confidence in the military justice system. [RSP Recommendation 12]*

2. Sentencing Procedures in Federal and Military Systems

Both civilian and military justice systems "pursue the goals of just punishment, deterrence, incapacitation, and rehabilitation. The military pursues the additional goal of maintaining good order and discipline."[670] In the Federal judicial system,[671] judges are the sole sentencing authority and consider the statutory purposes of sentencing when fashioning a sentence.[672]

The military-specific goal of preserving good order and discipline has impacted the structure and development of sentencing proceedings. The table below summarizes some of the differences in the structure and procedure of civilian and military justice systems that impact sentencing.

	Most Civilian Jurisdictions	Military
Number of members in non-capital cases	Usually 12 jurors	Does not require 12 members; Ranges from 3 to 12 depending on type of court-martial
Jury Verdict Requirement for Findings	Unanimous verdict in all cases	Unanimous verdict in capital cases; Usually 2/3 vote to convict by secret written ballot
Time between verdict and sentencing	Often delayed several weeks pending the completion of presentence report	Almost immediate
Who determines sentence in non-capital cases?	In most civilian jurisdictions, judge determines sentence in noncapital cases	Sentence is determined by military judge or by members (jury) based on choice of the accused: • Trial before members, sentencing by members • Trial by judge alone, sentencing by judge • Plead guilty, sentencing by members • Plead guilty, sentencing by judge The accused does *not* have option to select trial by members and then, if convicted, sentencing by military judge
Types of sentences	May include death, confinement, or fines, probation with completion of community service, treatment or education programs as condition of probation	May include death, confinement, reduction in rank, reduction in pay, forfeiture of pay and allowances, separation from military, fine, and reprimand
Sentencing per count or unitary	Receives sentence on each count for which he/she is convicted	Unitary sentencing, meaning one overall sentence
Sentencing by members/jury	Unanimous verdict in capital cases; Not applicable in most other cases because judge determines sentence in most jurisdictions	Unanimous verdict in capital cases; 3/4 vote for sentence of life imprisonment or confinement for more than ten years; 2/3 vote for any other sentence
Sentencing Guidelines	20 States, District of Columbia, and federal courts have sentencing guidelines to inform sentencing process	Each offense carries maximum penalty
Mandatory Minimums	Exist in many states and federal system for variety of offenses including some misdemeanors	• Dishonorable discharge for penetrative sexual assault offenses • Confinement for life for premeditated or felony murder • Death for spying

Clemency	Governor may grant pardon at end of process	Convening authority may set aside findings of guilt only in limited circumstances, and may not do so for "qualifying offenses."[673] Rights at Service clemency parole boards and right to petition President for clemency.
Appeals Process	Normally not granted automatic review; offender must file for review at next higher court	All sentences with punitive discharge or one year or greater confinement receive automatic appellate court review; all other cases automatically reviewed by judge advocate.

3. Comparing Sentencing Procedures in Civilian Courts and Courts-Martial

The Panel was asked to consider sentencing in courts-martial, but was unable to obtain empirical or quantifiable data indicating impacts on courts-martial sentences. This lack of data is partly due to procedures inherent in courts-martial, including:

- The unitary nature of courts-martial sentences makes it difficult to isolate sentences adjudged for particular offenses, including sexual assault offenses. When courts-martial convict Service members of more than one offense, it is unclear what portion of the aggregate punishment was based on any particular offense.

- Court-martial procedure provides no consolidated data source, such as a presentence report (PSR), to determine the circumstances of the offense(s) of conviction and the background of the accused. Information that is readily available in a PSR can be ascertained, if at all, in a court-martial only by a review of the entire record in each case. Also, matters in aggravation, extenuation, and mitigation are not maintained as part of the sentencing data as they would be in a PSR. Compounding this lack of uniformity is the data's relative unavailability. The lack of standardized, consolidated sentencing data in the courts-martial system makes comparing sentencing decisions cumbersome and challenging, both within the military justice system and between the military justice system and the civilian system.

DoD's Annual SAPRO Report to Congress includes individual Service case information about every unrestricted report filed in a given fiscal year.[674] This data, while useful in identifying trends and risk patterns, does not contain sufficient sentencing information to intelligibly inform discussion about sentencing trends in military courts-martial. Without access to more detailed data, including all convicted offenses and the exact sentence adjudged, critically evaluating sentencing data remains challenging across the Services.

4. Sentencing Authority – Military Judge or Jury

In the federal criminal justice system and 44 states, judges, not juries, impose sentences for convicted offenders in noncapital cases, including adult sexual assault cases.[675] There are six states that allow jury sentencing in felony cases.[676] The military retains an option for sentencing by panel members at the accused's request.[677] In non-capital courts-martial, the sentence is determined by the military judge or by the members[678]—based on the choice of the accused. If the accused is absent for trial, refuses to select a forum, or the military judge rejects the accused's request for trial by military judge alone,[679] the default forum is trial by officer members.[680] In any case, however, the accused does *not* have the option to select trial by members and then, if convicted, sentencing by the military judge.[681]

There are valid arguments for and against eliminating sentencing by court members and requiring sentencing by the military judge in all non-capital courts-martial. Discussion of such change predates the Military Justice Act of 1968.[682] Even today, the Services do not present a unified opinion on the subject, and recommend thorough study of the matter prior to any binding legislation.[683]

The Panel recognizes that it has long been "conventional wisdom" that members' sentences are more unpredictable.[684] However, without empirical data on sentencing differences or disparities, the panel cannot state definitively that sentencing by military judges would be qualitatively superior and perceived with greater confidence in sexual assault and other cases.[685] Ultimately, the decision to continue or eliminate the practice of panel sentencing will be a policy decision for lawmakers and justice practitioners. *The Secretary of Defense should direct a study to analyze whether changes should be made to the MCM, the UCMJ, and Service regulations, respectively, to make military judges the sole sentencing authority in sexual assault and other cases in the military justice system. [RSP Recommendation 122]* The table below summarizes prominent arguments supporting and in opposition to elimination of panel sentencing:[686]

Arguments to Eliminate Panel Sentencing (Sentence by Military Judge Alone)	Arguments to Retain Panel Sentencing (Sentence by Jury)
• Knowledge, experience, and training of military judges[687] • Panel members are not required to have legal training or experience[688] • Military court-martial sentences are complex because of range of potential punishments not available in civilian courts[689] • Court members are held from primary duties for duration of trial and sentencing • Member selection by convening authority may appear biased to general public[690] • Judges, not juries, adjudge sentences in 44 states and Federal system[691]	• Members best represent judgment of military community[692] • Member sentencing seen as right of the accused, and has been historically consistent in military justice practice[693] • Member participation provides future leaders experience and knowledge of court-martial process • Members have authority to convict, and should have authority to sentence • Members are screened by convening authority for selection according to Article 25 criteria[694]

5. Unitary Sentencing

The military system uses unitary or aggregate sentencing for multiple specifications (counts) of conviction.[695] In other words, a sentence is adjudged as a total for all offenses, rather than by specific offense. Changes to Article 60 in the FY14 NDAA restrict the convening authority's ability to set aside or commute findings of guilt, and specifically exclude offenses under Article 120(a) or 120(b), Article 120b, or Article 125 of the UCMJ even though convictions for these offenses often occur with convictions for other non-sexual offenses.[696] Thus, the practice of imposing a sentence in total, rather than specifying a sentence for each individual charge a defendant is convicted of, makes the convening authority's ability to act on charges for non-sexual offenses unclear, obscures the punitive consequences of specified offenses, and makes accountability for sexual assault difficult to ascertain.

By contrast, in Federal civilian criminal proceedings and in most states, the defendant, or offender, receives a distinct sentence for each offense of which convicted.[697] Thus, someone convicted of multiple offenses receives

a sentence for each offense.[698] The sentence for each offense is limited by a statutory maximum and, in some cases, minimum for the offense, plus any applicable guidelines. The judge has some discretion (often guided or cabined by guidelines or other rules) to direct that such separate sentences be served concurrently or consecutively, and sometimes may take other action to merge sentences for closely related offenses.

Unitary sentencing in courts-martial makes sentencing proceedings and deliberations less complicated; however, it may lead to less careful consideration of each and every offense of conviction and disparity in outcomes, as well as post-trial challenges. For instance, aggregate sentences may require sentencing rehearings when appellate courts remand cases. Although unusual, because appellate courts often reassess in light of identified errors, rehearings can be time consuming, costly, and logistically challenging. Additionally, they may burden victims and prevent case closure when victims have to re-appear at sentencing.

The Secretary of Defense should recommend amendments to the MCM and UCMJ to impose sentences which require the sentencing authority to enumerate the specific sentence awarded for each offense and to impose sentences for multiple offenses consecutively or concurrently to the President and Congress, respectively. [RSP Recommendation 123]

6. Sentencing Guidelines

Currently, there are no sentencing guidelines in the military justice system for sexual assault or any other offense. Instead, the President establishes by Executive Order a maximum punishment for each offense. In contrast, the Federal system, twenty states, and the District of Columbia use some form of a sentencing guideline system.[699] A proper analysis of sentencing guidelines would require the appropriate time and resources to: (a) gather data and rationale to support a recommendation, (b) determine the form guidelines should take, (c) and assess whether the military should adopt sentencing guidelines in sexual assault or other cases.[700]

Federal sentencing guidelines are derived from data analysis of sentences in thousands of cases[701] and are monitored and revised by the United States Sentencing Commission, which consists of seven voting members and one nonvoting member, supported by a staff of over 100.[702] Sentencing guidelines are often complex and may require substantial infrastructure to support them, including sentencing commissions which study, develop, implement and amend the guidelines over time. For instance, to formulate baseline recommendations for federal sentencing guidelines, the United States Sentencing Commission collected and examined data from 100,000 cases that had been sentenced in federal courts—10,000 of which it studied in "great detail."[703] Twenty-four states and the District of Columbia currently have sentencing commissions. A proper assessment of whether the military should adopt some form of sentencing guidelines in sexual assault or other cases requires in-depth study.

However, the Panel does not suggest that such study is necessary. The Panel heard no empirical evidence of whether inappropriate sentencing disparities exist in sexual assault or other courts-martial. After gathering evidence and testimony from Federal and state experts in sentencing guidelines, the Panel recognized that a complete study would involve a comprehensive comparison to Federal and state sentencing guidelines to determine whether they would be appropriate in the military justice system, and if so, what guideline model to follow. There are numerous complicated policy and structural issues to factor into such a decision, including:[704]

- The overarching goals in current state and federal sentencing guidelines vary based on the method of development, articulated purposes, structure, and application. Some common objectives include reducing sentencing disparities, achieving proportionality in sentencing, and protecting public safety.

- There are two approaches used in creating sentencing guidelines: (1) a descriptive approach, which is data-driven and used to achieve uniformity, and (2) a prescriptive approach, which is used to promote certain sentences.
- Different entities oversee sentencing guidelines in the state and federal systems, with some choosing judicial agencies and others choosing legislative agencies.
- The flexibility of sentencing guidelines varies widely in the states, ranging from mandatory to presumptively applicable to completely discretionary.
- Additional details include: (1) whether a worksheet or structured form is required, (2) whether the commission regularly reports on guidelines compliance, (3) whether compelling and substantial reasons are required for departures, (4) whether written rationales are required for departures, and (5) whether there is appellate review of defendant or government based challenges related to sentencing guidelines.
- The actual prison sentences defendants serve in jurisdictions with sentencing guidelines also vary depending on laws affecting parole and other "truth in sentencing" issues.

Most jurisdictions that have employed sentencing guidelines have had clearly articulated policy reasons for implementing those guidelines, and each jurisdiction's policy followed deliberate collection of quantifiable, empirical evidence.[705] "The most frequent [reason] that's cited or articulated is to reduce sentencing disparity or increase consistency in sentencing outcomes."[706] As noted above, the Panel heard no empirical evidence of whether inappropriate sentencing disparities exist in sexual assault or other courts-martial. *The Panel does not recommend the military adopt sentencing guidelines in sexual assault or other cases at this time. [RSP Recommendation 124]*

7. Mandatory Minimum Sentences

On September 4, 2013, the Secretary of Defense directed the Acting General Counsel to request the Panel study mandatory minimum sentences for military sex-related offenses.[707] The Acting General Counsel subsequently asked the Panel Chair to include in its review an assessment on the efficacy of mandatory minimum sentences for military sexual assault cases.[708] The Panel Chair responded that it was an implied task, and agreed to study it.[709]

The UCMJ currently requires a mandatory minimum sentence for three offenses. Spying has a mandatory minimum death sentence,[710] and premeditated murder[711] and felony murder[712] have mandatory minimums of a life sentence with the possibility of parole. Section 1705(a) of the FY14 NDAA amends Article 56 of the Uniform Code of Military Justice to impose the mandatory minimum punishment of dismissal or dishonorable discharge for anyone convicted of rape or sexual assault (under Article 120), rape or sexual assault of a child (under Article 120b), forcible sodomy (under Article 125), or attempts to commit those offenses (under Article 80). This provision became effective on June 24, 2014, 180 days after enactment of the Act.[713]

Mandatory minimum sentences remain controversial.[714] Testimony and other evidence gathered from civilian prosecutors, civilian defense counsel, and victim advocacy organizations demonstrates that mandatory minimum sentences do not prevent or deter adult sexual assault crimes, increase victim confidence, or increase victim reporting.[715] Some evidence indicates that mandatory minimum sentences, especially if too rigid or severe, may chill victim reporting in some cases because the victim may not want to be the cause of such consequences.[716]

The Panel also found that mandatory minimum sentences may decrease the likelihood of resolving cases through guilty pleas, especially if the mandatory minimum sentences are perceived as severe. In the FY14 NDAA, Congress tasked the JPP to examine mandatory minimums over a period of years. The JPP will be better positioned to further analyze the potential impact of mandatory minimum sentences on military sexual assault offenses. Based on the information received about mandatory minimum sentences, including their potential to deter victim reporting, *the Panel recommends Congress not enact further mandatory minimum sentences in sexual assault cases at this time. [RSP Recommendation 125]*

8. Victim Allocution in Sentencing

The victim's right to be heard at sentencing is currently governed by the Rules for Courts-Martial. Under military rules, a sexual assault victim may present evidence during the sentencing proceedings of financial, social, psychological, and medical impact of an offense the accused committed. Military procedure requires the victim and other witnesses -- except the accused -- to appear and testify under oath at the sentencing proceeding, subject to the rules of evidence and defense cross-examination.[717] This means that unless there is an agreement from the defense, the victim must testify under oath, and is subject to cross-examination.

The requirement that a victim testify in person and under oath to present victim impact evidence contrasts with the Federal Rules of Criminal Procedure, which generally permit a victim of a sexual abuse to make an unsworn statement or present information at sentencing.[718] Military practice is also inconsistent with statutes in a number of state jurisdictions, which permit a victim to present a victim impact statement without testifying under oath or being subject to cross-examination.[719] Additionally, the CVRA includes the opportunity for a victim to be reasonably heard at sentencing by allowing him or her to make a statement that is neither under oath nor subject to cross-examination. The newly enacted military victim rights in Article 6b of the UCMJ also include the right for the victim to be heard at sentencing.[720]

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

- *The members should be instructed similarly to the instruction they receive when the accused makes an unsworn statement;*
- *The substance of the unsworn statement, including all material facts, should be in writing, available to the defense counsel before sentencing, be subject to the same objections available to the government regarding the accused's unsworn statement; and*
- *If there is "new matter" that could affect the sentence brought up in the victim's unsworn statement, a military judge may take whatever action he or she believes is appropriate. [RSP Recommendation 56]*

H. POST-TRIAL AND CLEMENCY

Once completed, convening authorities must "act" on courts-martial results—in other words, approve the sentence—before it becomes final.[721] A convening authority may not disapprove a finding of not guilty or any judicial ruling amounting to a finding of not guilty.[722] If an accused is convicted of a charge and sentenced to confinement, he or she begins serving confinement immediately and the immediate commander and convening authority are notified of the findings and sentence.[723] 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.[724] If granted, the deferment ends when the sentence is ordered executed by the convening authority, or the convening authority may rescind it at any time prior to action.[725]

After trial, a court reporter prepares the record of trial, which all counsel review before the military judge authenticates it.[726] The record is served on the accused with a copy of the staff judge advocate's required written 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.[727] The accused, with the advice of counsel, may submit additional clemency matters to the convening authority.[728] Article 54(e) of the UCMJ provides a copy of the record of trial to any victim of any 120 offense who testified at trial,[729] and 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 convening authority."[730]

1. Article 60 Clemency Overview

Action on the findings of a court-martial by the convening authority is not required, but Article 60 of the UCMJ provides clemency 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.[731] Clemency authority differs in civilian and military systems. Military convening authorities normally exercise clemency authority under Article 60 of the UCMJ after the findings and sentence of a court-martial, before appellate review. The scope of appellate review varies by the length of sentence approved.[732] In civilian jurisdictions, each state has its own rules for handling clemency matters, but many vest the governor with the power to pardon criminals and commute sentences as the final act after a convicted person exhausts the judicial appellate process.

Section 1702(b) of the FY14 NDAA, which took effect on June 24, 2014, substantially 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]"— qualifying offenses are those where 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.[733]

In contrast to the presumptive regularity of court-martial findings, the convening authority must take action on the adjudged sentence.[734] A convening authority may not increase the severity of the sentence. While Article 60 provided broad discretion to convening authorities as a matter of "command prerogative" to disapprove, commute, or suspend punishments, Section 1702 of the FY14 NDAA reduced this discretion.[735] 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.[736] 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.[737]

The impact of recent modifications to Article 60 of the UCMJ is not fully known at this time, but they may bring some unintended consequences. For instance, the convening authority may no longer provide relief from forfeitures of pay to dependents of convicted Service members (who may themselves have been sexual assault victims). Also unclear is the convening authority's ability to grant clemency in cases in which there are convictions for both Article 120 and other offenses, because of the unitary nature of courts-martial sentences. *The Panel recommends that Congress 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. [RSP Recommendation 42] The Panel also recommends that*

Congress should amend Section 1702(b) of the FY14 NDAA to allow convening authorities to grant clemency as formerly permitted under the UCMJ to protect dependents of convicted Service members by relieving them of the burden of automatic and adjudged forfeitures. [RSP Recommendation 43]

2. Appeals

Following convening authority action on the sentence,[738] 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 appellate action in accordance with Articles 66 and 69 of the UCMJ, respectively, depending on the sentence.[739] A sentence to confinement of a year or more or a punitive discharge receives full appellate review[740] unless waived or withdrawn. 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.[741]

Chapter Nine:

ORGANIZING, TRAINING, AND RESOURCING INVESTIGATORS, PROSECUTORS, AND DEFENSE COUNSEL

A. ORGANIZING PROSECUTION RESOURCES

The organizational structure within civilian prosecution offices varies greatly. Some civilian prosecutors specialize in sexual assault for their entire careers[742] or rotate through sex crimes units specializing for a few years,[743] whereas others do not specialize and handle all felony level crimes.[744] Most of the prosecutors in medium size and smaller jurisdictions are assigned cases based on their experience level rather than a specific expertise in sexual assault cases.[745] The organizational structure in civilian prosecution offices depends upon the size of the jurisdiction, the resources available, the caseload, as well as the leadership's philosophy for assigning these complex cases.

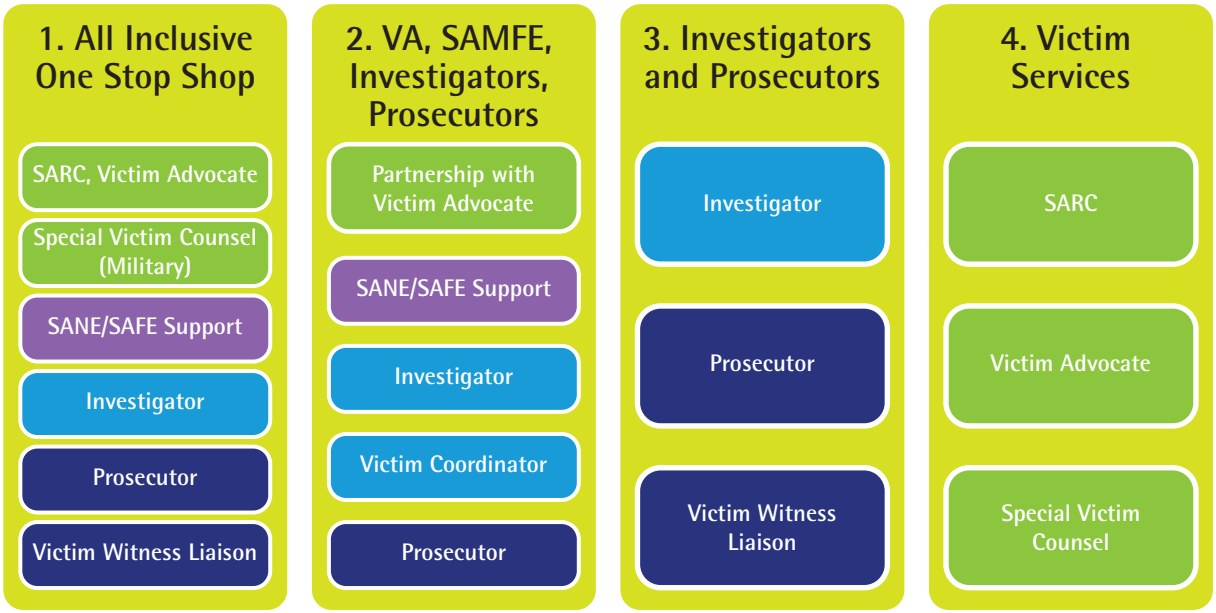
Rather than imposing a specific organizational structure on the Services, as previously noted, Congress required the Services to provide a Special Victim Capability by January 2014 consisting of specially trained investigators, prosecutors, paralegals, and victim witness liaisons.[746] The Services have implemented the Special Victim Capability and the Panel is optimistic about each Service's approach.

The Service Secretaries need to continue to fully implement the special victim prosecutor programs within the Special Victim Capability and further develop and sustain the expertise of prosecutors, investigators, victim witness liaisons, and paralegals in large jurisdictions or by regions for complex sexual assault cases. [RSP Recommendation 105] One way to enhance Special Victim Capability may be to co-locate some of the personnel so they could work more effectively together.

1. Co-locating Prosecutors, Investigators, and Victim Support Personnel

Civilian jurisdictions and the Services use different organizational structures to maximize the efficiency and effectiveness of coordination among sexual assault response personnel and minimize trauma to the victim. The Panel studied four types of co-location models used in some civilian and military jurisdictions.

Figure 14 – Co-location Models



(1) The all-inclusive "one-stop shop" model combines all the personnel who respond to a sexual assault allegation, including victim advocates, mental health personnel, SANEs, investigators, and prosecutors in a single location.[747] The goal is to increase communication among the stakeholders, minimize victim travel, and enhance the multidisciplinary approach in sexual assault cases. One civilian facility, Dawson Place in Everett, Washington, includes SANEs, and/or victim advocate agencies and mental health personnel, investigators, prosecutors and victim witness liaisons to handle child and adult sexual assault cases. The Army recently established a similar facility, the Sexual Assault Response Center, at Joint Base Lewis-McChord (JBLM) in Washington for adult sexual assault cases.[748]

There are potential drawbacks to co-locating all of these services. Co-locating victim services personnel with law enforcement and prosecution officials could create the perception that victim services are aligned with, or a part of, the prosecution team – and do not operate independently – with several potentially deleterious effects: First, although the intent of this consolidation model is to support victims, these arrangements may actually deter reporting if victims perceive victim services are tied to, or working with, investigators or prosecutors. Second, victim services medical personnel who work too closely with prosecutors may not be perceived as independent medical providers, but rather as extensions of law enforcement.[749] And third, the victim advocate-victim privilege, which generally ensures that communications between victims and advocates remain confidential, may be degraded or lost if confidential statements are made in the presence of, or disclosed to prosecutors.[750] Accordingly, if larger military installations adopt this model, any multidisciplinary meetings between victim services personnel, the prosecutor, and investigator should be limited to topics related to victim support and ensuring the victim remains informed and engaged in the process, but should not include discussions about case details.

(2) The second model, seen in the Philadelphia Sexual Assault Response Center (PSARC) in Pennsylvania and the Austin Police Department (PD) Special Victim Unit (SVU) in Texas, integrates the victim advocate, SANE, investigators, and prosecutors. PSARC partnered with Women Organized Against Rape (WOAR) and other local victim advocate agencies to gain victim confidence and encourage victims to utilize their resources.

The PSARC facility's capacity to perform SANE exams is unique in that the exam room is co-located with the Philadelphia PD Special Victim Unit, yet maintains independence with Drexel University providing PSARC's SANE support and other medical assistance to victims, regardless of whether they wish to file a police report.[751] Austin PD provides an office for victim advocates from SafePlace – a local rape crisis center – to work at the SVU. Austin PD works with a SANE Coordinator to arrange for forensic exams from a group of experienced SANEs who respond to a local emergency room.[752]

(3) The third model co-locates prosecutors and investigators. In Arlington, Virginia and at Fort Hood, Texas, the investigators and prosecutors work in the same building.[753] This model is easier for small to medium jurisdictions or installations to adopt because it requires fewer resources, but still yields the positive results associated with investigators and prosecutors working closely together.

(4) The fourth model co-locates all victim services support personnel. At Marine Corps Base Quantico, Virginia, the Marine Corps has collected all of the different services available to victims under one roof, including the SARC, victim advocate, and special victim counsel.[754] This is a positive step, especially when there are so many resources and service providers available to sexual assault victims.

Overall, consolidated facilities can improve communication between prosecutors, investigators, and victims. These facilities may help minimize unnecessary trauma to victims following a sexual assault by locating all of the resources required to respond, support, investigate, and prosecute sexual assault cases in one building. However, these models require substantial resources and the right mix of personnel. Co-locating prosecutors and victim services personnel may also compromise privileges for military victim advocates or cause other perception problems.[755]

The Secretary of Defense needs to assess the various strengths and weaknesses of different co-location models at locations throughout the Armed Forces in order to continue to improve the efficiency and effectiveness of investigation and prosecution of sexual assault offenses. [RSP Recommendation 107-A] Likewise, *the Service Secretaries should direct that each Service's Judge Advocate General Corps and MCIOs work together to co-locate prosecutors and investigators who handle sexual assault cases on installations where sufficient caseloads justify consolidation and resources are available. Additionally, locating a forensic exam room with special victims' prosecutors and investigators, where caseloads justify such an arrangement, can help minimize the travel and trauma to victims while maximizing the speed and effectiveness of investigations. Because of the importance of protecting privileged communication with victims, the SARC, victim advocate, special victim counsel or other victim support personnel should not be merged with the offices of prosecutors and investigators. [RSP Recommendation 107-B]*

2. Sexual Assault Nurse Examiners (SANEs)

In civilian jurisdictions, specially trained nurses or other trained health care providers perform SAFEs. Most police departments coordinate with local hospitals; however, not all civilian hospitals have a trained provider on staff. In those locations, victims may be transported to a designated location where forensic exams are routinely performed or a provider will respond to the victim's hospital. Having a pool of designated trained professionals who frequently are called to conduct SAFEs increases the level of expertise of those examiners and improves the quality of the exam.

Many installations coordinate with civilian forensic examiners to provide SAFE services. Depending on the location, many civilian medical facilities serve as the community's center of excellence for SAFEs and have more experienced SANEs than are typically available on a military installation. SANEs in civilian medical facilities typically have more experience in conducting forensic exams because they see more sexual assault victims over the course of a year than SANEs on most military installations.[756] On most, if not all, military installations, a full time SANE is unnecessary because not enough sexual assaults are reported within the first

96 hours of an incident to require a nurse physically located at a consolidated sexual assault center. However, it may be useful to provide appropriate space, supplies and equipment for SANE forensic exams in facilities housing investigators and prosecutors in order to support currently existing arrangements between military installations and civilian forensic examiners. Further, such arrangements would increase communication between prosecutors, investigators, and forensic examiners while easing the burden on victims by limiting the need to travel to a military hospital or off base civilian facility.

The FY14 NDAA Section 1725 requirement that every military installation medical treatment facility (MTF) with an emergency department that operates 24 hours per day, seven days a week to have at least one assigned SANE is overly prescriptive.[757] DoD policy already required timely, accessible, and comprehensive healthcare for victims of sexual assault, including a SAFE Kit.[758] In light of the DoD policy, and actual need for forensic exams in the military, *the Service Secretaries should direct their Surgeons General to: (1) review Section 1725 of the FY14 NDAA, which requires the assignment of at least one full-time SANE to each military medical facility with a 24 hour, seven days a week emergency room, and (2) provide recommendations to amend the legislation so as to permit the most effective way to provide SAFEs at their facilities, given that many civilian medical facilities have more experienced forensic examiners than are typically located on a military installation and those facilities serve as the community's center of excellence for SAFEs. [RSP Recommendation 99]*

3. Special Victim Capability Policy and Assessment

The Special Victim Capability strives to provide a level of prosecution expertise through specialization in complex sex-related cases, while recognizing that not every judge advocate is a subject matter expert in sexual assault prosecution. DoD's policy document Directive-Type Memorandum (DTM) 14-003 advances Congress's requirements by including timelines for special prosecutors' involvement in reported sexual assaults, criteria to measure effectiveness, and other standards.[759]

a. Terminology

Pursuant to DoD policy, the Special Victim Capability team responds to "covered offenses" which includes "sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ."[760] Accordingly, the prosecutors and investigators of the Special Victim Capability team are required to handle cases beyond Article 120 offenses. *The Secretary of Defense should direct the DTM 14-003 be revised so that definitions of "covered offenses" accurately reflect specific offenses currently listed in the relevant version(s) of Article 120 of the UCMJ. [RSP Recommendation 103]*

In large jurisdictions, prosecutors specializing in sexual assault cases handle felony level offenses, whereas less experienced attorneys handle misdemeanors or contact offenses. Article 120 of the UCMJ covers conduct from contact offenses to penetrative offenses, so a blanket requirement for using Special Victim Capability in all Article 120 cases would not be comparable to such civilian systems. Therefore, *the Secretary of Defense and Service Secretaries should develop policy that does not require special victim prosecutors to handle every sexual assault under Article 120 of the UCMJ. Due to the resources required, the wide range of conduct that falls within current sexual assault offenses in the UCMJ, and the difficulty of providing the capability in remote locations, a blanket requirement for special prosecutors to handle every case undermines effective prevention, investigation, and prosecution. [RSP Recommendation 104]*

b. Timelines

DoD established timelines to ensure military prosecutors' early involvement in sexual assault investigations. MCIOs inform the Staff Judge Advocate's legal office within 24 hours of learning of a report; the special victim prosecutor coordinates with the investigator within 48 hours.[761] The DoD policy is supported by studies that concluded when prosecutors become involved in sexual assault cases early, including meeting with the victim,

there is a greater likelihood the victim will cooperate in the investigation and prosecution of the alleged offender.[762] The large urban prosecution offices have programs that include protocols for investigators to notify prosecutors as soon as serious sexual assaults are identified. The protocols also provide for prosecutors to accompany investigators in certain circumstances, and for the coordination between the investigator and prosecutor through much of the process.[763] Military special victim prosecutors are on call and follow similar procedures as their civilian counterparts in large offices with ride-along programs. While the coordination between the military investigator and prosecutor follows the civilian best practice, there is no current requirement for the military prosecutor to meet with the victim as soon as possible.

The Secretary of Defense should maintain the requirement for an investigator to notify the prosecution section of the staff judge advocate's legal office of an unrestricted sexual assault report within 24 hours, and for the special victim prosecutor to consult with the investigator within 48 hours, and monthly, thereafter. Milestones should be established to insert the prosecutor into the investigation process and to ensure that the special victim prosecutor contacts the victim or the victim's counsel as soon as possible after an unrestricted report. [RSP Recommendation 102]

c. Measuring the Effectiveness of the Special Victim Capability

Department of Defense policy complies with the FY13 NDAA requirement for the Secretary of Defense to prescribe common criteria for measuring the effectiveness and impact of the Special Victim Capability from investigative, prosecutorial, and victim perspectives.[764] DoD established five evaluation criteria "to ensure that special victim offense cases are expertly prosecuted, and that victims and witnesses are treated with dignity and respect at all times, have a voice in the process, and that their specific needs are addressed in a competent and sensitive manner by Special Victim Capability personnel."[765] The DoD and the Services will assess the Special Victim Capability by reviewing the following measures:[766]

- Percentage of Special Victim Capability cases preferred, compared to overall number of courts-martial preferred in each fiscal year;
- Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor;
- Compliance with DoD Victim Witness Assistance Program reporting requirements to ensure Special Victim Capability legal personnel consult with and regularly update victims as required;
- Percentage of specially-trained prosecutors and other legal support personnel who receive additional and advanced training in Special Victim Capability topic areas; and
- Victim feedback on the effectiveness of Special Victim Capability prosecution and legal support services and recommendations for possible improvements.[767]

In addition to the DoD criteria, the Army uses the victim "drop out" rate to measure the effectiveness of the special victim counsel or special victim prosecutor. Evidence indicates that these programs, thus far, have been effective. Since the Army established the Special Victim Prosecutor Program in 2009, only six percent of sexual assault victims "dropped out" or were unable to continue to cooperate in the investigation and prosecution of the case.[768] In contrast, in 2011, prior to implementing the specially trained prosecutors or victims' counsel programs, the Air Force suffered from a 29 percent victim dropout rate.[769]

Special prosecutors, and now special victim counsel, are trained to prevent victim fatigue and ensure victims remain informed. Considering the correlation between the Special Victim Prosecutor Program's implementation and a reduced victim dropout rate, it is reasonable to conclude that special victim prosecutors

are making the process less intimidating for victims and are causing victims to have more faith in the process.[770] Nonetheless, to assess the long-term effectiveness of these programs, the Services should track the percentage of cases in which the victim declines to cooperate after filing an unrestricted report and the reasons for the declination. This additional data could reflect the effectiveness of both the special victim prosecutor and special victim counsel.

The Secretary of Defense should assess the Special Victim Capability annually to determine the effectiveness of the multidisciplinary approach and the resources required to sustain the capability, as well as continue to develop metrics such as the victim "drop-out" rate, rather than conviction rates, as a measure of success. [RSP Recommendation 109]

B. DEFENSE COUNSEL ORGANIZATION AND RESOURCE REQUIREMENTS

Defense counsel from across the Services informed the Panel that the mission of the military Defense Services is to provide independent, world-class representation in a zealous, ethical, and professional manner, thereby ensuring the military justice system is both fair and just.[771] While it is important to hold offenders appropriately accountable, it is also crucial that the military justice system remains balanced and respects the rights of the accused, particularly the presumption of innocence.

As required by law and policy, the Services provide military defense counsel, free of charge, to Service members facing potential court-martial, nonjudicial punishment, administrative separation, and similar adverse action.[772] Defense counsel perform a wide range of duties, including:

- representing Service members before tribunals and other administrative bodies – e.g., at courts-martial, Article 32 hearings, lineups and administrative separation boards;
- counseling Service members under investigation or prior to being subject to punitive or negative administrative action – e.g., those suspected of offenses, pending nonjudicial punishment under Article 15 of the UCMJ, subject to Summary Court-martial (where Service members are not entitled to attorney representation), recommended for administrative separation; and
- other legal services as determined by the Services.

All of the Services organize their trial defense services by geographic region.[773] Military defense counsel are assigned to separate and independent organizations, not under the supervision or control of their clients' commanders. This organizational structure ensures the independence of military defense counsel, both in fact and perception.

Unlike military or civilian special victim prosecutors, neither civilian public defenders offices nor military defense services have attorneys specializing in sexual assault cases;[774] instead both attempt to use the most experienced attorneys to try more complex cases, such as sexual assaults. The Services' regionally organized trial defense systems meet the demand for competent and independent legal representation of Service members accused of sexual assault. Therefore, rather than developing specialized defense counsel, DoD and the Services should continue to focus on improving defense counsel training and ensuring sufficient resources are provided so that military defense organizations and counsel can perform effectively.

Currently, military defense counsel cannot use the MCIO to conduct additional investigation for the defense, assuming the MCIO would agree to do so, because any information would not be protected by the attorney-client or work-product privileges,[775] and the alternative – military defense counsel conducting his or her own case investigations – is equally unsatisfactory. This places an additional burden on military defense counsel

who may be untrained in investigative techniques and lacking investigative assets. Further, it may place defense counsel in ethically compromising circumstances if he or she becomes the only witness to exculpatory, inconsistent, or other statements.

Unlike public defenders who employ their own investigators, military defense counsel have none. Civilian defense investigators typically assist the defense in locating and interviewing witnesses, finding appropriate experts, and finding services to assist the defense in complying with court ordered treatment or services.[776] The investigators' involvement and contributions permit civilian defense counsel to prepare for trial and may assist in reaching alternate dispositions in cases.[777] Investigators can "give[] attorneys a fighting chance to develop facts and other evidence that is rarely provided to them by the government and is crucial for the proper representation of their clients" and "contribute to the efficient disposition of cases." [778] One public defender from the Washington, D.C. Public Defender's Office told the Panel, "[I]t's surprising to hear about the lack of investigators involved when we're trying to uphold the Constitution here and try to give our clients the utmost in representation and being zealous."[779]

Currently, military defense counsel instead must rely solely on the MCIO investigation and defense counsel and defense paralegals, if available, to conduct any additional investigation. Although defense counsel can request an investigator be detailed to the defense team for a particular case, defense counsel told the Panel that convening authorities and military judges routinely deny their requests.[780] *The Secretary of Defense should direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission in cases and the fair administration of justice. 781 [RSP Recommendation 81]* Many civilian public defender offices have investigators on their staffs and consider them critical.[782]

The are several potential ways DoD could fulfill the requirement to provide defense investigators. One would create MCIO positions within the defense counsel offices[783] and ensure the investigators' evaluation and supervisory chains remain within the military trial defense organizations.[784] Investigators could "unplug" from the parent MCIO for an assignment, "plug" into the defense system, then "unplug" to resume work for the MCIO.[785] This would mirror JAG Corps attorneys who serve as both prosecutors and defense counsel, although always in different assignment tours. Another option is to hire civilian investigators as full time government employees or hire contractors to work for the defense.[786] Some public defender offices hire former law enforcement personnel who get narrow-purpose credentials issued to them to perform the investigative functions for the defense.[787]

Regardless of the way DoD implements this requirement, military defense counsel need independent, deployable defense investigators to zealously represent their clients and correct an obvious imbalance of resources.

C. TRAINING INVESTIGATORS, PROSECUTORS, AND DEFENSE COUNSEL

Overall, military trial counsel, defense counsel, and investigators are competently and professionally performing their duties in adult sexual assault cases. Collaboration and standardization of assignments and training across the Services are areas ripe for further improvement.

1. Improving Special Victim Unit Investigator Personnel Assignments

Military and civilian agencies with SVUs recognize that detectives assigned to those units should have both the capability and commitment to investigate sexual assaults.[788] Best practices in civilian SVU investigative agencies involve reassigning personnel experiencing "burn out" and careful interviewing and selection of applicants to weed out those investigators with biases or a lack of interest in investigating sexual assault

cases.[789] Based on military mission requirements and the resulting need for flexibility in personnel assignments, a military Service member agent may be assigned to support an SVU or act as the lead agent on a sexual assault investigation, even though he or she did not volunteer for the position. To mitigate this problem, the MCIOs created civilian SVU team chief and investigator positions, carefully staffing them with specifically selected investigators.[790] Thus, a military best practice is assigning civilian investigators to supervise the SVU, which enhances the continuity of investigations and coordination with other agencies involved in responding to sexual assault cases.

The Secretary of Defense should direct MCIO commanders and directors to carefully select and train military investigators assigned as investigators for SVUs, and whenever possible, utilize civilians for specialized investigative oversight to maximize continuity and expertise. MCIO commanders and directors should ensure that military personnel assigned to an SVU have the competence and commitment to investigate sexual assault cases. [RSP Recommendation 96]

2. Training to Improve Sexual Assault Investigations and Reports

Both military and civilian agencies recognize the possibility of potential biases or factually inaccurate perceptions of victim behavior (commonly referred to as "rape myths") among their officers and investigators.[791] Left unaddressed, such biases can result in failures to aggressively follow up on a complaint of sexual assault, inappropriate disposition of cases, or inaccurate reports.[792] One of the primary ways to address these issues is through targeted training.[793]

Civilian experts report that relatively few law enforcement professionals have sufficient training to write effective reports of sexual assaults.[794] In both civilian and military law enforcement communities, bias in the terms used in documenting sexual assaults sometimes inappropriately or inaccurately suggests consent of the victim.[795] One expert noted, "We talk about victims having sex with their perpetrators. We talk about victims performing oral sex on their perpetrators. And we don't think of the word picture that creates, which does not in any way show the reality of the crime."[796]

The MCIOs have identified this concern and are trying to address potential biases through training and policy.[797] Army CID has issued guidance about the use of language that may imply consent and has required investigators to complete the End Violence Against Women International (EVAWI) online course entitled "Effective Report Writing: The Language of Non-Consensual Sex" as part of its annual refresher training in FY 2013.[798] Though the other Services do not have specific policies on this subject, all stated they train investigators on eliminating bias in investigations, particularly regarding victim behaviors.[799]

A best practice in both military and civilian agencies is to provide training to address potential biases and inaccurate perceptions of victim behavior, preparing officers and investigators to more effectively respond to, investigate, and document reported sexual assaults. Therefore, *the Secretary of Defense should direct commanders and directors of the MCIOs to continue training of all levels of law enforcement personnel on potential biases and inaccurate perceptions of victim behavior. Investigators should also be trained against the use of language that inaccurately or inappropriately implies consent of the victim in reports. [RSP Recommendation 97]*

3. Collaboration and Consistency in Sexual Assault Forensic Examinations

FY14 NDAA requires that the curriculum and other components of the program for certification of SANE (Adult/Adolescent) use the most recent guidelines and standards, as outlined by the Department of Justice, Office on Violence Against Women.[800] While not all civilian agencies require their nurses performing forensic examinations to be certified as a SANE, all must have at least the required training as a forensic examiner (40

hours of training are required, but taking the national exam is not). Twelve hours of continuing education is required annually to maintain certification as a SANE.[801]

While the Department of Justice national guidelines form the basis for SAFE training in the military and civilian communities, each of the Military Services instituted different programs and developed guidelines independently. *To improve and synchronize these programs and efforts, the Secretary of Defense should direct the Services to create a working group to coordinate the Services' efforts, leverage expertise, and consider whether a joint forensic exam course open to all military and DoD practitioners, perhaps at the Joint Medical Education and Training Center, or portable forensic training and jointly designed refresher courses would help to ensure a robust baseline of common training across all Services. [RSP Recommendation 101]*

4. Training Prosecutors in Adult Sexual Assault Cases

The Panel gathered and examined comparative information and received witness testimony from twenty prosecution offices across the nation to assess and compare military prosecutor training.[802] There are no national or state minimum training standards or experience floors for civilian prosecutors handling adult sexual assault crimes. Though each civilian prosecution office has different training practices, most sex crime prosecutors are trained through supervised experience handling pretrial motions, trials, and appeals.[803] Civilian sex crimes prosecutors usually have at least three years of prosecution experience, and often more than five. Experience can also be measured by the number of trials completed, though there is no uniform minimum required number of trials to be assigned adult sexual assault cases. Some prosecutors in medium to large offices have caseloads of at least 50-60 cases, and spend at least two days per week in court.

Likewise, all the Services have specially-trained and selected lawyers who serve as lead trial counsel in sexual assault crimes cases. As discussed further below, specialized military prosecutors handling adult sexual assault cases receive advanced training and have access to a network of senior judge advocates, civilian experts, and prosecution specialists.

a. Specially Trained Prosecutor Programs

All of the Services have trained specially trained prosecutors to support the special victim capability. The Army selects trial lawyers with the most demonstrated court-martial experience, experience with special victim cases, general expertise in criminal law, and interpersonal skills in handling sensitive victim cases.[804] The table below details experience and training for specialized sexual assault prosecution programs:

Experience and Training for Prosecutors Trying Sexual Assault Cases[805]

Organization and Authorizations	Selection and Experience	Specialized Education and Training
U.S. Army ***Special Victim Prosecutor (SVP)*** • **23 Special Victim Prosecutors covering worldwide area spanning 65 installations.** • **Army SVPs work with CID special investigators and Special Victim Unit (SVU) investigative teams.**	• Individually selected from the Army's most experienced trial lawyers. • Demonstrated court-martial experience. • Experience with sexual assault and special victim cases. • General expertise in criminal law. • Interpersonal skill in handling sensitive victim cases. • Both prosecution and defense experience are not required for selection, but is preferred.[806]	• Specialized military and civilian courses. • Two weeks "on the job" with a civilian district attorney's office. • Special training on victim care and interviewing.
U.S. Air Force ***Special Victims Unit – Senior Trial Counsel (SVU-STC)*** • **16 Senior Trial Counsel, including 10 who are members of the SVU.** • **Work alongside 24 Air Force Office of Special Investigations (AFOSI) special investigators.** • **Located at 16 Air Force installations with a high number of reported sexual offenses.**	• Senior Trial Counsel (STC) litigate the Air Force's most difficult cases, including the vast majority of sexual-assault prosecutions. • STC typically have at least three years of experience and are selected to be STCs. • A subset of STC are members of the Special Victims Unit (SVU-STC) and specialize in the prosecution of sexual assault and family violence cases.[807]	• Air Force lawyers selected for litigation positions attend the Trial and Defense Advocacy Course (TDAC) and the Advanced Trial Advocacy Course (ATAC). • All SVU-STC attend the Advanced Sexual Assault Litigation Course (ASALC), focused on sexual assault, domestic violence, and child abuse course annually. • SVU JAGs also continuously attend various advanced training courses.[808]
U.S. Navy ***Military Justice Litigation Career Track (MJLCT) and Senior Trial Counsel (STC)*** • **9 regionally-based Senior Trial Counsel.** • **Collaborate with Naval Criminal Investigative Service (NCIS) special investigators to investigate, review, and prosecute special victim cases.**	• With demonstrated aptitude and a desire to further specialize in litigation, may apply for inclusion in the MJLCT. • MJLCT officers spend most of their career in litigation-related billets as trial counsel, defense counsel, and military judges.[809]	• An MJLCT officer can advance from Specialist I to Specialist II to Expert. • Most MJLCT officers also receive an advanced law degree (a Master of Laws or LL.M.) in trial advocacy or litigation from a civilian institution. • Complete a follow-on tour in a courtroom intensive billet with leadership requirements.[810]

U.S. Marine Corps ***Special Victim Qualified Trial Counsel (SVTC) and Complex Trial Teams (CTT)*** • **Specially qualified, geographically-assigned Complex Trial Teams led by experienced Regional Trial Counsel** • **Provide special victim prosecutorial expertise and support.**	• Prosecute a contested special or general court-martial in a special victim case as an assistant trial counsel. • Be a General Court-Martial Qualified trial counsel (experience requirement). • Receive written recommendation from the Regional Trial Counsel regarding expertise to try a special victim case. • Satisfy requisite expertise, experience, education, innate ability, and disposition to competently try special victim cases (to the approval an O-6 level Officer-in-Charge).	• Complete the Marine Corps basic judge advocate training requirements, including courses at the Naval Justice School. • Attend an intermediate-level trial advocacy training course for the prosecution of special victim cases.

b. Trial Counsel Assistance Programs and Highly Qualified Experts (HQEs)

In addition to specialized prosecutors, the Army, Navy, and Marine Corps each have a Trial Counsel Assistance Program (TCAP) that oversees training. TCAPs across the Services provide training to increase the expertise of trial counsel and lay a foundation for them to later serve as experienced and capable defense counsel, chiefs of military justice (i.e., supervisory trial counsel), deputy SJAs, and SJAs.[811] The table below describes each Service's TCAP organization, support, and budget:

Trial Counsel Assistance Programs[812]

Organization	Responsibilities	HQE Support	Budget
U.S. Army **Trial Counsel Assistance Program (TCAP)**	• Increase the expertise of trial counsel. • Lay a foundation for trial counsel to later serve as experienced and capable defense counsel, chiefs of military justice (i.e., supervisory trial counsel), deputy SJAs, and SJAs.[813]	• 3 Highly Qualified Experts (HQEs) provide supplemental support. • The HQEs are civilians with more than 30 years of combined prosecution experience.[814]	• $468,734.64 (annual "sexual assault training funds"). • $1,407 per trial counsel per year.
U.S. Air Force **No Centralized Program**	• N/A	• N/A	• $2,105 per STC.[815]
U.S. Navy **Trial Counsel Assistance Program** **(TCAP)**	• Oversees training for trial counsel. • Provides on scene and online training to prosecutors in specialized areas, including adult sexual assault. • Conducts annual mobile training. • Installation site-visits with training sections on special victim crimes and process inspection. • Live online training. • Interactive Web-based training (sponsored by TCAP and conducted by subject matter experts).	• In May of 2013 the Navy hired an HQE to work with its TCAP. • HQE has 17 years of experience as a prosecutor and as an instructor and course coordinator for the NDAA.	• Not provided.
U.S. Marine Corps **Trial Counsel Assistance Program** **(TCAP)**	• To train trial counsel to prosecute sexual assault cases.[816] • Answers questions from prosecutors in the field, • Maintains a Web site for trial counsel to share motions and best practices, • Conducts training—in conjunction with Navy TCAP.[817] • Marine Corps trial counsel must consult with their regional HQE within ten days of being detailed to any sexual assault case.[818]	• The Marine Corps recently hired three HQEs to assist in all sexual assault cases; • Two of the HQEs are assigned to the prosecution.[819]	• $250,000 (SAPR/SVC annual training funds). • $2,778 per trial counsel per year.

The Service Judge Advocate Generals and the Staff Judge Advocate to the Commandant of the Marine Corps should sustain or increase training of judge advocates to maintain the expertise necessary to litigate adult sexual assault cases in spite of the turnover created by personnel rotations within the Services' Judge Advocates General Corps. [RSP Recommendation 110]

Trial counsel in all the Military Services generally have more standardized and extensive training than some of their civilian counterparts, but fewer years of prosecution and trial experience. The Services all use a combination of experienced supervising attorneys, systematic sexual assault training, and smaller caseloads to address experience disparities.

As a promising option for increasing experience levels of military trial counsel, the Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should study the Navy's Military Justice Litigation Career Track (MJLCT), outlined in the chart above,[820] to determine whether this model, or a similar one, would be effective in enhancing expertise in litigating sexual assault cases in his or her Service.

5. Military Defense Counsel Training and Experience

The Panel compared civilian approaches and examined best and promising practices in assessing training and experience levels of military defense counsel. Defense counsel handling adult sexual assault cases in all the Services receive specialized training.[821] Many also have previous experience as trial counsel.[822] The table below illustrates training and experience of defense counsel across the Services:

Experience and Training for Defense Counsel Trying Sexual Assault Cases[823]

Organization	Experience	Training
U.S. Army Defense Counsel	• Majority of DCs have prior courtroom experience. No specific minimum experience required. • Experience sitting "second chair" until supervisor deems fit to try cases as first chair.	• Graduate of the Judge Advocate Officer Basic Course. • Defense Counsel "101," taught by DCAP. • Advanced Trial Advocacy Courses.
U.S. Air Force Defense Counsel	• The Air Force is unique in that defense counsel are selected in a competitive, best-qualified standard by the Air Force Judge Advocate General. • Most defense counsel arrive with two to five years of experience working in a base legal office, which includes time as a trial counsel in courts-martial. • New defense counsel normally have between eight and 10 courts-martial trials before starting as a defense counsel.[824]	• Specialized courses provided by the Air Force Judge Advocate General's School. • On-the-job training. • Group training remains a challenge because of geographic diversity of counsel and length of tours.[825] • Out of the 19 Senior Defense Counsel regions, only three (San Antonio, Colorado Springs and the National Capitol Region) have the majority of their bases in close enough proximity to drive to group training.[826]

U.S. Navy Defense Counsel	• Following their first 24-month tour handling administrative separations and other non-judicial issues, Navy Judge Advocates become eligible to be assigned to a Defense Service Office (DSO) as a defense counsel.[827] • MJLCT officers are stationed in all DSO headquarters offices and some detachments, which are smaller regional offices.[828]	• Once selected, counsel receive additional training, including a basic trial advocacy course focusing on courtroom advocacy. • Within the first year at a DSO, defense counsel also attend the defending sexual assault cases class, an intense one-week course involving experts from forensics and psychology and very experienced civilian defense counsel.[829]
U.S. Marine Corps Defense Counsel	• The vast majority of the Marine Corps' 72 defense counsel are first-tour judge advocates with less than three years of experience as an attorney.[830] • They typically serve 18 months as defense counsel before moving to another assignment. • The average litigation experience of both senior defense counsel and defense counsel is 14 months, which includes both prosecution and defense time.[831]	• Defense counsel training requirements are set forth in Marine Corps policy.[832]
U.S. Coast Guard Defense Counsel	• By memorandum of agreement between the Coast Guard and the Navy JAG Corps, the Navy is principally responsible for defending Coast Guard members accused of UCMJ crimes.[833] • In return, four Coast Guard judge advocates are detailed to work at various Navy Defense Service offices on two-year rotations, which provide another significant source of trial experience to Coast Guard judge advocates.[834]	• Coast Guard Defense Counsel attend Navy Defense Training.

Military defense counsel in all the Services tend to have more standardized and extensive course training than their civilian counterparts to compensate for a relative lack of experience.[835] Like their prosecution counterparts, defense counsel receive training, oversight, and mentoring from senior counsel.[836] *The Services should continue to provide experienced defense counsel through the regional defense organizations and draw from personnel with extensive trial experience and expertise in the Reserve component. [RSP Recommendation 85]*

It is difficult to develop defense experience given the relatively low number of courts-martial and personnel turnover. The Marine Corps faces particular problems with personnel turnover because their attorneys perform line duty mission requirements and may serve in defense counsel tour lengths as short as 12 months.[837] As previously discussed, not all military defense counsel possess trial experience prior to assuming the role of defense counsel. Some defense counsel said they were assigned adult sexual assault cases during their first tour of duty, when they had no prior litigation experience.[838]

The Service TJAGs and Staff Judge Advocate to the Commandant of the Marine Corps should permit only counsel with litigation experience to serve as lead defense counsel in a sexual assault case as well as set the minimum tour length of defense counsel at two years or more, except when a lesser tour length is approved by the Service TJAG or Staff Judge Advocate to the Commandant of the Marine Corps, or designee, because of exigent circumstances or to specifically enable training of defense counsel under supervision of experienced defense counsel. [RSP Recommendation 86]

6. Defense Counsel Assistance Programs (DCAPs) and HQEs

All of the Military Services except the Air Force have DCAPs and HQEs to assist with training and trial consultation in all cases, including sexual assaults. The table below describes these programs:

Defense Counsel Assistance Programs[839]

Organization	Responsibilities	HQE Support[840]	Budget
U.S. Army Trial Defense Service and Defense Counsel Assistance Program (DCAP)	• Provides training, resources and assistance for defense counsel worldwide, including "reach back" capability. • Coordinates with, but operates independently from The Judge Advocate General's Legal Center and School. • "Available around the clock for case consultation. [In FY13], DCAP received over 2,000 inquiries from defense counsel in the form of emails, phone calls and in-person inquiries during training events."[841]	• Two civilian HQEs. • Both HQEs are former military judges and experienced trial practitioners with over 40 years of combined military justice experience.	• $377,178.96 (annual). • $1,033.36 per counsel.
U.S. Air Force No Centralized Program	• Training and support provided internally through supervisory counsel.	• No HQE Support.	• $350,000.00 annually for "other than litigation" travel. • $1,870.00 per counsel.

U.S. Navy Defense Counsel Assistance Program (DCAP)	• In conjunction with the Naval Justice School, provides ongoing training to current and prospective defense counsel worldwide, through on-site command visits and online training.[842] • Tracks trends and identifies areas for training; monitors evaluations for improvement in practice.[843] • Hosts an online forum where counsel post, download, and share resources involving sexual assault litigation as well as a "discussion board" where defense counsel anywhere in the world can receive nearly instantaneous assistance from DCAP and the Navy defense bar.[844]	• One HQE (former military judge with extensive criminal law experience).	• Not Provided.
U.S. Marine Corps Defense Services Organization (DSO)	• Provides training and support to 72 defense counsel, most of whom are first-tour judge advocates with less than three years of experience as an attorney. [845]	• One HQE, a retired civilian public defender from San Diego with over 30 years of experience.[846]	• DSO has access to $250,000 in SAPR/SVC Training Funds. • $1870.00 per counsel.

The Service Secretaries should direct that current training efforts and programs be sustained to ensure that military defense counsel are competent, prepared, and equipped. [RSP Recommendation 84]

7. Ensuring the Continued Effectiveness of Military Defense Counsel

In contrast to assessment of the performance of prosecutors there are currently no requirements or pending initiatives for the Services to measure military defense counsel performance in trying sexual assault cases. It is difficult for civilian or military defense counsel to measure success in defending those accused of sexual assault offenses. Just as conviction rates are not an accurate or desirable measure of prosecution success, acquittal rates are also not an accurate or desirable measure of defense success. Instead, a favorable plea agreement, sentence, or agreement to dispose of a case through alternate means for a client may be an accomplishment. Additionally, high acquittal rates in military sexual assault cases may indicate that staff judge advocates are recommending, and convening authorities are referring, cases that do not warrant trial by court-martial.

Therefore, *the Secretary of Defense should direct the Services to assess military defense counsels' performance in sexual assault cases similar to performance assessment of prosecutors and identify areas that may need improvement. [RSP Recommendation 87]*

8. Sexual Assault Working Group for Military Lawyers

Currently, all Services send attorneys to the training courses and JAG schools of the other Services. They also informally share resources, personnel, lessons for training, and collaborate on some training, enabling counsel to share successful tactics, strategies, and approaches.[847] However, these processes are not formal or standardized. There does not appear to be any synchronized effort in creating, funding, and growing training programs—as evidenced by the varying names and acronyms used to describe similar programs. For example, military judges in the Navy prepare quarterly evaluations of counsel's advocacy that are forwarded to the Chief Judge of the Navy for review and shared with DCAP for use in training plans.[848] It does not appear that the other Services similarly measure and assess performance. The absence of standardization and coordination can create confusion, duplication of effort, and a lack of clarity and credibility to those outside of the system. Conversely, if formalized and shared across the Services, these processes and terms could enhance comparability and efficiency.

The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should sustain and broaden the emphasis on developing and maintaining shared resources, expertise, and experience in prosecuting and defending adult sexual assault crimes. [RSP Recommendation 111] To that end, a working group is an effective means of showing progress and development and ensuring that initiatives and promising practices are disseminated throughout the Services to avoid duplication and continue improving training practices. Therefore, *the Secretary of Defense should direct the establishment of a DoD judge advocate criminal law joint training working group to optimize sharing of best practices, resources, and expertise for prosecuting and defending adult sexual assault cases. The working group should produce a concise written report, delivered to the Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps at least annually, for the next five calendar years. The working group should identify best practices, strive to eliminate redundancy, consider consolidated training, consider ways to enhance expertise in litigating sexual assault cases, and monitor training and experience throughout the Services. The working group should review training programs such as: the Army's Special Victim Prosecutor program; the Navy's Military Justice Litigation Career Track (MJLCT); the Highly Qualified Expert (HQE) programs used for training in the Army, Navy, and Marine Corps; the Trial Counsel Assistance and Defense Counsel Assistance Programs (TCAP and DCAP); the Navy's use of quarterly judicial evaluations of counsel; and any other potential best practices, civilian or military. [RSP Recommendation 112]*

D. RESOURCING AND FUNDING

1. Defense Services Funding

Maintaining adequate resources for the defense of military personnel accused of crimes, including sexual assault, is essential to the legitimacy and fairness of the military justice system. Unlike many civilian public defender offices,[849] military defense counsel organizations generally do not maintain their own budget; instead, they receive funding from the convening authority, their Service legal commands, or other sources.

Some civilian public defender offices maintain their own budgets or request experts through a trial judge who manages the budget.[850] In the federal system, there is specific funding to pay for defense witness travel and experts for Federal Defender organizations. Federal discovery rules generally require the defense to disclose experts and other witnesses to the government before trial, but not as early as military defense counsel. Military defense counsel must also request their witnesses through the trial counsel.[851]

The Panel concludes that separate budgets for military defense organizations are not necessary at this time. However, *the Service Secretaries should ensure military defense counsel organizations are adequately resourced in funding resources and personnel, including defense supervisory personnel with training and experience*

comparable to their prosecution counterparts, and direct the Services to assess if that is the case. [RSP Recommendation 82]

2. Reviewing Defense Counsel Training Budgets

During site visits and meetings, defense counsel and HQEs voiced concerns about training budget funding inequities between prosecutors and defense counsel, particularly in the Marine Corps.[852] Defense counsel from the Air Force, Army, and Navy also mentioned inequities in funding generally between the prosecution and defense, but did not specifically emphasize training. Some defense counsel told the Panel that because they do not have independent budgets, their training opportunities were insufficient and unequal to those of their trial counsel counterparts.[853]

The Services provided details about their training budgets, which reflected that defense counsel training budgets are generally equivalent to those for military prosecutors. *The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should review military defense counsel training for adult sexual assault cases to ensure funding of defense training opportunities is on par with that of trial counsel. [RSP Recommendation 83]*

3. Maintaining Experienced Civilian Advocates

As discussed in the TCAP, DCAP, and HQE sections above, experienced civilian advocates play an important role training both prosecution and defense counsel in the Army, Air Force, Navy, and Marine Corps. Given the attrition and transience of military counsel, civilian involvement in training adds an important perspective and ensures a base level of experience and continuity. Most HQEs have 20-30 years of criminal law experience, often in both civilian and military practice—rare among lawyers in the Services.[854] Working in tandem with TCAP and DCAP, the HQEs add substantial specialized expertise in adult sexual assault litigation. Such civilian expert advocate participation also adds transparency and validity to military counsel training programs.

The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should continue to fund and expand programs that provide a permanent civilian presence in the training structure for both trial and defense counsel. The Services should continue to leverage experienced military Reservists and civilian attorneys for training, expertise, and experience. [RSP Recommendation 119]

4. Supporting Military Judicial Training

Military judges, both trial and appellate, are selected based on their legal experience, military service record, and exemplary personal character, including sound ethics and good judgment.[855] Military judges participate in joint training at the Army's Judge Advocate General's Legal Center and School before their respective Service TJAGs will certify them to be judges.[856] This three-week course at the Army JAG School in Charlottesville, Virginia, covers judicial philosophy, case management, and specific scenarios.[857] The course, which is designed around a sexual assault case, includes substantive criminal law and procedure, practical exercises designed to simulate trial practice, and scenarios focusing on factors for consideration in reaching appropriate sentences.[858] The chief trial judges of all Services collaborate to create the Military Judge Course curriculum, and all Services provide instructors.[859] Experienced senior military judges grade the capstone exercise, which is a mock trial over which student military judges must preside.[860]

The Service TJAGs and the Staff Judge Advocate to the Commandant of the Marine Corps should continue to fund sufficient training opportunities for military judges and consider more joint and consolidated programs. [RSP Recommendation 120]

5. Ensuring Funding for Investigator Training

The MCIOs face an ongoing challenge of ensuring adequate funding is available to send investigators to advanced sexual assault investigation training courses. The increased workload and agent turnover requires training more investigators.[861] Congress has not specifically set aside money for sexual assault investigator training, leading to concerns that as resources wane within the military, the Services may be forced to cut training funds.[862] It is critical to sustain funding for training investigators, often the first responders to a report of sexual assault. Therefore, *Congress should appropriate funds for training of sexual assault investigation personnel. The Secretary of Defense should direct the Service Secretaries to program and budget funding, as allowed by law, for the MCIOs to provide advanced training on sexual assault investigations to SVU investigators. [RSP Recommendation 98]*

6. Ensuring Resourcing of Special Victim Capability

The DoD has dedicated an immense amount of resources to combat sexual assault. However, DoD did not authorize any additional personnel to the individual Services specifically to meet the requirement for special prosecutors within the Special Victim Capability, although the Services may have obtained additional personnel prior to the Congressional mandate. Currently, the Military Services fully fund special prosecutors' case preparation requirements.

Prior to the Congressional requirement for a Special Victim Capability in FY13 NDAA, the Services established programs that centralized specially trained prosecutors for complex cases.[863] The requirement to establish a Special Victim Capability within each Service did not significantly impact overall JAG personnel requirements because the Services were already developing these capabilities and, depending on the Service, may have already received additional authorizations for personnel. However, in a time of scarce resources and drawdown, it may be difficult to maintain this kind of capability in each of the different Services. Therefore, DoD and the Services need to ensure continued resources and permanent personnel are dedicated to this capability. Accordingly, *the Service Secretaries should continue to assess and meet the need for well-trained prosecutors to support the Services' Special Victim Capabilities, especially if there is increased reporting. [RSP Recommendation 106]*

Chapter Ten:

ASSESSING MILITARY AND CIVILIAN JUSTICE SYSTEM STRUCTURE AND PROPOSED LEGISLATIVE CHANGES

A. MILITARY JUSTICE SYSTEM STRUCTURE: EFFECTS ON SEXUAL ASSAULT REPORTING AND ADJUDICATION

Critics of the military justice system have argued that removing prosecutorial discretion from the chain of command will increase victim confidence and sexual assault reporting, as well as make the system fairer.[864] In considering this position, the Panel heard extensive testimony from sexual assault survivors, victim advocacy organizations, legislators, academics, and retired Service members.

The Panel also considered the testimony of active and retired military officers, judge advocates, legislators, academics, and victims who testified that it was vital for commanders to retain prosecutorial discretion. Proponents of the military justice system argued that the maintenance of good order and discipline, which is vital to mission-readiness, is the duty of commanders.[865] And, therefore, commanders must retain convening authority to remain credible leaders with the ability to administer justice and enforce values.[866] They also testified that commanders need prosecutorial discretion in order to create a command environment in which victims feel comfortable reporting crimes.[867]

Most of this testimony, whether from opponents or proponents of the current military justice system, was anecdotal. To develop empirical data points, the Panel reviewed Allied military justice systems and United States civilian justice systems to determine whether these systems faced problems with reporting sexual violence crimes similar to those seen in the military justice system.[868]

1. Alternative Allied and Civilian Justice Systems

The Panel reviewed Allied military justice systems that have removed prosecutorial discretion from the chain of command and placed it with independent military or civilian prosecutors. None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault. Further, despite already making this fundamental change to their military justice systems, the evidence does not indicate that these Allies have seen any increase in sexual assault reporting or convictions due to this change.[869] In fact, despite removing prosecutorial discretion from the chain of command, Allied militaries face many of the same challenges as the U.S. military in preventing and responding to sexual assaults.[870]

Similarly, as previously noted, the Panel found that civilian jurisdictions face under-reporting challenges similar to those of the military.[871] Further, it is not clear that the criminal justice response in civilian jurisdictions—where prosecutorial decisions are supervised by elected or appointed lawyers—are any more effective at encouraging reporting of sexual assaults, or investigating and prosecuting these assaults when they are reported.[872] 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."[873] The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions

that ignored the wishes of sexual assault survivors.[874] 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."[875]

In short, arguments suggesting that there is an advantage to vesting prosecutorial discretion with independent civilian or military prosecutors, rather than convening authorities, have no empirical support.

2. Convening Authority Fairness and Objectivity

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. Convening authorities consist of a very small group of the larger category of commanders. Only senior officers who occupy specific command positions are afforded special court-martial and general court-martial convening authority, and it is unlikely convening authorities will have personal knowledge or familiarity with either the victim or the accused.[876] Further, 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.

There are systemic checks in place to ensure unbiased disposition decisions; i.e., the convening authority is required to recuse himself or herself if the convening authority has an other than official interest in a case.[877] Also, as discussed previously, staff judge advocates have the legal authority under Article 6 of the UCMJ to raise concerns with judge advocates further up the chain of command.

Moreover, 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.[878]

3. Convening Authority Legal Training and Advice

Senior officers entrusted with convening authority receive military justice training in pre-command courses, as well as specific legal training conducted by judge advocate instructors.[879] In addition to military justice training, those relatively few senior commanders who also serve as convening authorities for sexual assault allegations do not make prosecutorial decisions in isolation. Convening authorities are required by law to receive advice from judge advocates before making these decisions. Nonetheless, *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 duties and functions assigned to them under the UCMJ. [RSP Recommendation 38]*

4. Anticipated Consequences of Removing Convening Authority

It is not clear what impact removing prosecutorial discretion from the chain of command would have on the organization, discipline, operational capability or effectiveness of the Armed Forces.[880] And as previously noted, the Panel received only anecdotal evidence that removing prosecutorial discretion from the chain of command would increase reporting or prosecution of sexual assaults.[881] But the notion that independent prosecutors are a panacea for sexual assault in the Armed Forces is misplaced. The evidence does not support a conclusion that removing the authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault, increase reporting of sexual assaults, or improve the quality of investigations and prosecutions of sexual assaults, or increase the conviction rate in sexual assault cases in the Armed Forces.[882] Moreover, Allied military justice systems and civilian justice systems, which do not have a comparable entity to the convening authority, face similar reporting and prosecution problems as the U.S. military.

Accordingly, the Panel recommends that Congress not further limit 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. [RSP Recommendation 37]

B. ASSESSMENT OF PROPOSED LEGISLATIVE CHANGES

Congress has enacted significant amendments to the UCMJ to enhance the response to sexual assault in the military, and the DoD implemented numerous changes to policies and programs for the same purpose. Preliminary indicators demonstrated in recent reporting and prosecution trends appear encouraging. However, the FY14 NDAA reforms are not yet fully implemented and it will take time to assess their impact on sexual assault reporting and prosecution.

Four additional bills are currently pending in Congress that propose additional substantial systemic changes to the military justice system. Three of the pending bills are discussed below.[883]

1. Victims Protection Act (VPA) of 2014

On January 14, 2014, Senator Claire McCaskill (D-MO) filed the Victims Protection Act of 2014 (VPA), which provides additional enhancements to the Armed Forces' sexual assault prevention and response activities.[884] On March 10, 2014, the Senate unanimously passed the VPA.

Section 2 of the VPA would mandate Secretarial or higher convening authority review of referral decisions in addition to similar provisions Congress enacted in the FY14 NDAA.[885] If the staff judge advocate or the senior trial counsel recommends the convening authority refer a sex-related offense to trial by court-martial, and the convening authority does not do so, the case is forwarded to the Service Secretary for further review. In addition, if the staff judge advocate or senior trial counsel recommends the convening authority not refer a sex-related offense to trial by court-martial, and the convening authority agrees, the case is forwarded to the next higher general court-martial convening authority for review.[886]

The Panel recommends that Congress not enact Section 2 of the VPA. [RSP Recommendation 41] In addition to the Panel's concern, discussed earlier[887] about undue pressure on staff judge advocates and convening authorities when deciding whether to refer cases, the Panel believes the decision whether to refer a case to court-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate. Most "senior trial counsel" assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. Section 2 would inappropriately elevate the assessments of generally more junior judge advocates and would likely prove to be unproductive, unnecessary, and disruptive to ensuring the fair disposition of cases.

Section 3(b) of the VPA would require a consultation process for a sexual assault victim in the United States regarding his or her preference on prosecution by court-martial or the appropriate civilian jurisdiction. While not binding, the victim's preference would be entitled to "great weight" in determining prosecution forum. Should the victim prefer a civilian forum for prosecution and the civilian jurisdiction declines to prosecute, the victim must be "promptly" informed.[888]

The Panel recommends that Congress not enact Section 3(b) of the VPA. [RSP Recommendation 114] Jurisdiction is based on legal authority, not necessarily the victim's preferences. The decision whether civilian or military authorities will prosecute a case is routinely negotiated between the military and civilian authorities in cases with shared jurisdiction. In addition, the Panel did not receive evidence of problems with coordination between civilian prosecutors and military legal offices. In fact, the opposite appears to be true. There appears to be significant coordination and cooperation between military and civilian authorities with concurrent jurisdiction.

Forum selection should remain within the discretion of the civilian prosecutor's office and the Convening Authority.

Section 3(g) of the VPA would modify Military Rule of Evidence 404(a) regarding the character of the accused.[889] The provision prohibits the admission at trial of evidence of general military character to raise reasonable doubt as to the accused's guilt. The proposal permits the admission of evidence of military character at trial when it is relevant to an element of an offense for which the accused has been charged. Therefore, the accused retains the ability to offer military character evidence so long as defense counsel establish a proper basis to demonstrate its relevance to an element of a charged offense.[890]

The Panel recommends that Congress should enact Section 3(g) of the VPA. The Panel believes that implementing this section may increase victim confidence, but does not recommend further changes to the military rules of evidence regarding character. [RSP Recommendation 121] The Panel cautions, however, that this change is unlikely to result in significant modification of current trial practice. Military and other character evidence properly remains relevant and admissible at trial as part of the accused's defense under appropriate circumstances, and can, on its own, raise reasonable doubt as to the accused's guilt.

2. Sexual Assault Training Oversight and Prevention Act and the Military Justice Improvement Act of 2013

Representative Jackie Speier (D-CA) and Senator Kirsten Gillibrand (D-NY) have each filed bills in their respective chambers to remove commanders from serving as convening authorities. The primary feature of Representative Speier's proposal is removing commanders as convening authority for sex-related offenses.[891] Senator Gillibrand's proposal is broader and would remove commanders' authority to decide disposition of most "felony" offenses under the UCMJ.[892] Thus, the Military Justice Improvement Act (MJIA) would make a fundamental change to the structure and operation of the military justice system.

Representative Speier initially introduced the Sexual Assault Training Oversight and Prevention Act (STOP) in 2011 during the 112th Congress,[893] and re-introduced it as H.R. 1593 in 2013.[894] The STOP Act seeks to remove reporting, oversight, investigation and victim care of sexual assaults from the military chain of command and place jurisdiction in a newly created, autonomous Sexual Assault Oversight and Response Office.[895] 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.[896] 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.[897] All other offenses under the UCMJ would remain under the current system. Congress has not enacted the STOP Act.[898]

On May 16, 2013, Senator Gillibrand introduced S. 967, the MJIA.[899] The Senate Armed Services Committee did not include the MJIA in the FY14 NDAA, so, on November 18, 2013, Senator Gillibrand filed an amended version of the MJIA.[900] 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.[901] 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, which remains pending in the Senate.

Under the MJIA, disposition authority for "covered offenses,"[902] including sexual assault and many other offenses that are not "excluded offenses,"[903] would no longer be vested in senior commanders in the chain of command who have authority to convene courts-martial. Instead, a new cadre of O-6 judge advocates with significant prosecutorial experience, assigned by the Chiefs of the Services who are independent of the chains of command of victims and those accused, would decide whether to refer charges to courts-martial.[904]

To that end, 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 detail members to those courts-martial, responsibilities assigned currently to those senior commanders serving as convening authorities.[905] The MJIA would also amend authority to convene general courts-martial 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 with respect to the list of covered offenses.[906]

While the MJIA would create an entirely new office to convene general and special courts-martial for covered offenses, the MJIA includes a statutory restriction on the expenditure of additional resources and authorization of additional personnel to staff and operate that office. The Panel has serious concerns about the MJIA's restriction on additional expenditure and personnel, as resources are a primary issue for any legislation that creates additional structure.[907]

The evidence supports a conclusion that 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.

For the same reasons the Panel concluded that Congress should not remove the authority to convene courts-martial from senior commanders,[908] *the Panel does not recommend Congress adopt the reforms in either the STOP Act or the MJIA. [RSP Recommendation 36]* In addition, proposals for systemic changes to the military justice system should be considered carefully in the context of the many changes that have recently been made to the form and function of the military justice system. The numerous and substantive changes recently enacted require time to be implemented and then assessed prior to enacting additional reforms.

Chapter Eleven:

ADDITIONAL VIEWS OF PANEL MEMBERS

Response Systems Panel on Military Sexual Assault

Separate Statement of Dean Elizabeth L. Hillman & Mr. Harvey Bryant

June 22, 2014

Congress created the Response Systems Panel to make an independent assessment of the military's response to sexual assault. Perhaps no other aspect of military operations has generated worse outcomes in recent decades than military leaders' efforts to reduce and punish sexual assaults. The Panel's assessment revealed many improvements already in place and other areas in which changes should be made. Removing prosecutorial discretion from the chain of command, however, is not among the changes recommended by the Panel. We write separately because it should be.

Court-martial convening authorities, a small and high-ranking part of the military's command structure,[1] should no longer control the decision to prosecute sexual assault cases in the military justice system. The Panel's recommendation that the authority to prosecute remain within the command structure of the military is based on the testimony of high-ranking commanders and attorneys within the U.S. military. It neglects the words of survivors of sexual assault, rank-and-file Service members, outside experts, and officers in our allies' militaries. They tell us that the commander as prosecutor creates doubt about the fairness of military justice, has little connection to exercising legitimate authority over subordinates, and undermines the confidence of victims.[2] Preserving command authority over case disposition, pre-trial processes, and post-trial matters prevents commanding officers from acting assertively to deter and punish military sexual assault.[3] It also undermines the rights of both victims and accused Service members, all of whom deserve an independent and impartial tribunal.

Command authority in military justice has already been reduced significantly over time.[4] It will be further limited through recently enacted changes.[5] The United Kingdom, Canada, Australia, and many other countries have already ended command control of courts-martial.[6] When these nations proposed replacing convening authorities with experienced and trained prosecutors, opponents of reform voiced concerns about the deterioration of command similar to those articulated by some U.S. military leaders and accepted by our colleagues on the Panel.[7] Yet no country with independent prosecutors has reported any of the dire consequences forecast by those opposed to prosecutorial independence.[8]

Maintaining the status quo on this issue was often justified on the basis that there was no evidence changing it would increase victim reporting.[9] But increasing victim reporting rates, while an important goal, is not the only or even primary goal and benefit of having prosecutors and judges make, respectively, prosecutorial and judicial decisions rather than convening authorities. Even the suggestion of a pilot program to test the

premises advanced on both sides of the issue, which would presumably result in evidence as to the efficacy of a change, was met with resistance.[10]

Requiring commanders to exercise prosecutorial discretion and perform judicial functions hinders their ability to respond vigorously and fairly to sexual assault.[11] It also exacerbates the negative impact of inevitable failures of commanders to fairly and objectively act as prosecutors and judges.[12] It rejects the independent prosecutors on whom every other criminal justice system—U.S. state and federal criminal courts, our allies' military courts, and international criminal courts—relies. As a result, the U.S. military justice system will continue to operate outside the constraints of 21st-century norms for fairness and transparency in criminal justice.[13] We dissent.

1 *See* RSP Report, Page 74 (providing the number of convening authorities across the branches of Service). Given that women make up fewer than 7% of flag officers in the U.S. military, despite being 15% of Service members overall today, means that not only are very few, high-ranking officers making decisions, almost all of those decisions are being made by men. *See* Defense Manpower Data Center, "Active Duty Military Personnel by Service Rank/Grade: April 2014," *at*, https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&tsubCat=milActDutReg (reflecting the latest number of women in each Service, by rank, and the percentage of those who are female within the total force.). This is particularly problematic given the fact that service women are victims of sexual assault at higher rates than their male counterparts. *See* U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2013, Exhibit 17 at 90 (Apr. 15, 2014) *available at* http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf. (illustrating the gender of victims in completed investigations of unrestricted reports in Fiscal Year 2013, with 86% being female and 14% male).

2 *See Transcript of RSP Public Meeting* 19 (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis) ("[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); *Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Martin 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 Paul Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom); *id.* at 58, 61, 68-69, 93-94 (testimony of Professor Eugene Fidell, Yale Law School).

3 The Panel also rejected the Comparative Systems Subcommittee's recommendations that military judges be involved earlier in the criminal justice process and adjudge sentences upon conviction, both of which would enhance fairness while re-aligning the responsibilities of commanders in military justice. *See* Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (May 2014) [hereinafter CSS Report to RSP], Annex, *infra,* Recommendations 43A - F and 54 at 28-30, 36, 180-188, 221-228 (recommending the military judge be available at the time of preferral or pretrial confinement to rule on issues raised by victims, trial counsel, or defense counsel, including presiding over the Article 32 hearing with a binding decision regarding probable cause, and serving as the sole sentencing authority, thereby eliminating military panel member sentencing).

4 *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").

5 *See, e.g.,* FY14 NDAA, Pub. L. No. 113-66, § 1702(b), 127 Stat. 672 (2013) (precluding convening authorities from dismissing or modifying convictions for qualifying sexual assault offenses and requiring them to explain in writing any sentence modification); *id.* at § 1705 (requiring dishonorable discharge or dismissal for certain sex offenses when found guilty for such offenses at a general court-martial); *id.* at § 1708 (eliminating character and military service of accused as factor commanders should consider in deciding how to dispose of an offense); *id.* at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial).

6 *See* L. Libr. of Cong., Mil. J.: Adjudication of Sexual Offenses 4-5, 55-58 (July 2013); *Transcript of RSP Public Meeting* 38-42 (Sept. 24, 2013) (testimony of Lord Martin Thomas); *id.* at 223 (testimony of Air Commodore Paul Cronan); *id.* at 156-58 (testimony of Major General Blaise 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 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 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.

7 *See Transcript of RSP Public Meeting* 41 (Sept. 24, 2013) (testimony of Lord Martin Thomas 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).

8 *See Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Martin 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 Paul Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).

9 *See* RoC Report to RSP, Annex, *infra,* at 112; *Transcript of RSP Public Meeting* 232-233, 235 (Jan. 30, 2014) (Hon. Barbara S. Jones reading the draft of the majority of the Panel's initial assessment for deliberations); *Transcript of RSP Public Meeting* 105 (Sept. 24, 2013) (Hon. Barbara S. Jones "[O]ur interest in empirical evidence such as this flows from the rationale that is out there behind making the change to the role of the commander in our military. And the rationale, or at least the primary one, is that it will increase the confidence of victims and will increase reporting. And so, to some extent it's obviously important for us to see whether there is, in fact, that empirical connection."); *id.* at 89 (testimony of Professor Vanlandingham); *id.* at 238 (Air Commodore Paul Cronon); *id.* at 347-349 (testimony of Senator Claire McCaskill); *Contra Transcript of RSP Public Meeting* 55 (Sept. 24, 2013) (testimony of Professor Guiora, "I would suggest that that increased sense of confidence is directly related, at least in Israel, to the forceful prosecution policy implemented by the JAGs who are, again, not in the chain of command."); *id.* at 317-318, 332 (testimony of Senator Kirsten Gillibrand).

10 *Transcript of RSP Public Meeting* 299-304 (Jan. 30, 2014) (discussion of a pilot program by the Panel members). *Transcript of RSP Public Meeting* 176-181 (testimony from Commander William Dwyer, U.S. Coast Guard, General Edward Rice, U.S. Air Force, Lieutenant Colonel Kevin Harris, U.S. Marine Corps, and Major General Steven Busby, U.S. Marine Corps); *Transcript of RSP Public Meeting* 372-374 (Sept. 24, 2013)(Mr. Bryant asking Senator McCaskill if a pilot program would give more confidence in the proposed changes rather than requiring them to implement reforms immediately).

11 *See, e.g.*, the impact of unlawful command influence on commanders, *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 and Sampson, P.C., explaining how claims of unlawful command influence have arisen from recent training on sexual assault prevention and response).

12 The Panel's Report describes the uniqueness of command and the care with which commanders are "groomed" to make disposition decisions. No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders, and it cannot make convening authorities into experienced prosecutors. Two recent examples demonstrate that some of these high ranking commanders engage in sexual misconduct themselves. *See* Alan Blinder, *General in Sex Case to Retire With a 2-Rank Demotion, Jeffrey Sinclair to Receive Benefits, but at a Lower Level*, New York Times (June 20, 2014)(explaining the sentence for an Army brigadier general convicted at court-martial for maltreatment and adultery will include retirement benefits, but at a different rank due to his "pattern of inappropriate and at time illegal behavior both while serving as a brigadier general and a colonel) *available at* http://www.nytimes.com/2014/06/21/us/general-in-sex-case-jeffrey-sinclair-to-retire-with-a-2-rank-demotion.html?_r=0; Craig Whitlock, *Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment,* Wash. Post (Apr. 23, 2014) (reporting on a complaint that a former commander of the elite naval aviators and president of Tailhook Association created a 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.

13 *See* CSS Report to RSP, Annex, *infra,* Recommendations 10-B, 10C, 13, 43-A to F, 46, at 15, 17, 28-30, 36, 83-86, 90-92, 180-188, 192-194, 221-229) (highlighting the primary differences between military justice system and civilian practices and recommending changes be considered in the following areas: (1) immunity for victims' minor collateral misconduct, (2) shifting the unfounding decision from the commander to the prosecutor and investigator, (3) plea bargaining process to mirror the agreement between the defendant and prosecutor, (4) increasing the role of the military judge to align with most federal and State judges who control cases earlier in the process and usually act as the sole sentencing authority in the justice system, and (5) abandoning unitary sentencing, all to increase confidence in the system, as well as transparency and fairness of decisions).

Additional Statement

by

The Honorable Elizabeth Holtzman, Dean Elizabeth L. Hillman, & Ms. Mai Fernandez

The recommendations of this Panel cannot be understood in isolation. Fighting sexual assault in the military depends in the end on instilling among all Service members respect for others as equals. This goal, however, cannot be realized as long as women are still not treated equally in the military. Yes, much progress has taken place, but until women share fully in the responsibilities of military service in terms of the roles they are allowed to fill and the positions they hold, the message will be sent by the Armed Forces themselves that women are not equally capable and deserving of respect. This must change, and change quickly.

ENDNOTES TO CHAPTERS 1-10

[1] National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239 [hereinafter FY13 NDAA], § 576, 126 Stat. 1632 (2013).

[2] Brief biographies of the nine Panel members are provided at Appendix B.

[3] FY13 NDAA, *supra* note 1, at § 576.

[4] National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA] § 1731(a)(1), 127 Stat. 672 (2013).

[5] Letter from Robert S. Taylor, Acting General Counsel, Department of Defense, to The Honorable Barbara S. Jones, Panel Chair, (September 4, 2013) (available at http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Correspondence/Dignitaries/Letter_From_OGC_Taylor_20130904.pdf). The Panel Chair responded that, "In [her] opinion, the study of mandatory minimum sentences and their possible collateral consequences is an implied task in [the Panel's] statutory requirement to study sentencing guidelines," and agreed to "study the advisability of adopting mandatory minimum sentences." Letter from The Honorable Barbara S. Jones, Panel Chair, to Robert S. Taylor, Acting General Counsel, Department of Defense (September 17, 2013) (available at http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Correspondence/Dignitaries/Letter_To_OGC_Taylor_20130917.pdf).

[6] 5 U.S.C. App. 2 (1972) as amended, 41 C.F.R. section 102-3.50(a) [hereinafter FACA].

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

[8] FY14 NDAA, *supra* note 4, at §§ 1701-1709, 1711-1716, 1721-1726, 1731-1735, 1741-1747, 1751-1753.

[9] DoD formally issued the first SAPR policy in October 2005 and issued initial SAPR program procedures in 2006. In 2007, SAPRO held its first Prevention Summit, a three-day meeting of DoD leadership, military SAPR program managers, and experts recommended by the National Sexual Violence Resource Center, including representatives from the CDC and the California Coalition Against Sexual Assault and subsequently issued the 2008 Prevention Strategy that outlined a comprehensive plan for DoD's prevention efforts. *Transcript of Role of the Commander Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO).

[10] Patrick McGann and Paul Schewe, The Department of Defense Sexual Assault Prevention Strategy: Creating a National Benchmark Program (Sept. 30, 2008) [hereinafter DoD SAPRO 2008 Prevention Strategy]; *Transcript of Role of the Commander Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Dr. Galbreath); DoD Response to RSP Request for Information 79a (Dec. 19, 2013). U.S. Dep't of Def., 2014-2016 Sexual Assault Prevention Strategy 4 (Apr. 30, 2014) [hereinafter DoD 2014-2016 Prevention Strategy], *available at* http://sapr.mil/public/docs/prevention/DoD_SAPR_Prevention_Strategy_2014-2016.pdf. *See also* Chapter 4 for further discussion of DoD SAPR prevention policy and efforts.

[11] U.S. Dep't of Def., "News Transcript: Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) [hereinafter SecDef Apr. 2012 Remarks], *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013; *see also* .S. Dep't of Def., SAPRO, "DoD Sexual Assault Prevention and Response Initiatives as of April 2013," [hereinafter DoD SAPR Initiatives] at 3, *available at* http://www.defense.gov/news/DoDSexualAssaultPreventionandResponseInitiatives.pdf .

[12] Even if the House of Representatives does not pass the VPA, four parts of the Act were incorporated into the Fair Military Act, filed by Congressman Mike Turner (R-OH) and Congresswoman Niki Tsongas (D-MA). *See* H.R. 4485, 113th Cong. (2014). Additionally, at least two VPA sections were incorporated into the Fiscal Year 2015 National Defense Authorization Act as passed by the House of Representatives on May 22, 2014. *See* Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. §§ 506, 534 (2014).

[13] S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013) [hereinafter MJIA].

[14] On 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. *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 in invoked, a bill may proceed to a vote. The majority required to invoke cloture on this motion was 60 Senators.

[15] *See* Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, H.R. 4435, 113th Cong. §§ 506, 532-539, 582, 585 (2014); Carl Levin National Defense Authorization Act for Fiscal Year 2015, S. 2410, 113th Cong. §§ 541-555 (2014).

[16] The White House Council on Women and Girls, Rape and Sexual Assault: A Renewed Call to Action 9 (Jan. 2014) [hereinafter White House Report], *available at* http://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf (citing National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey 2010 Summary Report (Nov. 2011), [hereinafter NISVS 2010 Summary Report], *available at* http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

[17] *Id.* at 7.

[18] *Id.* at 10 (citing National Intimate Partner and Sexual Violence Survey (NISVS)) 2010 Summary Report, *supra* note 16; Christopher P. Krebs, et al., The Campus Sexual Assault (CSA) Study (Oct. 2007) [hereinafter CSA Study], *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf; Christopher P. Krebs, et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College,* 57(6) J. of Am. College Health 639-47 (2009) [hereinafter *College Women's Experiences*].

[19] *Transcript of RSP Public Meeting* 124-26 (June 27, 2013) (testimony of Nathan Galbreath, Ph.D.) (citing NISVS Technical Report, *infra* note 20); *see also* DoD SAPRO June 2013 PowerPoint Presentation to RSP at 60 [hereinafter DoD SAPRO June 2013 PowerPoint Presentation]. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent. *Id.*

[20] 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 27 (March 2010) [hereinafter NISVS Technical Report], *available at* http://www.sapr.mil/public/docs/research/2010_National_Intimate_Partner_and_Sexual_Violence_Survey-Technical_Report.pdf. 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. NISVS 2010 Summary Report, *supra* 16, at 18-19.

[21] For more information on sexual assault rates in the military compared to the civilian population, see DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2012, Vol. I, at 1-6, 27-30 (May 2013) [hereinafter DoD SAPRO FY12 Report, Vol. I], *available at* http://sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf.

[22] *Transcript of RSP Public Meeting* 26 (June 27, 2013) (testimony of Lynn Addington, Ph.D., Associate Professor, Department of Justice, Law, and Criminology, 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 Role of the Commander Subcommittee Meeting* 58-60 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); *see also* DoD SAPRO PowerPoint Presentation to RSP Role of the Commander Subcommittee at 8-9 (Oct. 23, 2013) [hereinafter DoD SAPRO Oct. 2013 PowerPoint Presentation].

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

[24] *See, e.g., Transcript of RSP Victim Services Subcommittee Meeting* 313 (Feb. 26, 2014) (testimony of Captain John A. Ralph, U.S. Navy) (stating that he has never encountered "a patient who was a sexual assault victim or a combat victim who didn't engage in self-blame" and that self-blame is "almost universal after a traumatic experience").

[25] White House Report, *supra* note 16, at 9.

[26] U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report: Female Victims of Sexual Violence, 1994-2010, at 7, Table 9 (Mar. 2013) [hereinafter BJS Special Report] (presenting national reporting rates), *available at* http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf.

[27] *Id.*

[28] "College students are especially at risk [for sexual assault]: 1 in 5 women has been sexually assaulted while in college." White House Report, *supra* note 16, at 10 (citing CSA Study, *supra* note 18, and *College Women's Experiences*, *supra* note 18, at 639-47).

[29] National Institute of Justice, "Measuring Frequency," (Oct. 1, 2008) *at* http://nij.gov/topics/crime/rape-sexual-violence/campus/Pages/measuring.aspx?utm_source=dyk&utm_medium=nijgov&utm_campaign=saam (citing CSA Study, *supra* note 18).

[30] *Id.*

[31] *Id.* Survey participants were able to offer more than one reason. *Id.*

[32] Of the female military victims who reported their sexual assaults, they did so because it was the right thing to do; to seek closure on the incident; to stop the offender from hurting others; to stop the offender from hurting them again; to discourage other potential offenders; to seek help dealing with an emotional incident; to identify a fellow military member who was acting inappropriately; to seek justice; to punish the offender; to seek mental health assistance; to stop rumors by coming forward; to seek medical assistance; and to prevent the offender from continuing in the military. *Transcript of RSP Role of the Commander Subcommittee Meeting* 58-59 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 8. Reasons cited by male victims for reporting were not noted. *Id.*

[33] *Transcript of RSP Role of the Commander Subcommittee Meeting* 22 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Director, DoD SAPRO).

[34] *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*] 110 (June 4, 2013) (testimony of Ms. Anu Bhagwati, Executive Director, Service Women's Action Network).

[35] Defense Manpower Data Center, 2012 Workplace and Gender Relations Survey of Active Duty Members, Survey Note [DMDC 2012 Survey Note] (Mar. 15, 2013), *available at* http://www.sapr.mil/public/docs/research/2012_workplace_and_gender_relations_survey_of_active_duty_members- survey_note_and_briefing.pdf.

[36] *See* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 9.

[37] *See id.*

[38] As one victim explained:

> One of the problems I had was, early on my command tried to get [the offender] moved to get us separated and no other command on base would take him. They didn't want to deal with it. So he ended up still working with me on different shifts. There was a no contact order in place, but I still saw him around. He was still around. He lived across the street.

Transcript of RSP Victim Services Subcommittee Meeting 50 (Mar. 13, 2014) (testimony of Ms. P.C.).

[39] *Transcript of RSP Public Meeting* 498 (Dec. 11, 2013) (public comment of Major Melissa Brown, Texas National Guard).

[40] *Transcript of RSP Victim Services Subcommittee Meeting* 27-28 (Mar. 13, 2014) (testimony of Ms. P.C.).

[41] Center for the Army Profession and Ethic (CAPE), *The Effects of Sexual Assault/Sexual Harassment on the Army Profession* (transcribing videotaped statement of Private First Class Natasha Schuette) [hereinafter CAPE Video], *available at* http://cape.army.mil/repository/video-case-studies/facilitator-guides/facilitator-guide-pfc-schuette.pdf.

[42] *See* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22 at 9.

[43] *Transcript of RSP Public Meeting* 325-26 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders).

[44] Protect Our Defenders, "Nine Roadblocks to Justice: The Need for an Independent, Impartial Military Justice System," at 1, *available at* http://www.protectourdefenders.com/roadblocks-to-justice/.

[45] *See* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22 at 9.

[46] *See id.*

[47] U.S. Dep't of Def., Instr. 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures encl. 5, ¶ 7.a (Mar. 28, 2013) [hereinafter DoDI 6495.02], *available at* http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf.

[48] *Id.*

[49] Services' Responses to RSP Request for Information 49 (Nov. 21, 2013).

[50] Army's Response to RSP Request for Information 138 (Apr. 11, 2014).

[51] DMDC 2012 Survey Note, *supra* note 35, at 107-108.

[52] *See* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 9.

[53] *Transcript of RSP Victim Services Subcommittee Meeting* 17 (Mar. 13, 2014) (testimony of Ms. J.P.).

[54] CAPE Video, *supra* note 41.

[55] *Transcript of RSP Victim Services Subcommittee Meeting* 11 (Mar. 13, 2014) (testimony of Ms. E.M.).

[56] *Id.*

[57] *Transcript of RSP Public Meeting* 497-98 (Dec. 11, 2013) (public comment of Major Melissa Brown).

[58] *Transcript of RSP Public Meeting* 18 (Nov. 8, 2013) (testimony of Mr. Brian Lewis).

[59] 10 U.S.C. § 654 (repealed Dec. 22, 2010).

[60] DMDC 2012 Survey Note, *supra* note 35, at 106.

[61] *See* DoD SAPRO Oct. 2013 PowerPoint Presentation, *supra* note 22, at 9.

[62] U.S. Dep't of Def., Memorandum from the Secretary of Defense on Department of Defense Care for Victims of Sexual Assaults (Feb. 5, 2004), *available at* http://www.sapr.mil/public/docs/laws/d20040213satf.pdf.

[63] Task Force Report on Care for Victims of Sexual Assault 46 (Apr. 2004) [hereinafter 2004 Task Force Report], *available at* http://www.sapr.mil/public/docs/reports/task-force-report-for-care-of-victims-of-sa-2004.pdf.

[64] *Id.* In August 2004, DoD established the Joint Task Force for Sexual Assault Prevention and Response as a single point of accountability for sexual assault policy in DoD. U.S. Dep't of Def., Memorandum from the Under Secretary of Defense (Plans) on Joint Task Force (Sexual Assault Prevention and Response) (Aug. 20, 2004), *available at* http://www.sapr.mil/public/docs/news/USD-PR-JTF-SAPR-08-20-04.pdf.

[65] National Defense Authorization Act for Fiscal Year 2005 [hereinafter FY05 NDAA], Pub. L. No. 108-375, § 577(a), 118 Stat. 1926 (2004).

[66] U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2013, at 6 (Apr. 15, 2014) [hereinafter DoD SAPRO FY13 Report], *available at* http://sapr.mil/public/docs/reports/FY13_DoD_SAPRO_Annual_Report_on_Sexual_Assault.pdf.

[67] U.S. Dep't of Def., Dir. 6495.01, Sexual Assault Prevention and Response (SAPR) Program (Oct. 6, 2005), *available at* http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf.

[68] *Transcript of RSP Public Meeting* 94-95 (June 27, 2013) (testimony of Major General Gary S. Patton).

[69] *See* DoD SAPR Initiatives, *supra,* note 11, at 3; "Advance Policy Questions for the Honorable Jessica L. Wright Nominee for Under Secretary of Defense for Personnel and Readiness," at 15-16, *available at* http://www.armed-services.senate.gov/imo/media/doc/Wright_09-19-13.pdf; *see also Transcript of RSP Public Meeting* 35 (Nov. 7, 2013) (testimony of Major General Gary S. Patton).

[70] DoDD 6495.01 Glossary.

[71] *Transcript of RSP Public Meeting* 96-97 (June 27, 2013) (testimony of Major General Gary S. Patton). The then Director, DoD SAPRO told the Panel that DoD's definition includes the following offenses under the current version of the Uniform Code of Military Justice (UCMJ): rape, sexual assault, aggravated sexual contact, and abusive sexual contact under Article 120; forcible sodomy under article 125; and attempts to commit these offenses under Article 80. *Id.* at 97; *see also* DoD SAPRO June 2013 PowerPoint Presentation, *supra* note 19, at 5. The current version of Article 120 of the UCMJ became effective on June 28, 2012. The previous version of Article 120, which was in effect from 2007 to 2012, did not include a specific offense of "sexual assault." *See* Manual for Courts-Martial, United States pt. IV, ¶ 45 (2008 ed.) [hereinafter 2008 MCM].

[72] *See* 10 U.S.C. § 920(b), UCMJ art. 120(b) (sexual assault).

[73] 2004 Task Force Report, *supra* note 63, at 49.

[74] DoDI 6495.02 encl. 4, ¶ 1a. MCIOs include the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). The Coast Guard Investigative Service (CGIS) is not formally considered an MCIO, because it falls under the Department of Homeland Security, but it provides the same function and capability. For purposes of this report, CGIS is treated as an MCIO.

[75] DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 52.

[76] DoD SAPRO FY13 Report, *supra* note 66, at 45; *Transcript of RSP Public Meeting* 34-35 (Nov. 7, 2013) (testimony of Major General Patton). DoD SAPRO began reporting sexual assault statistics in calendar year 2005, but switched to a fiscal year reporting in 2007. As such, data from calendar and fiscal year reports are not equivalent. Additionally, reporting results for October 2006 to December 2006 are included in totals for both Calendar Year 2006 and Fiscal Year 2007. Department of Defense FY07 Report on Sexual Assault in the Military 4, 15 (Mar. 2008) [hereinafter DoD SAPRO FY07 Report], *available at* http://sapr.mil/public/docs/reports/2007-annual-report.pdf.

[77] DoD SAPRO sexual assault reporting data do not necessarily reflect the total number of reported sexual assaults that involve a military subject or military victim. *See,* DoD SAPRO FY13 Report, *supra* note 66, at 62. DoD maintains a separate system for tracking victims and perpetrators of domestic violence including spouse or intimate partner sexual violence which is tracked through the Family Advocacy Program (FAP) rather than DoD SAPRO. DoD initiated the Family Advocacy Program (FAP) over twenty years ago to support military families and to provide services for victims of domestic violence and child abuse. Domestic violence victims who are also victims of sexual assault are treated and supported by the FAP. In these cases, FAP does not record or track the sexual assaults in the same database maintained by the SAPR program and used to collect data for SAPRO's annual report to Congress about reported adult sexual assaults. Specifically, FAP tracks reports of spouses and adult children of Service members who are sexually assaulted by a spouse or intimate partner and children of Service members under the age of 17 who are sexually assaulted by any offender. These cases must be accounted for when assessing the full scope of sexual assault in DoD. *The Secretary of Defense should direct that the annual DoD SAPRO report of adult sexual assault cases include the reports handled by FAP and recorded in its database. [RSP Recommendation 41]*

[78] DoD SAPRO FY13 Report, *supra* note 66, at 62.

[79] In the FY05 NDAA, *supra* note 65, Congress directed the Secretary of Defense to review the UCMJ and the Manual for Courts-Martial (MCM) to determine what changes were required to improve the military justice system's handling of sexual assault and to conform the UCMJ and MCM more closely to other Federal laws and regulations that address such issues. At the time of that review, Article 120 of the UCMJ simply covered rape (sexual intercourse between a man and woman by force and without consent) and carnal knowledge (sexual intercourse with a child under 16). 2012 Manual for Courts-Martial, United States, app. 27 (2012 ed.) [hereinafter 2012 MCM]. In 2006, Congress comprehensively reformed Article 120 into a far more expansive punitive article through the National Defense Authorization Act for Fiscal Year 2006 (FY06 NDAA). *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3134 (2006) (expanding Article 120 to cover: (a) rape, (b) rape of a child, (c) aggravated sexual assault, (d) aggravated sexual assault of a child, (e) aggravated sexual contact, (f) aggravated sexual abuse of a child, (g) aggravated sexual contact with a child, (h) abusive sexual contact, (i) abusive sexual contact with a child, (j) indecent liberty with a child, (k) indecent act, (l) forcible pandering, (m) wrongful sexual contact, and (n) indecent exposure.). The revised Article 120 received a great deal of criticism and some provisions were ultimately successfully challenged on constitutional grounds. *See United States v. Prather*, 69 M.J. 338, 343-45 (C.A.A.F. 2011); *see also United States v. Medina*, 69 M.J. 462, 464 (C.A.A.F. 2011) ("In this court's recent opinion in *Prather*, we analyzed the shifting burdens found in Article 120(t)(16), UCMJ, and held that the statutory interplay among Article 120(c)(2), UCMJ, Article 120(t)(14), UCMJ, and Article 120(t)(16), UCMJ, resulted in an unconstitutional burden shift to an accused.") (citing *Prather*, 69 M.J. at 343). This led Congress to again revise the framework for prosecuting sexual assaults. FY12 NDAA streamlined Article 120 to cover only adult offenses; it separated out sexual offenses against children and other non-contact sexual misconduct like voyeurism and indecent exposure. In addition to restructuring Article 120, Congress also adopted seven additional provisions targeted at improving sexual assault prevention and response in the Armed Forces in the FY12 NDAA. FY12 NDAA, *supra* note 7, §§ 542, 581, 582, 583, 584, 585, 586, 125. The following year, in the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA, *supra* note 1), Congress included twelve sexual assault related provisions.

[80] *See* Manual for Courts-Martial, United States pt. IV, ¶ 45 (2005 ed.) [hereinafter 2005 MCM].

[81] *Id.* at 45, 51, 60.

[82] *See* 2008 MCM, *supra* note 71, pt. IV, ¶ 45.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *See* 2012 MCM *supra* note 79, pt. IV, ¶ 45.

[87] *Id.* ¶ 45(g)(1)-(2).

[88] *Id.* at ¶ 45.

[89] Id. at ¶ 45(g)(5).

[90] *Id.* at ¶¶ 45a-c.

[91] *See* 2008 MCM, *supra* note 71, pt. IV, ¶ 45.

[92] *See id.*; *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2010).

[93] *See* 2012 MCM, *supra* note 79, pt. IV, ¶ 45.

[94] 10 U.S.C. § 920 (UCMJ art. 120).

[95] In Fiscal Year 2013, 2,128 (56.5%) of the 3,768 unrestricted reports alleged penetration-type offenses. DoD SAPRO FY13 Report, *supra* note 66, at 75.

[96] *Id.*

[97] In Fiscal Year (FY) 2007, 1,383 (66.3%) of the 2,085 unrestricted reports alleged penetration-type offenses; in FY 2008, 1,548 (68.3%) of the 2,265 unrestricted reports alleged penetration-type offenses; in FY 2009, 1,701 (67.6%) of the 2,516 unrestricted reports alleged penetration-type offenses; in FY 2010, 1,590 (66%) of the 2,410 unrestricted reports alleged penetration-type offenses; in FY 2011, 1,631 (66.9%) of the 2,439 unrestricted reports alleged penetration-type offenses; and in FY 2012, 1,562 (61.1%) of the 2,558 unrestricted reports alleged penetration-type offenses. *See* DoD SAPRO FY07 Report, *supra* note 76, at 17; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2008 34 (Mar. 2009), [hereinafter DoD SAPRO FY08 Report] *available at* http://www.sapr.mil/public/docs/reports/dod_fy08_annual_report_combined.pdf; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2009 61 (Mar. 2010) [hereinafter DoD SAPRO FY09 REPORT], *available at* http://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2010 67 (Mar. 2011), [hereinafter DoD SAPRO FY10 Report] *available at* http://www.sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; DoD SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2011 37-38 (Apr. 2012), [hereinafter DoD SAPRO FY11 Report] *available at* http://www.sapr.mil/public/docs/reports/Department_of_Defense_Fiscal_Year_2011_Annual_Report_on_Sexual_Assault_in_the_Military.pdf; DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 64.

[98] *Transcript of RSP Comparative Systems Subcommittee Meeting* 9 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[99] *Transcript of RSP Public Meeting* 13 (June 27, 2013) (testimony of Lynn Addington, Ph.D.); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 118 (Apr. 11, 2014) (testimony of William J. Sabol, Ph.D., Acting Director, Bureau of Justice Statistics).

[100] The National Academy of Sciences Committee on National Statistics Report on *Estimating the Incidence of Rape and Sexual Assault* [hereinafter NAS Report] 1 (2014).

[101] *Id.* at 2 (2014).

[102] *Transcript of RSP Public Meeting* 13 (June 27, 2013) (testimony of Dr. Lynn Addington, Ph.D.); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 25 (Apr. 11, 2014) (testimony of Dr. James P. Lynch, former Director, Bureau of Justice Statistics; and Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland); *id.* at 124 (testimony of Dr. William J. Sabol, Ph.D.).

[103] NAS Report, *supra* note 100 at 1.

[104] *Id.* at 2.

[105] William J. Sabol and Allen Beck, "Appearance before the Comparative Systems Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel," at 13 (Apr. 11, 2014) (PowerPoint Presentation to Panel Comparative Systems Subcommittee) [hereinafter BJS PowerPoint Presentation].

[106] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 30 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[107] *See id.* at 118 (testimony of William J. Sabol, Ph.D., Acting Director, Bureau of Justice Statistics, regarding comparison of NCVS data to actual crimes to determine number of unreported crimes).

[108] BJS PowerPoint Presentation, *supra* note 105, at 13.

[109] Bureau of Justice Statistics, "Data Collection: National Crime Victimization Survey (NCVS): Methodology," *at* http://www.bjs.gov/index.cfm?ty=dcdetail&tiid=245#Methodology.

[110] *Transcript of RSP Public Meeting* 13 (June 27, 2013) (testimony of Lynn Addington, Ph.D.); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 25 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D); *id.* at 124 (testimony of William J. Sabol, Ph.D.).

[111] *Transcript of RSP Comparative Systems Subcommittee Meeting* 31-36 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.); BJS PowerPoint Presentation, *supra* note 105, at 23.

[112] Bonnie S. Fisher, *Measuring Rape Against Women: The Significance of Survey Questions* I-4-4 (2004), *available at* https://www.ncjrs.gov/pdffiles1/nij/199705.pdf (citing Ronet Bachman, *A Comparison of Annual Incidence Rates and Contextual Characteristics of Intimate-Partner Violence Against Women From the National Crime Victimization Survey (NCVS) and the National Violence Against Women Survey (NVAWS)*, 6(8) Violence Against Women 839-67 (2000); James P. Lynch, *Clarifying Divergent Estimates of Rape From Two National Surveys*, 60(3) Public Opinion Quarterly, 410-30 (1996); James P. Lynch, *Understanding Differences in the Estimates of Rape from Self-Report Surveys,* in From Data to Public Policy: Affirmative Action, Sexual Harassment, and Domestic Violence, and Social Welfare (Rita J. Simon ed., 1996); and Martin D. Schwartz, *Methodological Issues in the Use of Survey Data for Measuring and Characterizing Violence Against Women*, 6(8) Violence Against Women 815 (2000)).

[113] *See generally* BJS PowerPoint Presentation, *supra* note 105 at 5-115.

[114] James P. Lynch, "Measuring Rape and Sexual Assault in Self-Report Surveys" at 3 (Apr. 11, 2014) (PowerPoint Presentation to RSP Comparative Systems Subcommittee).

[115] Department of Defense 2012 Workplace and Gender Relations Survey of Active Duty Members Survey Instrument 2 (2012) [hereinafter WGRA 2012 Survey], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140411_CSS/03d_DMDC_WorkPlace_PublicRelations_Survey_2012.pdf. The DoD acronym for the Workplace Gender Relation Survey for active duty personnel is "WGRA." The "WGRS" refers to DoD's survey of both active duty and Reservists.

[116] *Id.*

[117] *See* 10 U.S.C. § 481 (2013).

[118] *See id.*

[119] *See* DoD SAPRO, 2012 Workplace and Gender Relations Survey of Active Duty Members: Statistical Methodology Report iii (Dec. 2012) (noting that "[t]he 2012 WGRA used a single-stage stratified sample design"), *available at* http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/2012WGRA_Statistical_Methodology_Report_Final.pdf; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 81-83 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); *see generally* Lisa M. Schenck, *Informing the Debate about Sexual Assault in the Military Services: Is the DoD Its Own Worst Enemy?,* 11 Ohio St. J. Crim. L. 579 (Spring 2014); *see also* Report of the Comparative Systems Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel (May 2014) [hereinafter CSS Report to RSP], Annex, *infra,* at 58-62 (discussing public health surveys, including NISVS).

[120] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 29-30 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[121] *See Transcript of RSP Role of the Commander Subcommittee* 24-25 (Oct. 23, 2013) (testimony of Elise Van Winkle, Ph.D., Branch Chief of Research, Defense Manpower Data Center (DMDC)).

[122] DMDC 2012 Survey Note, *supra* note 35, at 1.

[123] *Id.*

[124] *Id.*

[125] WGRA 2012 Survey, *supra* note 115, at 12 (Question 32). The specific question asked of survey recipients was as follows:

> In the past 12 months, have you experienced any of the following intentional sexual contacts that were against your will or occurred when you did not or could not consent where someone…
>
> - Sexually touched you (e.g., intentional touching of genitalia, breasts, or buttocks) or made you sexually touch them?
> - Attempted to make you have sexual intercourse, but was not successful?
> - Made you have sexual intercourse?
> - Attempted to make you perform or receive oral sex, anal sex, or penetration by a finger or object, but was not successful?
> - Made you perform or receive oral sex, anal sex, or penetration by a finger or object?

[126] "Completed" surveys were those surveys in which the respondents answered 50% or more of the survey questions. WGRA 2012 Survey, *supra* note 115, at 6.

[127] U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Military Services Sexual Assault for Calendar Year 2006 [hereinafter DoD SAPRO CY06 Report], *available at* http://sapr.mil/public/docs/reports/2006-annual-report.pdf.

[128] U.S. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military: Fiscal Year 2010, [hereinafter DoD SAPRO FY10 Report], *available at* http://sapr.mil/public/docs/reports/DoD_Fiscal_Year_2010_Annual_Report_on_Sexual_Assault_in_the_Military.pdf.

[129] DoD SAPRO FY12 Report, *supra* note 21, Vol. II.

[130] *See, e.g.,* Schenck, *supra* note 119; *see also* Captain Lindsay Rodman, *The Pentagon's Bad Math on Sexual Assault,* Wall St. J. (May 19, 2013). *See generally, e.g.,* DoD SAPRO FY13 Report, *supra* note 66.

[131] *See generally* BJS PowerPoint Presentation, *supra* note 105, at 3.

[132] *Transcript of RSP Public Meeting* 52 (June 27, 2013) (testimony of Ms. Delilah Rumburg, Executive Director, Pennsylvania Coalition Against Rape).

[133] Report of the Defense Task Force on Sexual Assault in the Military Services 19 n.45 (Dec. 2009) [hereinafter DTFSAMS], *available at* http://www.sapr.mil/public/docs/research/DTFSAMS-Rept_Dec09.pdf; DoD SAPRO, "2012 Workplace and Gender Relations Survey of Active Duty Members Fact Sheet," at 2 (2013), *available at* http://www.sapr.mil/public/docs/research/WGRA_Survey_Fact_Sheet.pdf.

[134] S. Rep. No. 113-44, at 119 (2013).

[135] *Id.* at 120. DoD has not had an opportunity to incorporate the SASC's direction because the WGRA is conducted every other year and did not occur in 2013. The WGRA for 2014 was being developed while this report was being published.

[136] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 8-9 (Apr. 11, 2014) (testimony of James P. Lynch, Ph.D.).

[137] NAS Report, *supra* note 100, at 162.

[138] DoD SAPRO FY12 Report, Vol. II, Annex A, *supra* note 129, at 6.

[139] *See Transcript of RSP Public Meeting* 120-121 (June 27, 2013) (testimony of Nathan Galbreath, Ph.D.).

[140] *Transcript of RSP Public Meeting* 15-16 (June 27, 2013) (testimony of Lynn Addington, Ph.D.).

[141] BJS PowerPoint Presentation, *supra* note 105, at 6.

[142] *Transcript of RSP Public Meeting* 16 (June 27, 2013) (testimony of Lynn Addington).

[143] *See generally id.* at 122-23 (testimony of Nate Galbreath, Ph.D.).

[144] The WGRS includes the Workplace and Gender Relations Survey of both Active duty and Reserve Component members. *See* U.S. Dep't of Def., SAPRO, "2014 DoD Workplace and Gender Relations Survey (WGRS)" (Apr. 2014), *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[145] *See id.*

[146] *See id.*

[147] The chart in Section B of this chapter indicates the number of commanders compared to the total active duty population in each Service.

[148] *See* 2012 MCM, *supra* note 79, R.C.M. 103(5),(6).

[149] 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.

[150] *See* 10 U.S.C. § 822(a)(1, 2, 4) (UCMJ art. 22(a)(1, 2, 4)).

[151] 10 U.S.C. §§ 822-824 (UCMJ arts. 22-24).

[152] In this context, the term "statutory authority" includes Secretarial and Presidential designation of convening authorities under Article 22(a)(8)(9), Article 23 (a)(7), and Article 24(a)(4), UCMJ.

[153] 10 U.S.C. § 818 (UCMJ art. 18). For the maximum punishments that may be imposed by a General Court-Martial, see 2012 MCM, *supra* note 79, app. 12.

[154] *Transcript of RSP Public Meeting* 270-71 (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army).

[155] 10 U.S.C. § 819 (UCMJ art. 19). For the maximum punishments that may be imposed by a Special Court-Martial, see 2012 MCM, *supra* note 79, at app. 12.

[156] Role of the Commander Subcommittee, Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial 4 (Jan. 2014), *reprinted in* Report of the Role of the Commander Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel, Annex, [hereinafter RoC Subcommittee Report to RSP] (May 2014) *infra* at app. G.

[157] 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 a Request for Information. Services' Responses to RSP Supplemental 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. *Id.*

[158] *See* Army's Response to RSP Request for Information 1(c) (Nov. 1, 2013).

[159] *See, e.g., Transcript of RSP Role of the Commander Subcommittee Meeting* 151-52 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler).

[160] *Id.* The courses of study for the command and staff colleges each last about twelve months.

[161] *See* Services' Responses to RSP Request for Information 1(c) (Nov. 1, 2013).

[162] *See* Army's and Navy's Responses to RSP Request for Information 1(c) (Nov. 1, 2013).

[163] *See* Navy's Responses to RSP Request for Information 1(c) (Nov. 1, 2013).

[164] *See* Air Force's Response to RSP Request for Information 1(c) (Nov. 1, 2013).

[165] 2012 MCM, *supra* note 79, pt. I, ¶3.

[166] 10 U.S.C. § 802 (UCMJ art. 2).

[167] *Transcript of RSP Public Meeting* 243-45 (Jun. 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

[168] 10 U.S.C. § 818 (UCMJ art. 18). For the maximum punishments that may be imposed by a general court-martial, see 2012 MCM, *supra* note 79, app. 12.

[169] 10 U.S.C. § 819 (UCMJ art. 19). For the maximum punishments that may be imposed by a special court-martial, see 2012 MCM, *supra* note 79, app. 12.

[170] Here, the term "Sexual Assault" includes rape, in violation of Art. 120, UCMJ; sexual assault, in violation of Art. 120, UCMJ; forcible sodomy, in violation of Art. 125, UCMJ; and attempts to commit such offenses, in violation of Art. 80, UCMJ. *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 SecDef Apr. 2012 Withhold Memo].

[171] This chart is adapted from Gregory E. Maggs and Lisa M. Schenck, Modern Military Justice: Cases and Materials (2012).

[172] *See generally* DoD SAPRO FY13 Report, *supra* note 66.

[173] *Id.* at 80-81.

[174] *Id.* at 80.

[175] *Transcript of RSP Public Meeting* 211 (Dec. 12, 2013) (testimony of Captain Jason Brown, Military Justice Officer, Military Justice Branch, Judge Advocate Division, Headquarters Marine Corps, U.S. Marine Corps). Another Service representative describing Service statistics concurred, stating, "I agree with that." *Id.* (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force).

[176] The Services collect and report data to DoD SAPRO, Congress, the Service appellate courts, the Court of Appeals for the Armed Forces, the American Bar Association, and others, including this Panel.

[177] *Transcript of RSP Public Meeting* 217 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

[178] *Id.* at 217-218.

[179] In response to RSP Request for Information 39, the Navy stated that "[t]he reasons unrestricted reports do not result in a commander's ability to take action include the offender is unknown, offender is a civilian not subject to military jurisdiction, civilian authorities prosecute the military offender, the victim declines to participate, the evidence is insufficient or the allegation is unfounded." Navy's Response to RSP Request for Information 39 (Nov. 21, 2013). In response to the same question, the Marine Corps explained that NCIS does not unfound cases, and the vast majority of cases unfounded by the commander were victim recantations. Marine Corps' Response to RSP Request for Information 39 (Nov. 21, 2013); *see also* Coast Guard's Response to Request for Information 49 (stating that "CGIS does not classify crimes as 'unfounded' at the current time").

[180] U.S. Dep't of Justice, Uniform Crime Reporting Handbook 41 (2004) [hereinafter UCR Handbook], *available at* http://www.fbi.gov/about-us/cjis/ucr/additional-ucr-publications/ucr_handbook.pdf.

[181] The Services provided data summaries of sexual assault crime prosecutions for the Panel's consideration. However, comparing data among the Services or with other jurisdictions is difficult, since Service calculation methodologies do not align with each other or with DoD SAPRO reports. Service representatives suggested a number of reasons for these differences. *Transcript of RSP Public Meeting* 208 (Dec. 12, 2013) (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force) ("One of the other unique differences, I think most of us, the investigating–so the MCIO, Air Force OSI does not unsubstantiate any of our cases. So, before – so, our commanders get all of our cases to adjudicate, which I think it gets factored in when you look at – and I use this very subjectively … but the type of case that is presented. If you have an investigative agency that said no, we unsubstantiate this [like the Army's procedure], so you're only being presented with substantiated cases, I think you get a different type of case."). *Cf. id.* at 221-22 (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army) ("Founding is a probable cause determination. The commander [in the Army] does not have a role in founding or unfounding of a case. Lawyers in coordination with investigating agencies, CID for the Army, make that determination. And it is a permanent law enforcement record.") The Comparative Systems Subcommittee assessed that the Army reports a higher prosecution rate than the other Services because the convening authority is only considering cases that an attorney and MCIO investigator previously determined had probable cause, so there is a greater probability the convening authority will take some adverse action on those cases. For instance, in FY12, 118 out of 476 cases were closed by the Army CID for lack of probable cause, and the convening authority only considered 358 cases. Since an attorney already determined there was reason to believe an offense had been committed, those cases were more likely to be prosecuted, resulting in a higher prosecution rate (number of courts-martial divided by 358). If the Army's prosecution rate was based on all 476 possible cases, the prosecution rate would likely have been lower (number of courts-martial divided by 476). The Air Force and Navy MCIOs, on the other hand, presented all cases to the commander, and divided the number of cases preferred by all sexual assault cases, resulting in a lower percentage. *See* CSS Report to RSP, Annex, *infra*, at 90-91.

[182] DoD SAPRO FY11 Report, *supra* note 97, at 43.

[183] *Transcript of RSP Public Meeting* 284-85 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University).

[184] *Id.* at 202 (testimony of Captain Robert Crow, Director, Criminal Law Division, U.S. Navy) ("[T]here is no uniform way on how we measure prosecution rate. There is no uniform way on how we measure conviction rate.").

[185] The Comparative Systems Subcommittee developed a proposal for standardizing data collection across the Services. *See* CSS Report to RSP, Annex, *infra*, at 204-07.

[186] National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1631, 124 Stat. 4137 (2011).

[187] "A substantiated report of sexual assault is an Unrestricted Report that was investigated by an MCIO, provided to the appropriate military command for consideration of action, and found to have sufficient evidence to support the command's action against the subject." DoDI 6495.02 encl. 12 (app.), ¶ a.

[188] FY13 NDAA, *supra* note 1 at § 576(d)(1)(E).

[189] This conclusion is supported by the results of Dr. Spohn's attempt to compare rates among DoD and studies of which she was aware in civilian jurisdictions. *See Transcript of RSP Public Meeting* 259 (Dec. 12, 2013) (testimony of Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University). For detailed examples of problems associated with comparing civilian and military statistics, *see* CSS Report to RSP, Annex, *infra*, at 209-12.

[190] The Comparative Systems Subcommittee Report describes numerous, significant differences between civilian jurisdictions and the military in the calculation, tracking, and processing of information in sexual assault cases. *See* CSS Report to RSP, Annex, *infra*, at 209-212.

[191] U.S. Dep't of Justice, Federal Bureau of Investigation, Criminal Justice Information Services (CJIS) Division Uniform Crime Reporting (UCR) Program: Reporting Rape in 2013, at 2 (Apr. 2014), *available at* http://www.fbi.gov/about-us/cjis/ucr/recent-program-updates/reporting-rape-in-2013-revised.

[192] DoD 2014-2016 Prevention Strategy, *supra* note 10, at 8.

[193] *Transcript of RSP Role of the Commander Subcommittee Meeting* 16-17 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D., Health Scientist, Research and Evaluation Branch, Division of Violence Prevention, CDC) (explaining CDC's focus on primary prevention).

[194] *Transcript of SASC Hearing, supra* note 34, at 19 (testimony of Admiral Robert J. Papp, Jr., Commandant, U.S. Coast Guard).

[195] *See* RoC Subcommittee Report to RSP, Annex, *infra* note 156, at 60-61 (May 2014); *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D) (noting that CDC prevention experts have "been very encouraged and pleased by the way that [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").

[196] *Transcript of RSP Role of the Commander Subcommittee Meeting* 9-14, 36 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.). 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), *available at* http://nsvrc.org/sites/default/files/Publications_NSVRC_Fact-sheet_Prevention-Resource-Packet-Intro.pdf*; see also* Andra Teten Tharp, Ph.D., "Preventing Sexual Violence Perpetration" 10-11 (Feb. 12, 2014) (PowerPoint presentation to RSP Role of the Commander Subcommittee) [hereinafter CDC PowerPoint Presentation], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140212_ROC/Materials_Presenters/09_CDC_Tharp_Presentation_201402.pdf.

[197] DoD SAPRO 2008 Prevention Strategy, *supra* note 10; *Transcript of RSP Role of the Commander Subcommittee Meeting* 173-75 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.); DoD Response to RSP Request for Information 79a (Dec. 19, 2013).

[198] DoD SAPRO 2008 Prevention Strategy, *supra* note 10 at 18-20; *see also Transcript of RoC Subcommittee Meeting* 175-77, 186 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.) (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"); U.S. Dep't of Def., SAPRO, "Prevention Strategy Update" 3 (Feb. 12, 2014) (PowerPoint presentation to RSP Role of the Commander Subcommittee) [hereinafter DoD SAPRO Feb. 2014 PowerPoint Presentation], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140212_ROC/Materials_Presenters/13_DoD_SAPRO_Brief_20140212.pdf.

[199] DoD 2014-2016 Prevention Strategy, *supra* note 10, at 8 at 8.

[200] DoD SAPRO 2008 Prevention Strategy, *supra* note 10 at 18-20.

[201] *Id.* at 29-31.

[202] *Transcript of RSP Role of the Commander Subcommittee Meeting* 20-22 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.). *But cf.* 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"), *available at* http://www.csmonitor.com/USA/Military/2014/0224/US-military-s-new-tactic-to-curtail-sexual-assaults-nab-serial-predators.

[203] *Transcript of RSP Role of the Commander Subcommittee Meeting* 17-20 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

[204] *Id.* at 20.

[205] NISVS Technical Report, *supra* note 20, at 2, stating, "Additional research would be important in improving our understanding of how military-specific factors, such as deployment, might increase risk (e.g., by examining the impact of multiple deployments and deployment in high-conflict settings)."

[206] *See* DoD SAPRO 2008 Prevention Strategy, *supra* note 10, 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); *Transcript of RSP Role of the Commander Subcommittee Meeting* 227-28 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.) (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).

[207] DoDD 6495.01 ¶¶ 4.d, 4.f.

[208] Joint Chiefs of Staff, "Strategic Direction to the Joint Force on Sexual Assault Prevention and Response," at 5 (May 7, 2012), *available at* http://www.sapr.mil/public/docs/directives/Strategic_Direction_on_SAPR.pdf.

[209] SecDef Apr. 2012 Remarks, *supra* note 11; DoD SAPR Initiatives, *supra* note 11.

[210] 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.

[211] U.S. Dep't of Def., Sexual Assault Prevention and Response Strategic Plan 18 (Apr. 30, 2013), *available at* http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf; *Transcript of RSP Role of the Commander Subcommittee Meeting* 198-202 (Feb. 12, 2014) (testimony of Colonel Alan R. Metzler).

[212] *Id.*

[213] *Id.*; U.S. Dep't of Def., SAPRO, Feb. 2014 PowerPoint Presentation, *supra* note 198, at 6-7; *see also id.* at 17 (enumerating and describing five core competencies and various learning objectives resulting from each).

[214] *Transcript of RSP Role of the Commander Subcommittee Meeting* 204-08 (Feb. 12, 2014) (testimony of Colonel Litonya Wilson, Chief of Prevention and Victim Assistance, DoD SAPRO); DoD SAPRO Feb. 2014 PowerPoint Presentation, *supra* note 198, at 8-9; DoD Response to RSP Request for Information 79a (Dec. 19, 2013).

[215] *Transcript of RSP Role of the Commander Subcommittee Meeting* 76-77 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

[216] DoD 2014-2016 Prevention Strategy, *supra* note 10.

[217] *Id.*

[218] *Id.* at 9.

[219] *Id.* at 10-12.

[220] *Id.*

[221] *See, e.g.,* 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] DoDD 6495.01 encl. 2, ¶ 1.c.

[223] The White House, "Statement by the President on Eliminating Sexual Assault in the Armed Forces" (Dec. 20, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/12/20/statement-president-eliminating-sexual-assault-armed-forces. The President directed the Secretary and Chairman to report to him by December 1, 2014. *Id.*

[224] *Transcript of RSP Role of the Commander Subcommittee Meeting* 214-15 (Feb. 12, 2014) (testimony of Nathan Galbreath, Ph.D.).

[225] *Id.* at 215; *see* DoD 2014-2016 Prevention Strategy, *supra* note 10, at 13 (enumerating as key prevention metrics: past-year prevalence of unwanted sexual contact; prevalence vs. reporting; bystander intervention experience in past 12 months; and command climate index – addressing continuum of harm).

[226] *Id.* at 216-219.

[227] *Transcript of RSP Role of the Commander Subcommittee Meeting* 36-38 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); CDC PowerPoint Presentation, *supra* note 196, at 43.

[228] *Id.*; *accord* National Sexual Violence Resource Center, Engaging Bystanders to Prevent Sexual Violence: A Guide for Preventionists 2 (2013) [hereinafter NSVRC], *available at* http://www.nsvrc.org/publications/nsvrc-publications-guides/engaging-bystanders-prevent-sexual-violence-guide; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 107-10 (Feb. 12, 2014) (testimony of 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.").

[229] NSVRC, *supra* note 228, at 2.

[230] *Id.* at 3; *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, 870 (2011); Victoria L. Banyard, et al., *Sexual Violence Prevention through Bystander Education: An Experimental Evaluation,* 35: 4 J. of Community Psychol. 463 - 465 (2007).

[231] *Transcript of RSP Role of the Commander Subcommittee Meeting* 86-89 (Feb. 12, 2014) (testimony of Jackson Katz, Ph.D.); Jackson Katz, "Penn State: The mother of all teachable moments for the bystander approach" (Dec. 1, 2011), *available at* http://nsvrc.org/news/Jackson-Katz-Series_Penn-State-Teachable-moment.

[232] *See, e.g.,* Banyard, *supra* note 230, at 477-79.

[233] Jackson Katz, "Penn State and the bystander approach: Laying bare the dynamics in male peer culture" (Dec. 8, 2011), *available at* http://www.nsvrc.org/news/Jackson-Katz-Series_Penn-State-and-Bystander-Approach; *see also Transcript of RSP Role of the Commander Subcommittee Meeting* 153-154 (Feb. 12, 2014) (testimony of Victoria L. Banyard, Ph.D., Co-Director, Prevention Innovations, University of New Hampshire).

[234] *Transcript of RSP Role of the Commander 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"); 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 and DeGue Summary], *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[235] Lippy and DeGue Summary, *id* at 1.

[236] *Transcript of RSP Role of the Commander 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.); Lippy and DeGue Summary, *supra* note 234, at Table 1; *see also* CDC PowerPoint Presentation, *supra* note 196, at 39-41.

[237] *Transcript of RSP Role of the Commander Subcommittee Meeting* 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).

[238] DoD SAPRO 2008 Prevention Strategy, *supra* note 10, at 34-35.

[239] *See* RoC Subcommittee Report to RSP, Annex, *infra*, at 59-61.

[240] *See generally* DoD SAPRO 2008 Prevention Strategy, *supra* note 10; *see also* DoD 2014-2016 Prevention Strategy, *supra* note 10, at 12 (recommending that prevention programs include "harm reduction" efforts that, in turn, "can include" alcohol policies); *id.* at 16 (enumerating as a "prevention task" that DoD "[r]eview and if necessary expand . . . alcohol policies").

[241] White House Report, *supra* note 16, at 9 and n.8 (citing National Center for Injury Prevention and Control, National Intimate Partner and Sexual Violence Survey (2010)); DoD SAPRO June 2013 PowerPoint Presentation, *supra* note 19, at 13.

[242] *See, e.g.,* DMDC 2012 Survey Note, *supra* note 35, at 4.

[243] *Transcript of RSP Role of the Commander Subcommittee Meeting* 26 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.).

[244] *Id.* at 16-17, 72-74; Letter from Scott Berkowitz and Rebecca O'Connor, RAINN (Rape, Abuse and Incest National Network) to White House Task Force to Protect Students from Sexual Assault at 5 (unnumbered) (Feb. 28, 2014) [hereinafter RAINN Letter], *available at* http://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf.

[245] *See generally* DoD 2014-2016 Prevention Strategy, *supra* note 10.

[246] *Transcript of RSP Role of the Commander Subcommittee Meeting* 9-10, 16-17 (Feb. 12, 2014) (testimony of Andra Teten Tharp, Ph.D.); RAINN Letter, *supra* note 246244, at 5.

[247] *See* DoD 2014-2016 Prevention Strategy, *supra* note 10, at 9. For example, 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." *Id.* at 34-35. In addition, DoD policy requires commanders and managers to ensure Service members receive prevention training which incorporates adult learning theory; is appropriate to Service members' grade and commensurate with their level of responsibility; and identifies prevention strategies and behaviors that may reduce sexual assault, including bystander intervention, risk reduction, and obtaining affirmative consent.

[248] The proscribed training was intended "to strengthen individual knowledge, skills, and capacity to prevent" sexual assault. FY12 NDAA, *supra* note 7, § 585(b), 125 Stat. 1298 (2011). Commanders are now required to ensure that SAPR training for all Service members incorporates adult learning theory, is appropriate to grade and commensurate with level of responsibility, identifies prevention strategies and behaviors that may reduce sexual assault, and provides scenario-based, real-life situations. RoC Subcommittee Report to RSP, Annex, *infra*, at 56.

[249] DoDI 6495.02 encl. 10, ¶ 3.

[250] FY13 NDAA, *supra* note 1 at § 574.

[251] 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), *reprinted in* DoD Response to RSP Request for Information 31 at 000760, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q31.pdf; DoD SAPRO, Report to the Secretary of Defense: Evaluation of Pre-Command Sexual Assault Prevention and Response Training 6 (May 2012) [hereinafter DoD Pre-Command SAPR Report], *available at* http://www.sapr.mil/public/docs/news/PreCommand_Training_Evaluation_Final_Report.pdf.

[252] In a Defense Equal Opportunity Climate Survey (DEOCS) conducted in January and February 2014, 94% 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) [hereinafter DEOMI SAPR Climate Report], *reprinted in* DoD Response to RSP Request for Information 152 at 003286, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q152.pdf.

[253] Services' Responses to Request for Information 1b (Nov. 5, 2013); Services' Responses to Requests for Information 79a, 80c (Dec. 19, 2013); U.S. Navy, Take the Helm: Sexual Assault Prevention and Response Training for the Fleet (SAPR-F) Facilitation Guide FY 12/13, *available at* http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/sapr/Documents/Navy_SAPR-F_FacilitationGuide.pdf.

[254] DoDI 6495.02 encl. 10, ¶¶ 3(a)-(g).

[255] The Safe Helpline is described in greater detail in the Report of the Victim Services Subcommittee. *See* Report of the Victim Services Subcommittee to the Response Systems to Adult Sexual Assault Crimes Panel, Annex, (May 2014) [hereinafter VSS Report to RSP] *infra*, at 43-45.

[256] DoDI 6495.02 encl. 10, ¶¶ 2d(1)-(12), 3a(1),(2).

[257] *See generally,* VSS Report to RSP, Annex, *infra*, at 36-38.

[258] FY14 NDAA, *supra* note 4, at §1731.

[259] SecDef Apr. 2012 Remarks, *supra* note 11; DoD SAPR Initiatives, *supra* note 69.

[260] Services' Responses to RSP Request for Information 1b (Nov. 5, 2013); Services' Responses to RSP 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, at 70 [hereinafter Navy Leaders Guide], *available at* http://www.c6f.navy.mil/navy_sapr-l_fac_guide_final_v2_072612.pdf.

[261] 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. In particular, professional military education (PME), leadership development training (LDT) for senior NCOs and officers, and pre-command training must include: an explanation of the commander's role in the SAPR program; rape myths, facts, and trends; procedures to protect victims of sexual assault from coercion, retaliation, and reprisal; and actions that constitute reprisal. DoDI 6495.02 encl. 10, ¶¶ 1-3; *see also* FY13 NDAA, *supra* note 1 at § 574 (requiring sexual assault prevention and response training for new or prospective commanders at all levels of command); DoDI 6495.02 Glossary (defining reprisal as "[t]aking 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"). Commanders are also required to receive similar prevention training prior to assuming a command position, appropriate to the level of responsibility and commensurate with the level of command. DoDI 6495.02 encl. 10, ¶ 3.g(1)-(6).

[262] *Id.* at encl. 10, ¶ 3.g(5).

[263] Services' Responses to RSP Request for Information 1c. (Nov. 1, 2013); Services' Responses to RSP Requests for Information 79a, 80c, 80d (Dec. 19, 2013). *See also*, Navy Leaders Guide, *supra* note 260, at 13.

[264] *See* Chapter 3, Section B, for additional discussion on the distinction between commanders and convening authority.

[265] *See, e.g.,* Army's Response to RSP Request for Information 1c (Nov. 1, 2013).

[266] *See, e.g., Transcript of RSP Role of the Commander Subcommittee Meeting* 151-52 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler) (outlining deliberate nature of command selection screening process) ("[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.").

[267] *See id.* at 152.

[268] *Id.* The courses of study for the command and staff colleges each last about ten months.

[269] *See* Services' Responses to RSP Request for Information 1c (Nov. 1, 2013).

[270] *See id.*

[271] DoD Pre-Command SAPRO Report, *supra* note 251, at 5. Because the evaluation was directed by the Secretary of Defense, Coast Guard sexual assault prevention and response training was not evaluated.

[272] *Id.*

[273] *Id.* at 3-4.

[274] *Id.*

[275] DoD SAPRO, Enhancements to Pre-Command and Senior Enlisted Leader Sexual Assault Prevention and Response Training (Jan. 2013), *reprinted in* DoD Response to RSP Request for Information 8 at 000088.

[276] *Transcript of RSP Role of the Commander Subcommittee Meeting* 236 (Jan. 8, 2014) (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps).

[277] FY13 NDAA, *supra* note 1 at §§ 572(a)(3), 574.

[278] U.S. 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).

[279] *See 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. *See* FY14 NDAA, *supra* note 4.

[280] Navy Administrative Message 216/13, Navy Performance Evaluation Changes (Aug. 2013), *available at* http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2013/NAV13216.txt, explaining "positive command climate" by noting, "Sailors must demonstrate how they have cultivated or maintained command climates where improper discrimination of any kind, sexual harassment, sexual assault, hazing, and other inappropriate conduct is not tolerated; where all hands are treated with dignity and respect; and where professionalism is the norm."

[281] Navy Administrative Message 181/13, Implementation of Navy Sexual Assault Prevention and Response Program Initiatives (July 2013) [hereinafter NAVADMIN 181/13], *available at* http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2013/NAV13181.txt.

[282] *See Transcript of RSP RoC Subcommittee Meeting* 153 (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler).

[283] *Id.* at 95.

[284] Section 3(c) provides that "[t]he 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 sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command. S. 1917, § 3(c)(2), 113th Cong., Victims Protection Act of 2014 (2014). Section 1751 of the FY14 NDAA expressed 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. FY14 NDAA. Section 1751 further specifies the sense of Congress that commander evaluations should be maintained for use in personnel assignment decisions as well as promotion and command selection boards. *Id.*

[285] *See* S. 1917, § 3(c), 113th Cong., Victims Protection Act of 2014 (2014).

[286] *Transcript of RSP Role of the Commander Subcommittee Meeting* 223 (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

[287] *See* 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. The Secretary of Defense meets weekly with senior Service leadership to review SAPR efforts and progress to ensure full implementation of all initiatives. U.S. Dep't of Def., News Release, Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), *available at* http://www.defense.gov/releases/release.aspx?releaseid=16443.

[288] *See* RoC Subcommittee Report to RSP, Annex, *infra*, at 125-128.

[289] S. 1917, § 3(c)(1), 113th Cong., Victims Protection Act of 2014 (2014).

[290] Each Service employs a process for removing a member from a duty position after a senior commander loses confidence in the officer, or determines that the officer has displayed substandard performance, or engaged in unprofessional or illegal conduct. While governed by individual Service guidelines, all Services require that a relief for cause action be documented in an officer's performance evaluation. *See* U.S. Dep't of the Army Reg. 600-20, Army Command Policy, ¶ 2-17 (Sep. 20, 2012), *available at* http://www.apd.army.mil/pdffiles/r600_20.pdf; U.S. Dep't of the Navy MILPERSMAN 1611-020, Officer Detachment For Cause (Mar. 30, 2007), *available at* http://www.public.navy.mil/bupers-npc/reference/milpersman/1000/1600Performance/Documents/1611-020.pdf; U.S. Dep't of the Air Force Inst. 36-2406, Officer and Enlisted Evaluation Systems ¶ 7.4.5 (Apr. 15, 2005), *available at* http://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2406/afi36-2406.pdf; U.S. Marine Corps, Order P1610.7F, ch. 2, Performance Evaluation System (Nov. 19, 2010), *available at* http://www.marines.mil/Portals/59/Publications/MCO P1610.7F W CH 1-2.pdf.pdf; U.S. Coast Guard Commandant Inst. M1000.6A (including changes 1-36), Coast Guard Personnel Manual ch. 4F (Jan. 8, 1988), *available at* http://isddc.dot.gov/OLPFiles/USCG/010564.pdf.

[291] As a retired senior Air Force commander explained to the RSP, "[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." *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 Role of the Commander 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). 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." *Id.* at 235 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters and Service Battalion Quantico, U.S. Marine Corps).

[292] FY14 NDAA, *supra* note 4, at § 1751.

[293] *Id.* at § 1701(b)(2)(E).

[294] 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. Articles 133 and 134 are more general in nature; they proscribe other conduct that is "unbecoming an officer" or that is "prejudicial to good order and discipline" or "of a nature to bring discredit upon the Armed Forces," such as obstruction of justice or interference with administrative proceedings. 10 U.S.C. §§ 892, 898, 933, 934 (UCMJ arts. 92, 98, 133, 134).

[295] 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.

[296] The Services have different interpretations of the Privacy Act of 1974, 5 U.S.C. § 552a and the implications of administrative actions that hold commanders accountable. The 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. *See* RoC Subcommittee Report to RSP, Annex, *infra*, at 130.

[297] *Transcript of RSP Public Meeting* 26-29 (Nov. 7, 2013) (testimony of Major General Gary S. Patton); *see also* U.S. Dep't of Def., SAPRO, "DoD Sexual Assault Prevention and Response Metrics" 6-14 (Nov. 7, 2013) (PowerPoint presentation to RSP) [hereinafter DoD SAPRO Nov. 2013 PowerPoint Presentation].

[298] *Transcript of RSP Public Meeting* 27-28 (Nov. 7, 2013) (testimony of Major General Gary S. Patton); *see also* DoD SAPRO Nov. 2013 PowerPoint Presentation, *supra* note 19, at 3.

[299] *Transcript of RSP Role of the Commander 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).

[300] *Id.* at 83-85 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI). According to Dr. McDonald, 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.

[301] DEOMI SAPR Climate Report, *supra* note 252, 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.

[302] *Id.*

[303] *See* VSS Report to RSP, Annex, *infra*, at 37 and n.93 (noting that 47 percent of women who did not report 'unwanted sexual contact' indicate that they were afraid of reprisal or retaliation from persons who did it, or from their friends, or thought they would be labeled a troublemaker") (citing 2012 WGRA); RoC Subcommittee Report to RSP, Annex, *infra*, at 112 (noting that "[r]etaliation concerns raised by victims generally relate to peers or direct supervisors and rarely involve convening authorities").

[304] FY13 NDAA, *supra* note 1, at § 572(a)(3); 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, *supra* note 4, at § 1721.

[305] U.S. Dep't of Def., Memorandum from the Under Secretary of Defense for Personnel and Readiness on Command Climate Assessments (July 25, 2013) [hereinafter USDPR Memo], *reprinted in* DoD Response to RSP Request for Information 31, at 000760, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q31.pdf.

[306] FY14 NDAA, *supra* note 4, at § 587(b),(c).

[307] USDPR Memo, *supra* note 305.

[308] FY14 NDAA, *supra,* note 4, at § 587(b),(c).

[309] 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], *available at* http://www.marines.mil/News/Messages/MessagesDisplay/tabid/13286/Article/150139/command-climate-assessments.aspx; U.S. Dep't of the Army Dir. 2013-29, "Army Command Climate Assessments" (Dec. 23, 2013) [hereinafter Army Dir. 2013-29], *available at* http://armypubs.army.mil/epubs/pdf/ad2013_29.pdf; 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), *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08a_AF_EnhancingCdrAccountability.pdf.

[310] *Transcript of RSP Role of the Commander 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).

[311] *Id.* at 104-05.

[312] *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), *available at* http://www.dtic.mil/whs/directives/corres/pdf/135002p.pdf.

[313] *See* MARADMIN 464/13, *supra* note 309.

[314] *See* Army Dir. 2013-29, *supra* note 309; Navy Personnel Command, "Command Climate Assessment Process," *at* http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx."

[315] *See* DEOMI Responses to RSP Requests for Information 33c, 33e (Nov. 21, 2013).

[316] The terms described in this chart are used to provide standard definitions used throughout this report.

[317] U.S. Dep't of Def. Dir. 6400.1, Family Advocacy Program encl. 1 (Aug. 23, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/640001p.pdf.

[318] *See* U.S. Army, Special Victim Counsel Handbook 1 (Nov. 2013) [hereinafter Army SVC Handbook], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf

[319] U.S. Air Force, Special Victims' Counsel Rules of Practice and Procedure [hereinafter Air Force SVC Rules], Rule 4 (July 2013), *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/05_USAF_SpecialVictimsCounsel_RulesofPracticeandProcedure.pdf; *see also* Army SVC Handbook, *supra* note 318, ch. 4; Services' Responses to RSP Requests for Information 4 (Nov. 5, 2013).

[320] *See* VSS Report to RSP, Annex, *infra*, at 81-84.

[321] *See* Air Force SVC Rules, *supra* note 319, Rule 4; *see also* Army SVC Handbook, *supra* note 318, ch. 4.

[322] *See* DoDD 6495.01 ¶ 4.e; DoDI 6495.02 encl. 6 ¶1.

[323] *See* U.S. Dep't of Justice, Office on Violence Against Women, A National Protocol for Sexual Assault Medical Forensic Examinations: Adults/Adolescents (Apr. 2013) [hereinafter OVW Protocol], *available at* https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf.

[324] *See* DoDD 6495.01 ¶ 4.e.

[325] *Id.*

[326] *See* OVW Protocol, *supra* note 323.

[327] *Id.*

[328] U.S. Dep't of Def. Directive-type Memorandum 14-003, DoD Implementation of Special Victim Capability Prosecution and Legal Support 12 (Feb. 12, 2014) [hereinafter DTM 14-003], *available at* http://www.dtic.mil/whs/directives/corres/pdf/DTM-14-003.pdf.

[329] DoDD 1030.2, Department of Defense Instruction, Victim and Witness Procedures ¶ 6.1 (June 4, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf.

[330] DTM 14-003, *supra* note 328, at 13.

[331] *Transcript of RSP Public Meeting* 94 (June 27, 2013) (testimony of Major General Gary S. Patton,); *see also* DoD SAPRO June 2013 PowerPoint Presentation, *supra* note 19, at 3 ("The Department of Defense prevents and responds to the crime of sexual assault in order to enable military readiness and reduce – with goal to eliminate – sexual assault from the military."). Note: the Panel uses the term "testimony" to describe the unsworn remarks and responses made by individuals invited to appear before the RSP and Subcommittee to share their experiences and expertise on issues related to sexual assault in the military. For further discussion of the SAPR program, see VSS Report to RSP, Annex, *infra* at 29-30.

[332] *See generally* DoD SAPRO FY09 REPORT, *supra* note 97, at 6 (providing history of DoD Sexual Assault Prevention and Response (SAPR) program).

[333] DoDD 6495.01 ¶ 4.e(1),(2). DoD SAPR policy is set forth in DoD Directive 6495.01 and DoD Instruction 6495.02.

[334] The legislative history of the development and oversight of the DoD SAPR program is described in more detail in Appendix B to the Report of the Victim Services Subcommittee. *See* VSS Report to RSP, Annex, *infra* at 135-146.

[335] *Transcript of RSP Public Meeting* 218 (Nov. 7, 2013) (testimony of Master Sergeant Carol Chapman, U.S. Army, SHARP Program Manager, 7th Infantry Division, Joint Base Lewis-McChord).

[336] For a more complete discussion of these programs and initiatives, see VSS Report to RSP, Annex, *infra*, at 46-49.

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

[338] DoDI 6495.02 encl. 4, ¶ 1.b.

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

[340] 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.

[341] DoDI 6495.02 encl. 4, ¶ 1.b.

[342] *Id.*

[343] *Id.*, encl. 4, ¶ 1.e.

[344] 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.*, encl. 4, ¶ 1.b(3).

[345] Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. *See id.* They confer with victims and may help direct them to a SARC to assess their reporting options.

[346] 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. DoD policy indicates that MCIOs should honor a victim's choice to decline to participate in an investigation. DoDI 6495.02, encl. 4, ¶ 1.c(1).

[347] *See id.*

[348] *See also id.*, 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.").

[349] 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.

[350] 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." *See* DoDI 6495.02, encl. 4, ¶ 1.b(3).

[351] 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.

[352] 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.*, encl. 10, ¶ 2.d.

[353] *Id.*, encl. 10, ¶ 2.d(6, 11).

[354] DEOMI SAPR Climate Report, *supra* note 252, at iii-iv, 45-46. The information reflects data from 2,582 climate surveys conducted in January and February 2014, which resulted in 122,003 responses from DoD and Coast Guard personnel.

[355] *See* Air Force SVC Rules, *supra* note 319, Rule 6; *see also* Army SVC Handbook, *supra* n. 318, Ch. 1.; *Transcript of RSP Public Meeting* 104-160 (Nov. 8, 2013) (testimony of SVC Program Heads). For a complete description of the SVC program and the Panel's findings and recommendations with regard to the program, see Section D of this chapter, *infra*.

[356] DoDI 6495.02 encl. 4, ¶ 1.

[357] *Id.*, encl. 5, ¶ 7.

[358] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 167-170 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap (NBK) and Joint Base Lewis-McChord (JBLM)* (Feb. 5, 2014) (on file at RSP).

[359] DoDI 6495.02 encl. 5, ¶ 7.

[360] *See* 2012 MCM, *supra* note 79, R.C.M. 704(c).

[361] Appendices to the Report of the Joint Service Committee – Sexual Assault Subcommittee (Sept. 2013) [hereinafter JSC-SAS Appendices], app. M at 8, *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20140131_CSS/JSC_SAS_Report_Appendices.pdf. The Joint Service Committee - Sexual Assault Subcommittee was formed at the direction of the acting DoD General Counsel. The JSC-SAS traveled to eighteen civilian jurisdictions in 2013, gathering information and conducting interviews of law enforcement, prosecutors, public defenders, victims' attorneys, and victim advocates for an independent panel to complete a comparative analysis.

[362] DoD and Services' Responses to RSP Request for Information 141 (Apr. 11, 2014).

[363] *Id.*

[364] *See, e.g.*, Report of the Defense Task Force on Sexual Harassment and Violence at the Military Service Academies 28 (June 2005), *available at* http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf; 2004 Task Force Report, *supra* note 63, at 28.

[365] DoDD 6495.01 encl. 2, ¶ 1.f(5).

[366] DoDI 6495.02 encl. 4, ¶ 4.

[367] FY14 NDAA, *supra* note 4, at § 1731.

[368] DoDI 6495.02 encl. 4, ¶ 5.b(2).

[369] Army's Response to RSP Request for Information 135 (Apr. 14, 2014).

[370] *See Transcript of RSP Public Meeting* 323 (Dec. 11, 2013) (testimony of Deputy Chief Corey Falls, Ashland, Oregon Police Department).

[371] DoD currently uses the acronym "SVC" to refer to both special victim counsel, the attorneys who assist victims, and the Special Victim Capability designed to enhance the investigation and prosecution process. This section focuses on the special victim counsel.

[372] Army SVC Handbook, *supra* note 318, at 1.

[373] Air Force SVC Rules, *supra* note 319, at 2.

[374] *See generally Transcript of RSP Public Meeting* 118-90 (Nov. 8, 2013) (testimony of SVC program heads).

[375] *See* Air Force SVC Rules, *supra* note 319, Rule 4; *see also* Army SVC Handbook, *supra* note 318, ch. 4; Services' Responses to RSP Request for Information 4 (Nov. 5, 2013).

[376] *See* VSS Report to RSP, Annex, *infra*, at 81-84.

[377] *Id.*

[378] *See* Air Force SVC Rules, *supra* note 319, Rule 4; *see also* Army SVC Handbook, *supra* note 318, ch. 4; U.S. Marine Corps Order P5800.16A, Marine Corps Manual for Legal Administration ¶ 6004 (Feb. 10, 2014) [hereinafter MCO P5800.16A], *available at* http://www.marines.mil/Portals/59/Publications/MCO%20P5800_16A%20CH%201-6%20PT%201.pdf; Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); *see generally Transcript of RSP Public Meeting* 110-80 (Nov. 8, 2013) (testimony of SVC program heads).

[379] *See* Air Force SVC Rules, *supra* note 319, Rule 4; *see also* Army SVC Handbook, *supra* note 318, ch. 4.

[380] FY14 NDAA, *supra* note 4, at § 1716.

[381] *See id.* at § 1716(a); *see also* Air Force SVC Rules, *supra* note 319, Rule 1; Army SVC Handbook, *supra* note 318, ch. 1; MCO P5800.16A ¶ 6003, *supra* note 380.

[382] Air Force SVC Rules, *supra* note 319, Rule 2; *see also* Army SVC Handbook, *supra* note 318, ch. 2; MCO P5800.16A ¶ 6003, *supra* note 380.

[383] FY14 NDAA, *supra* note 4, at § 1716(d).

[384] *Transcript of RSP Public Meeting* 104-60 (Nov. 8, 2013) (testimony of SVC program heads); *see also* Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); Air Force SVC Rules, *supra* note 319, Rule 8; Army SVC Handbook, *supra* note 318, ch. 8.

[385] *Transcript of RSP Public Meeting* 131 (Nov. 8, 2013) (testimony of Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel, U.S. Navy); *see also* Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); U.S. Dep't of Def., Department of Defense Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014, at 1, 3, 5-6 (Apr. 2014) [hereinafter DoD Section 1716 Report], *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[386] *See* Services' Responses to RSP Request for Information 4 (Nov. 1, 2013); *see also* U.S. Army, Memorandum from The Judge Advocate General on Office of the Judge Advocate General Policy Memorandum #14-01, Special Victim Counsel (Nov. 1, 2013), *reprinted in* DoD Response to RSP Request for Information 4 at 200204-07, *currently available at* http://responsesystemspanel.whs.mil/Public/docs/Background_Materials/Requests_For_Information/RFI_Response_Q4.pdf.

[387] *Transcript of RSP Public Meeting* 166-67 (Nov. 8, 2013) (testimony of Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel Program, U.S. Navy).

[388] *See* Air Force SVC Rules, *supra* note 319, Rule 8.

[389] Army SVC Handbook, *supra* note 318, ch. 8.

[390] Final disposition is considered the point when the convening authority takes action on the findings and sentence of the court-martial. For non-judicial punishment actions under Article 15 of the UCMJ, final disposition is considered the point when the punishment is complete. For administrative actions, case disposition occurs when the separation authority takes action. *Id.*, ch. 3; *see also* Air Force SVC Rules, *supra* note 3557, Rule 3; MCO P5800.16A, *supra* note 378 ¶ 6005.

[391] *Id.*

[392] *See Transcript of RSP Victim Services Subcommittee Meeting* 14-37 (Mar. 13, 2014) (testimony of sexual assault survivors).

[393] *Id.* at 16-22, 28, 57, 78.

[394] *See* Air Force's Response to RSP Request for Information 1(d), Victim Impact Survey Attachment; DoD Section 1716 Report, *supra* note 385, at 8; U.S. Air Force, "Air Force Special Victims' Counsel Program Victim Impact Survey" (provided to RSP Victim Services Subcommittee in March 2013), *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140313_VSS/17_AirForce_VictimImpactSurvey_Results.pdf.

[395] *See Transcript of RSP Public Meeting* 150-57 (Nov. 8, 2013) (testimony of Colonel Dawn Hankins, Chief, Victims' Counsel Division, Air Force Legal Operations Agency, U.S. Air Force); DoD Section 1716 Report, *supra* note 385, at 8.

[396] *See* CSS Report to RSP, Annex, *infra*, at 161.

[397] *See Transcript of RSP Public Meeting* 187 (Nov. 8, 2013) (testimony of Colonel James McKee, Chief, Special Victims' Advocate Program, U.S. Army; Colonel Carol Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps; and Captain Karen Fisher-Anderson, Chief of Staff, Victims' Legal Counsel Program, U.S. Navy).

[398] *See id.* at 165 (testimony of Colonel James McKee, Chief, Special Victims' Advocate Program, U.S. Army).

[399] *See generally id.* at 104-60 (testimony of SVC program heads).

[400] *See* Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 8124, 128 Stat. 5 (2014).

[401] DoD Section 1716 Report, *supra* note 385, at 3.

[402] DoDI 6495.02 encl. 5, ¶ 3.c(2),(3).

[403] FY14 NDAA, *supra* note 4, at § 1743(a). (The statute only specifies that the report is to be submitted by a "designated person.") *Id.*

[404] *Id.* at § 1743(b),(c)(E)(i)-(iv).

[405] An Air Force VA told the RSP: "With the program changes that have been made since 2005 until now, I think expedited transfers have been huge for victims . . . ." *Transcript of Public Meeting* 233 (Nov. 7, 2013) (testimony of Master Sergeant Stacia Rountree, Victim Advocate, 11th Wing, Andrews Air Force Base, U.S. Air Force). Victim advocate groups also attest to the necessity of this policy for victim care. In his testimony before the RSP, a representative of the Service Women's Action Network explained that "policies that allow victims to transfer away from hostile units . . . go a long way in ensuring that victims are not in continued jeopardy." *Id.* at 339-40 (testimony of Mr. Greg Jacob, Policy Director, Service Women's Action Network).

[406] *See generally Transcript from RSP Public Meeting*, 145 (Nov. 7, 2013) (testimony of Rear Admiral Sean Buck, Director, Twenty-First Century Sailor Office, U.S. Navy); *Transcript from RSP Public Meeting* 161 (Nov. 7, 2013) (testimony of Christine Altendorf, Ph.D., Director, Sexual Harassment/Assault Response and Prevention (SHARP), U.S. Army).

[407] *Id.; see also* DoDI 6495.02 encl. 5, ¶ 5.b.

[408] *See id*; *see also Transcript from RSP Public Meeting* 160 (Nov. 7, 2013) (testimony of Christine Altendorf, Ph.D.)

[409] *Id.* 160.

[410] *See generally id.* at 160-66 (testimony of SAPR and SHARP program heads).

[411] DoDI 6495.02 encl. 5, ¶ 5.b(2).

[412] FY14 NDAA, *supra* note 4, at § 1742.

[413] DoDI 6495.02 encl. 7.

[414] *See Transcript of RSP Public Meeting* 95 (May 16, 2014) (discussing evidence taken at site visits by the Victim Services Subcommittee).

[415] DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 30.

[416] *Id.*

[417] *See* DoDI 6495.02 encl. 2 ¶6.y.

[418] DoD SAPRO FY12 Report, Vol. I, *supra* note 21, at 30; The Safe Helpline phone number is (877) 995-5247 and the website is www.SafeHelpline.org.

[419] VSS Report to RSP, Annex, *infra*, at 43-45.

[420] *See id.*

[421] *See id.*

[422] Department of Defense Task Force on Mental Health: An Achievable Vision 12 (Jun. 2007), *An achievable vision: Report of the Department of Defense Task Force on Mental Health, available at* http://www.taps.org/uploadedFiles/TAPS/RESOURCES/DOD%20Mental%20Health%20Task%20Force%20Report.pdf.

[423] *See* VSS Report to RSP, Annex, *infra*, at 33-35.

[424] *See id.* at 31.

[425] *See id.* at 35.

[426] *Id.* at 39.

[427] *See, e.g.*, JSC-SAS Appendices, *supra* note 361, app. D (Arizona); *id.,* app. I (Maryland); *id.,* app. L (Oregon); *id.,* app. N (Texas).

[428] *See id.* apps. C-P (providing overview of victim advocacy services provided in 18 jurisdictions in 14 states); *see also Transcript of RSP Victim Services Subcommittee Meeting* 211 (Feb. 26, 2014) (testimony of Mr. Scott Berkowitz, Founder and President, Rape, Abuse and Incest National Network (RAINN)) (indicating there are more than 1,000 local sexual assault service programs throughout United States that respond to extensive array of mental health, medical, legal and other needs).

[429] *See* JSC-SAS Appendices, *supra* note 361, apps. C–P.

[430] *See* BJS Special Report, *supra* note 26, at 6.

[431] *See, e.g.,* JSC-SAS Appendices, *supra* note 361, app. M at 6 (stating Women Organized Against Rape (WOAR) advocates provide services that include 24-hour hotline, medical accompaniment, adult drop-in groups, counseling and support, accompaniment to court hearings, and support during court process in Philadelphia); *Transcript of RSP Victim Services Subcommittee Meeting* 211(Feb. 26, 2014) (testimony of Mr. Scott Berkowitz, Founder and President, RAINN).

[432] *See* JSC-SAS Appendices, *supra* note 361, app. H at 3.

[433] *Id.*

[434] *Transcript of RSP Victim Services Subcommittee Meeting* 343-45 (Feb. 26, 2014) (testimony of Ms. Patricia Haist, Director, Clinical Services, YWCA West Central, Grand Rapids, Michigan) (stating that victims may receive SANE exam and other services without reporting crime to police and that there is agreement with local law enforcement to permit "anonymous" reporting which victim may later convert to actual standard report).

[435] *Id.* at 343.

[436] *Id. at 346.*

[437] Id.at *348.*

[438] *See, e.g., Transcript of RSP Public Meeting* 284 (Nov. 8, 2013) (testimony of Mr. Chris Mallios, Attorney Advisor, AEquitas); *see also* JSC-SAS Appendices, *supra* note 361, app. K-3 (Manhattan, NY); *id.,* app. K-4 (Queens, NY); *id.,* app. M at 5 (Philadelphia, PA); *Transcript of RSP Public Meeting* 283 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York).

[439] *Transcript of RSP Public Meeting* 228 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York).

[440] *Id.*

[441] *Id.*

[442] *Id.*

[443] *See* JSC-SAS Appendices, *supra* note 361, app. D at 3 (Maricopa County, AZ) (explaining that victim advocates are employed by some police departments in Arizona); *id.,* app. E at 3-5 (San Diego, CA) (describing San Diego Police Department crisis intervention unit which provides short-term support and referral services); *id.,* app. G at 1-3 (Washington, DC) (explaining that both FBI and local law enforcement agencies such as Metropolitan Police Department have victim advocates who are assigned as soon as officers respond to a crime scene); *see also Transcript of RSP Public Meeting* 260 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Chief of Detectives, Detective Bureau, Los Angeles Police Department).

[444] JSC-SAS Appendices, *supra* note 361, app. C at 2 (Anchorage, AK) (explaining that Standing Together Against Rape (STAR) advocates will accompany victim through investigative process in Alaska); *id.,* app. D at 3 (Maricopa County, AZ) (explaining that in Arizona where there are no police advocates employed by agency, community victim advocates working out of advocacy centers are present for victim support from beginning of investigation); *id.,* app. E at 3-5 (San Diego, CA) (explaining that in addition to advocates who work for San Diego Police Department, community-based advocates are available to accompany victims to law enforcement interviews); *id.,* app. I at 3-4 (Baltimore, MD) (explaining that Turnaround has collaborative relationship with Baltimore County Police Department such that when law enforcement is called to scene, Turnaround is also notified so victim advocate can respond).

[445] *See id.,* apps. C-P.

[446] *See, e.g., id.,* app. I (explaining that social worker on staff with State's Attorney for Baltimore City may work with victim when discussing a case that prosecutor has determined cannot be charged); *id.,* app. L (discussing role victim advocate in Yamill County, OR plays in discussing prosecutor's decision that sexual assault charge cannot be filed).

[447] FY12 NDAA, *supra* note 7, § 584; *see also* U.S., Dep't of Def., SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Army 2 (Jan. 2013) [hereinafter DoD SAPRO Training Report to Army], *currently available at* http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140313_VSS/02a_DoD_SARC_Army_VA_TrainingObservationReport_20130122.pdf; Under Secretary of Defense for Personnel and Readiness, Performance Work Statement for DoD Sexual Assault Advocate Certification Program (D-SAACP) 2 (Jan. 7, 2012) [hereinafter D-SAACP Statement], *currently available at* http://responsesystemspanel.whs.mil/public/docs/meetings/20131107/20131107/01_Overview_DoD_Victims_Svcs/PWS_DoD_SAACP.pdf; DTFSAMS, *supra* note 133, at 50-52 (Dec. 2009).

[448] D-SAACP Statement, *supra* note 447, at § 1.1. The certification program was developed in collaboration with civilian subject matter experts from the Department of Justice's Office of Victims of Crime, National Organization of Victim Advocates (NOVA), the National Advocate Credentialing Program (NACP), and the National Victim Assistance Standards Consortium.

[449] *See* D-SAACP Statement, *supra* note 447.

[450] *See* VSS Report to RSP, Annex, *infra*, at 81-83 (discussing formal training for victim advocate personnel in civilian agencies that include both formal training courses and shadowing, observation, or other experiential requirements before advocates are permitted to work without direct supervision).

[451] *See* DoD SAPRO Training Report to Army, *supra* note 447, at 2. "This report is in response to the requirement in DoDI 6495.02 for Services and the National Guard Bureau to submit a copy of their SAPR training programs, or SAPR training elements, to the Under Secretary of Defense (Personnel and Readiness) through the SAPRO for evaluation of consistency and compliance with DoD SAPR training standards contained in DoDI 6495.02." SAPRO Training Report to Army, *supra* note 447 at 2; *see also* U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Air Force (Jan. 2013); U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Navy (Mar. 2013); U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the U.S. Marine Corps (Feb. 2013); U.S. DoD SAPRO, Observation of Sexual Assault Response Coordinator (SARC) and Victim Advocate (VA) Sexual Assault Prevention and Response Training: Report to the National Guard Bureau (Jan. 2013). All five training reports are currently available at http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions-2/20131107-4/vs-20140313.

[452] DoDI 6495.02 encl. 10, ¶ 7 (Feb. 12, 2014) (Change 1).

[453] *Id.*

[454] *Id.* encl. 10, ¶ 7 (a)(1)-(2).

[455] *Id.* encl. 10, ¶ 7 (b)-(c).

[456] *See* JSC-SAS Appendices, *supra* note 361, apps. C-P.

[457] *Id.,* app. K-1 at 3 (Bronx, NY).

[458] *Transcript of RSP Public Meeting* 257 (Nov. 7, 2013) (testimony of Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County and Falls Church, Virginia); *see also* JSC-SAS Appendices, *supra* note 361, app. M at 6 (Philadelphia, PA).

[459] *See, e.g.,* JSC-SAS Appendices, *supra* note 361, app. K-2 (Brooklyn, NY). Some agencies, such as the YWCA in Grand Rapids, Michigan, have both paid staff and volunteer victim advocates. Volunteer advocates are not required to be college graduates and are provided 35 to 40 hours of training prior to providing any services, such as court-accompaniment. Their work is also observed by a more seasoned volunteer. The YWCA also holds monthly in-house training meetings for advocates. *Transcript of RSP Victim Services Subcommittee Meeting* 354, 360 (Feb. 26, 2014) (testimony of Ms. Patricia Haist, Director, Clinical Services, YWCA West Central, Grand Rapids, Michigan). Prosecution offices in several jurisdictions the Panel examined have formal training for their victim advocates, including observation of court procedures and shadowing an experienced advocate before working independently with victims. *See, e.g.,* JSC-SAS Appendices, *supra* note 361, app. K-2 (Brooklyn, NY) (social workers in Brooklyn District Attorney's Office undergo two-week training program that includes training by ADA's, speakers, sexual assault victim testimonials, shadowing experienced social works and other on-the-job training for which new social worker must by "signed off" or certified by experienced supervisor before beginning duties). For example, victim advocates in the Bronx District Attorney's Office undergo formal training, court observation, and other on-the-job training before receiving their own cases. Informal shadowing may include observing criminal trials and meeting with system based advocates. *Id.,* app. K-1 (Bronx, NY) (victim advocates must complete two-week observation period in courtroom, in addition to unit training and observation by supervisor). In San Diego, advocates from a local community advocate organization are required to complete a five week training period, which encompasses both a formal program and shadowing other advocates. *Id.,* app. E at 5. At the Maricopa County Attorney's Office in Arizona, victim advocates are required to have bachelor's degrees, prior experience as an advocate, parole or probation officer, and complete a training program before beginning to shadow other advocates. *Id.,* app. D at 4. They typically do not handle cases on their own until working in the office for a few months.

[460] *See Minutes of Victim Services Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 9, 2013).

[461] *Id.*

[462] FY 14 NDAA, Pub. L. No. 113-66, §1716(b), 127 Stat. 672 (2013).

[463] *See* Army's and Air Force's Responses to RSP Request for Information 4 (Nov. 1, 2013).

[464] *Transcript of RSP Public Meeting* 114 (Nov. 8, 2013) (testimony of Colonel James McKee, Chief, Special Victims' Advocate Program, U.S. Army).

[465] Army's Response to RSP Request for Information 144 (Apr. 2014).

[466] 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.

[467] Army's Response to RSP Request for Information 144 (Apr. 2014).

[468] *Id.*

[469] U.S. Dep't of Def., Establishment of Special Victim Capabilities within the Military Departments to Respond to Allegations of Certain Special Victim Offenses: Report to the Committees on Armed Services of the U.S. Senate and U.S. House of Representatives 3 (Dec. 2013) [hereinafter DoD Special Victim Capabilities Report], *available at* http://www.sapr.mil/public/docs/reports/DoD_SpecialVictimsCapabilities_Report_20131213.pdf. For further discussion of the Special Victim Capability, *see* Chapter 9, Section A, *infra*.

[470] DTM 14-003, *supra* note 328, at 3, 4. Funding and requirements are legislated by Congress and established by DoD policy; however, implementation of the Special Victim Capability is left for each Service to tailor programs to the specific needs of their Service's needs, structure, and culture. For more detail on DoD's collective capability and how it is implemented in each Military Service, see CSS Report to RSP, Annex, *infra*, at 65-102, 141-152.

[471] DTM 14-003, *supra* note 328, at 3, 4.

[472] This diagram is an adaptation from a similar graphic the Marine Corps provided the panel in response to Request for Information 21. *See* Marine Corps' Response to RSP Request for Information 21 (Nov. 21, 2013), at 400419.

[473] The Command support personnel, victim advocate, and special victim counsel (personnel annotated with an asterisk in Figure 9) may remain involved in the case to assist the victim through each phase of the military response process.

[474] 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], *available at* http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf.

[475] FY14 NDAA, *supra* note 4, at §§ 1742, 1714; *see also*, DoDI 6495.02.

[476] DoDI 6495.02 encl. 5, ¶ 3.h(1).

[477] *See* FY14 NDAA, *supra* note 4, at § 1743. 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.

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

[479] DoDI 5505.18, *supra* note 474, at ¶ 3.a.

[480] *Id.*, encl. 2, ¶ 6.

[481] *Id.*, encl. 2, ¶ 1.

[482] *Id.*, ¶ 3.c(3).

[483] *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. 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.

[484] 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], http://www.dtic.mil/whs/directives/corres/pdf/DTM-14-002.pdf. *See* FY13 NDAA, *supra* note 1 at§ 573 (mandating Special Victim Capabilities in DoD).

[485] For further discussion on the structure and implementation of Special Victim Capabilities, *see* CSS Report to RSP, Annex, *infra*, at 89-98.

[486] U.S. Dep't of Def., Instr. 5505.03 Initiation of Investigations by Defense Criminal Investigative Organizations, ¶ 4a (Mar. 24, 2011), *available at* http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf.

[487] DoDI 6495.02, Appendix to Encl. 12, ¶ a (referring to standard reporting of substantiated reports).

[488] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 80 (Nov. 19, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, Army CID).

[489] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 172-173 (Nov. 19, 2013) (testimony of Chief Warrant Officer Wilson, Marine Corps CID); *see also Transcript of RSP Public Meeting* 255 (Dec. 11, 2013) (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI).

[490] *See id.* at 172-73 (testimony of Chief Warrant Officer Five Shannon Wilson, U.S. Marine Corps).

[491] *See id.* at 173.

[492] *See Transcript of RSP Public Meeting* 256 (Dec. 11, 2013)(testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI); *id.* 251-252 (testimony of Mr. Gilliard, Deputy Assistant Director, NCIS).

[493] *See, e.g., id.* at 190-191.

[494] Colby T. Hauser, "Army Expert Receives National Recognition for Combating Sexual Assault," *available at* http://www.army.mil/article/72055/ (Jan. 17, 2012) (quoting Joanne Archambault, executive director of End Violence Against Women International (EVAWI) and 23-year veteran of San Diego Police Department).

[495] *See generally,* JSC-SAS Appendices, *supra* note 361 (Special Victim Unit (SVU) is used as a generic term for any unit designated to handle sexual assault and other crimes with a more vulnerable victim; police agencies use a variety of terms for these specialized units).

[496] *See generally, Transcript of RSP Public Meeting* 91-92 (Dec. 11, 2013) (testimony of Mr. Guy Surian, U.S. Army CID); Army's and Air Force's Responses to RSP Request for Information 50 (Nov. 21, 2013); *see also* Naval Criminal Investigative Service, "Family and Sexual Violence Program," *available at* http://www.ncis.navy.mil/CoreMissions/FI/Pages/FamilySexualViolenceProgram.aspx; *see also* DTFSAMS, *supra* note 133, at 88.

[497] *See, e.g., Transcript of RSP Public Meeting* 194, 197-198 (Dec. 11, 2013) (testimony of Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Investigative Service (CGIS).

[498] *See id.* at 275 (testimony of Sergeant Liz Donegan, Austin Police Department).

[499] Maryland Coalition Against Sexual Assault, Baltimore City Sexual Assault Response Team, Annual Report (Oct. 5, 2011) [hereinafter MCASA].

[500] *Id.*; *see also* Joanna Walters, *Investigating Rape in Philadelphia: How One City's Crisis Stands to Help Others,* The Guardian (July 2, 2013).

[501] POLICE EXECUTIVE RESEARCH FORUM (PERF), CRITICAL ISSUES IN POLICING SERIES: IMPROVING THE POLICE RESPONSE TO SEXUAL ASSAULT 2 (Mar. 2012), available at http://www.policeforum.org/critical-issues-series.

[502] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish Country).

[503] MCASA, *supra* note 499, at 8.

[504] *See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC)* (Feb. 20, 2014) (on file at RSP).

[505] DoDI 5505.18, *supra* note 474, at ¶ 3c. ("All unrestricted reports of sexual assault (and attempts) against adults will be immediately reported to the MCIO, regardless of the severity of the allegation.").

[506] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of law enforcement personnel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (JBSA)* (Dec. 13, 2013) (same).

[507] *Transcript of RSP Public Meeting* 212-13 (Dec. 11, 2013) (testimony of Mr. Guy Surian); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 168-169 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, AFOSI); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP) (interviews of investigators); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBSA* (Dec. 13, 2013) (on file at RSP) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP) (same).

[508] *Id.; see also* DTFSAMS, *supra* note 133, at 31, 36. For additional discussion, see Chapter 2, Section A.

[509] *See* Navy's Response to RSP Request for Information 137 (Apr. 11, 2014); *see also* Navy's Response to Request for Information 64 (Nov. 21, 2013). NCIS further stated: "In the majority of NCIS sexual assault investigations, the victim's collateral misconduct does not rise to the felony level. Often, the misconduct is a status offense such as underage drinking or adultery or other minor UCMJ violation." *Id.; see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014); (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (on file at RSP).

[510] *See* Navy's Response to RSP Request for Information 64 (Nov. 21, 2013) ("In practice, an investigator would rad a victim his/her Article 31 rights if the victim was suspected of a serious collateral offense. For non-serious collateral misconduct, the collateral misconduct would be noted in the NCIS report and deferred to the command for disposition."); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap* (Feb. 5, 2014) (on file at RSP).

[511] *Transcript of RSP Public Meeting* 262 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Chief of Detectives, Detective Bureau, Los Angeles Police Department); JSC-SAS Appendices, *supra* note 361, apps. C-P.

[512] *See, e.g., Transcript of RSP Public Meeting* 262 (Dec. 11, 2013) (testimony of Deputy Chief Kirk Albanese, Los Angeles Police Department).

[513] *Id.*

[514] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Station Kitsap* (Feb. 5, 2014) (on file at RSP).

[515] Requirements for approval of the use of electronic intercept and recording communications are governed by a DoD Instruction that is not publicly available. *See* U.S. Dep't of the Army Reg. 190-53, Interception of Wire, Electronic, and Oral Communications for Law Enforcement Purposes (Nov. 3, 1986). *See also Transcript of RSP Public Meeting* 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian); *Transcript of RSP Comparative Systems Subcommittee Meeting* 169 (Nov. 19, 2013) (testimony of Mr. Kevin Poorman); *id.* at 170 (testimony of Mr. Guy Surian).

[516] *Id.*

[517] OVW Protocol, *supra* note 323, at 101.

[518] *See, e.g., Minutes of RSP Comparative Systems Subcommittee Preparatory Session, DFSC/USACIL* (Nov. 14, 2013) (on file at RSP) (interview of Dr. Jeff Salyards, Executive Director, DFSC); *Transcript of RSP Comparative Systems Subcommittee Meeting* 333-334 (Nov. 19, 2013) (testimony of Sue Rotolo, Ph.D., former SANE Coordinator, Inova Fairfax Hospital, Fairfax, Virginia), (testimony of Commander Kristie Robson, Dept. Head of Clinical Programs, U.S. Navy Bureau of Medicine and Surgery), and (Colonel (Retired) Carol Haig, Chief, Women's Health Service Line and Deputy, Sexual Harassment/Assault Response and Prevention Workgroup, office of the U.S. Army Surgeon General); *see also, Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview with Ms. Paula Newman-Skomski, Nurse Practitioner, Providence Intervention Center for Assault and Abuse).

[519] *See, e.g., Transcript of RSP Comparative System Subcommittee Meeting* 27, 37-38 (Nov. 19, 2013) (testimony of Mr. Scott Russell, Director, Violent Crimes Division, DoD IG).

[520] *See, e.g., id.* at 13-20, 51-58 (testimony of Mr. Scott Russell).

[521] DoDI 6495.02 encl. 2, ¶ 5a.

[522] DoD IG, Evaluation of the Military Criminal Investigative Organizations' Sexual Assault Investigations (July 2013) [hereinafter DoD IG July 2013 Report], *available at* http://www.dodig.mil/pubs/documents/DODIG-2013-091.pdf.

[523] *See, e.g.,* MCASA, *supra* note 499 at 9-11; Walters, *supra* note 500; *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP); *Transcript of RSP Comparative Systems Subcommittee Meeting* 339 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department). Additionally, Cassia Spohn, a criminal justice expert who has written and studied policing and prosecuting sexual assault cases recently reviewed sexual assault case files from the Los Angeles Police Department and the Los Angeles Sheriff's Office and found that a significant number of cases were inappropriately unfounded or inappropriately closed through clearance by exceptional means. Cassia Spohn and Katherine Tellis, *Policing and Prosecuting Sexual Assault in Los Angeles City and County: A Collaborative Study in Partnership with the Los Angeles Police Department, the Lost Angeles County Sheriff's Department, and the Los Angeles County District Attorney's Office* (Feb. 2012), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf.

[524] *See* DoD Response to RSP Request for Information 59 (Nov. 21, 2013).

[525] DoDI 6495.02, Appendix to encl. 12 ¶ d.

[526] *See* UCR Handbook, *supra* note 180, at 41.

[527] DoD SAPRO FY13 Report, *supra* note 66, at 77. This report also defines unfounded as "false or baseless."

[528] For more information on the minimum level of commander/convening authority who may resolve sexual assault allegations, *see* discussion of "Initial Disposition Authority," *infra,* at Part B.2. of this Chapter.

[529] *Transcript of RSP Public Meeting* 268-69 (Dec. 12, 2013) (testimony of Cassia Spohn, Ph.D., Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University); *see also* Air Force Response to RSP Request for Information 39 (at attached Powerpoint slides) (Nov. 21, 2013); Services' Responses to RSP Request for Information 59 (Nov. 21, 2013).

[530] Navy and Marine Corps' Response to RSP Request for Information 59 (Nov. 21, 2013).

[531] U.S. Dep't of the Army Reg. 190-45, Law Enforcement Reporting 136 (Mar. 30, 2007).

[532] Army's Responses to RSP Requests for Information 58, 59, 66 (Nov. 21, 2013); *see also Transcript of RSP Public Meeting* 221-22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army, discussing role of trial counsel in founding and unfounding offenses).

[533] FY14 NDAA, *supra* note 4, at §1732 provided, "the Secretary of Defense shall conduct a review of the practices of the military criminal investigative organizations (Army Criminal Investigative Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigation) in response to an allegation that a member of the Armed Forces has committed an offense under the Uniform Code of Military Justice, including the extent to which the military criminal investigative organizations make a recommendation regarding whether an allegation appears founded or unfounded." The Panel did not receive or review this report prior to the publication of the report.

[534] UCR Handbook, *supra* note 180, at 77-78.

[535] A best practice among civilian law enforcement agencies requires detectives to remain assigned to cases after the cases are referred to the prosecutor. JSC-SAS Appendices, *supra* note 361, apps. C-P. For example, in Philadelphia, detectives and investigative staff will remain involved after the case goes to the prosecutor and will complete follow-up work requested by the prosecutor. *Id.,* app. M at 2.

[536] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 357 (Nov. 19, 2013) (testimony of Lieutenant Mark Kidd, Fairfax Police Department).

[537] *See, e.g., id.* at 357-58 (testimony of Lieutenant Mark Kidd and Lieutenant Paul Thompson, Fairfax County Police Department, Detective Lanis Geluso, Virginia Beach Police Department, and Ms. Rhonnie Jaus, explaining that most civilian police procedures require the detective to get supervisor approval to unfound a sexual assault case).

[538] JSC-SAS Appendices, *supra* note 361, apps. C-P.

[539] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 389 (Nov. 19, 2013) (testimony of Detective Lanis Geluso, Virginia Beach Police Department).

[540] *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, PSARC* (Feb. 20, 2014) (on file at RSP) (interview with Captain John Darby). For example, the Philadelphia SVU uses nine percent as a benchmark, and does an in-depth review if the unfounded rate goes into the double digits. *Id.* The Baltimore Police Department adopted a similar practice after discovering that "more than 30 percent of the cases investigated each year were determined by officers to be false or baseless . . . five times the national average." MCASA, *supra* note 499, at 2. Both Philadelphia and Baltimore detectives said this required culture change regarding measuring success – they had to accept a lower number of closed, unfounded cases, and adjust to having a higher number of open cases.

[541] *See Transcript of RSP Public Meeting* 221-22 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army).

[542] *Id.* at 180 (testimony of Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force); *id.* at 245 (testimony of Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard); *id.* at 250 testimony of Captain Robert Crow, Director, Criminal Law Division, U.S. Navy).

[543] Air Force and Navy Responses to RSP Request for Information 58 (Nov. 21, 2013).

[544] DoD IG July 2013 Report, *supra* note 522.

[545] *See Transcript of RSP Public Meeting* 221-222 (Dec. 12, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army); *see also* Army's Responses to RSP Request for Information 58 (Nov. 21, 2013).

[546] *See* Army's Response to RSP Request for Information 66 (Nov. 21, 2013).

[547] 2012 MCM, *supra* note 79, R.C.M. 601(d)(1); *see also, id.* at R.C.M. 406 discussion; 10 U.S.C. §834 (UCMJ art. 34).

[548] DoDI 5505.18, *supra* note 474, at encl. 2, ¶ 5.

[549] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session,* JBSA (Dec. 13, 2013) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

[550] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

[551] *Id.*; A best practice used by the Coast Guard in case classification describes cases as "open," "open – pending adjudication," or "closed – based on final adjudication."

[552] *Transcript of RSP Public Meeting* 80 (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps).

[553] *Id.*

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

[555] *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).

[556] 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 and Comp. L. 419, 426 (Spring 2008).

[557] 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).

[558] 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.

H.R. Rep. No. 81-491, at 7-8 (1949).

[559] *See* Hansen, *supra* note 556, 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"); The Judge Advocate General's School, The Background of the Uniform Code of Military Justice 10 (1959) [hereinafter TJAG's School].

[560] 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 559.

[561] 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).

[562] For a summary of the FY14 NDAA provisions that impact roles and responsibilities of commanders in sexual assault prevention and response, see Part III of RoC Subcommittee Report to RSP, Annex, *infra*.

[563] *Transcript of RSP Public Meeting* 197 (June 27, 2013) (testimony of Mr. Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps).

[564] Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 Harv. L. Rev. 937, 943 (2010).

[565] *See* 2012 MCM, *supra* note 79, R.C.M. 306.

[566] SecDef Apr. 2012 Withhold Memo, *supra* note 170.

[567] DoDI 6495.02 encl. 5, ¶ 7.b (referring to SecDef Apr. 2012 Withhold Memo, *supra* note 170).

[568] *Id.*

[569] DODI 6495.02, appendix to Encl. 12 ¶¶ a, c. d. *See generally* SecDef Apr. 2012 Withhold Memo, *supra* note 170; *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, or directing a pretrial investigation pursuant to Article 32 of the UCMJ if the disposition authority determines a general court-martial may be warranted.

[570] *See generally Transcript of RSP Role of the Commander Subcommittee Meeting* 6-199 (Sept. 25, 2013) (testimony of senior military commanders and staff judge advocates explaining convening authority's reliance on advice of staff judge advocate).

[571] *See* U.S. Dep't of Army, Army Reg. 27-26, Rules of Professional Conduct for Lawyers 23 (Rule 3.8) (May 1, 1992), *available at* http://www.apd.army.mil/pdffiles/r27_26.pdf; U.S. Dep't of Air Force, Air Force Instr. 51-201, Administration of Military Justice 299 (Standard 3-3.9) (June 6, 2013), *available at* http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf; 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), *available at* http://www.jag.navy.mil/library/instructions/JAGINST_5803-1D.pdf.

[572] 2012 MCM, *supra* note 79, R.C.M. 306 disc.

[573] For a comparison of the factors considered by military authorities versus federal and state prosecutors, see CSS Report to RSP, Annex, *infra*, at 168-75.

[574] 2012 MCM, *supra* note 79, R.C.M. 306 disc.

[575] FY14 NDAA, *supra* note 4, at § 1708.

[576] For a comparison with civilian prosecutors' consideration of the suspects' background, see Cassia Spohn and David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 Just. Quarterly 651 (2004) (citing *Bordenkircher v. Hayes,* 434 U.S. 357, 364 (1978)) ("These studies suggest that although [civilian] prosecutors' assessments of convictability are based primarily on legal factors such as the seriousness of the offense, the strength of evidence in the case, and the culpability of the defendant, legally irrelevant characteristics of the suspect and victim also come into play.").

[577] 2012 MCM, *supra* note 79, at R.C.M. 401(c).

[578] For additional discussion of the prosecutor disposition decisions according to the Department of Justice's United States Attorney's Manual, see CSS Report to RSP, Annex, *infra*, at 172-79.

[579] For additional discussion of the prosecutor disposition decisions according to the Department of Justice's United States Attorney's Manual, see CSS Report to RSP, Annex, *infra*, at 172-79.

[580] *See Transcript of CSS Meeting* 289, 293-97 (Apr. 11, 2014) (Ms. Jaus, a subcommittee member, explained there are alternate dispositions available to civilian prosecutors similar to those in the military. For instance, she compared a prosecutor informing a teacher that he must resign from his job or he will face criminal charges which may be compared to a resignation in lieu of a court-martial.).

[581] For a summary of situations provided by the Services where alternatives to courts-martial may be appropriate, see CSS Report to RSP, Annex, *infra*, at 172-79.

[582] *See* Services' Responses to RSP Request for Information 41(d) (Nov. 21, 2013) (noting that of 117 cases where commander imposed nonjudicial punishment, none involved penetrative offense and most consisted of unwanted touching over clothing).

[583] In FY13, there were 5,061 reports of sexual assault incidents, with 1,293 filed as restricted reports and 3,768 filed as unrestricted reports. In the 3,768 unrestricted reports, there were 3,858 subjects identified, which is depicted in Figure 13. *Transcript of RSP Public Meeting* 73-76 (May 5, 2014) (testimony of Major General Jeffrey J. Snow, Director, DoD SAPRO). *See also* DoD SAPRO FY13 Report, *supra* note 66, at 76, 78, 79 (Exhibits 9, 10, Table 4). For additional discussion regarding the multiple definitions of "unfounded" applied by MCIOs and commanders, *see* Chapter 7, Part C of this report.

[584] *See* 10 U.S.C. § 830 (UCMJ art. 30).

[585] An accused may waive an Article 32 hearing, but the government does not have to accept the waiver. *See* 2012 MCM, *supra* note 79, R.C.M 405(k).

[586] *Id.,* R.C.M. 405(c). The SPCMCA normally orders Article 32 investigations.

[587] For a description of the "Initial Disposition Authority" *see supra,* Part B of this Chapter.

[588] *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 serve as the hearing officer "whenever practicable" in all cases. FY14 NDAA, *supra* note 4, § 1702(b)(2). 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).

[589] 10 U.S.C. § 832 (UCMJ art. 32).

[590] *See* FY14 NDAA, *supra* note 4, at § 1702(a).

[591] *Id.* at § 1702(d)(1).

[592] *See* 2012 MCM, *supra* note 79, R.C.M. 702(a) disc.

[593] *Id.*, R.C.M. 702(b).

[594] *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center, PA.* (Feb. 20, 2014) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session Everett, WA* (Feb. 6, 2014) (on file at RSP).

[595] *See* 2012 MCM, *supra* note 79, 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.

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

[597] *See* FY14 NDAA, *supra* note 4, at § 1705.

[598] 10 U.S.C. § 832 (UCMJ art. 32); 2012 MCM, *supra* note 79, R.C.M. 405. As noted above, the FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 27, 2014. *See supra* note 588 and accompanying text.

[599] A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command. 2012 MCM, *supra* note 79, R.C.M. 103(17), R.C.M. 105(a). Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6. *See Transcript of RSP Public Meeting* 244 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

[600] 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 179, R.C.M. 406(b)(2) discussion; *see also, id.* at R.C.M. 601(d)(1).

[601] 10 U.S.C. § 834 (UCMJ art. 34); 2012 MCM, *supra* note 79, R.C.M. 406.

[602] *Id.* Article 34 of the UCMJ requires only written SJA advice for referral to general courts-martial, 10 U.S.C. § 834, but written advice may be provided to the convening authority in referrals to lesser courts-martial as well.

[603] 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).

[604] RoC Subcommittee Report to RSP, Annex, *infra*, at 82.

[605] *See* 10 U.S.C. § 806(b) (UCMJ art. 6(b)).

[606] *Transcript of RSP Public Meeting* 206-07 (Sept. 25, 2013) (testimony of Brigadier General Richard C. Gross, U.S. Army).

[607] *Id.* at 207.

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

[609] *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).

[610] FY14 NDAA, *supra* note 4, at § 1744.

[611] S. 1917, § 2, 113th Cong., Victims Protection Act of 2014 (2014).

[612] FY14 NDAA, *supra* note 4, at § 1744.

[613] S. 1917, § 2, 113th Cong., Victims Protection Act of 2014 (2014).

[614] FY14 NDAA, *supra* note 4, at § 1744(e)(6). The case file must include: the preferral of charges, reports of MCIO investigations and Article 32 reports, the written advice of the staff judge advocate to the convening authority, a written statement explaining the reasons for the convening authority's decision not to refer any charges for trial by court-martial, and certification of compliance with victim rights and the victim's statements to the MCIO, chain of command, and convening authority.

[615] *See* Services' Responses to RSP Requests for Information 69 (Nov. 21, 2013) (stating consistently that there is no formal written requirement but that they each follow general policies requiring communication between staff judge advocates and convening authorities). If the charges are forwarded to the general court-martial convening authority, the staff judge advocate must provide written advice on the legal sufficiency of the charges and a recommended disposition as to the charges pursuant to Article 34 of the UCMJ and Rule for Courts-Martial 406. *See* 10 U.S.C. § 834; 2012 MCM, *supra* note 79, R.C.M. 406. The general court-martial convening authority can then refer the charges to a court-martial or dismiss the charges and no further written documentation is required. Additionally, Rule 604 contemplates a written declination for cases that have been withdrawn and are re-referred. *See* 2012 MCM, *supra* note 79, R.C.M. 604. Withdrawal does not automatically require written justification; however, in the event that the charges are later referred to another court-martial, the discussion to Rule for Court-Martial 604 suggests that the reasons for the withdrawal and later referral should be included in the record of the later court-martial. *Id.* disc.

[616] *Id.*

[617] 10 U.S.C. § 834 (UCMJ art. 34); 2012 MCM, *supra* note 79, R.C.M. 604.

[618] *See* Services' Responses to RSP Request for Information 69 (Nov. 21, 2013).

[619] *See generally* JSC-SAS Appendices, *supra* note 361, apps. C-P.

[620] *See* U.S. Dep't of Justice, U.S. Attorneys' Manual 9-2001 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

[621] 2012 MCM, *supra* note 79, R.C.M. 601.

[622] *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).

[623] 10 U.S.C. § 825(d)(2) (UCMJ art. 25(d)(2)).

[624] 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 Role of the Commander Subcommittee Meeting* 36 (Mar. 12, 2014) (testimony of Mr. Robert Reed, former DoD Associate Deputy General Counsel for Military Justice and Personnel Policy).

[625] 2012 MCM, *supra* note 79, R.C.M. 703(c)(2)(D).

[626] 10 U.S.C. § 846 (UCMJ art. 46); 2012 MCM, *supra* note 79, R.C.M. 701, 703.

[627] *Transcript of RSP Public Meeting* 297 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service, U.S. Army).

[628] 2012 MCM, *supra* note 79, R.C.M. 703(c)(1). *See also Transcript of RSP Public Meeting* 297 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service, U.S. Army).

[629] *See Transcript of RSP Public Meeting* 327 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps).

[630] *Id.*

[631] *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, DCAP, U.S. Navy; Captain Scott Shinn, Officer-in-Charge, DCAP, U.S. Marine Corps; and Lieutenant Colonel Fansu Ku, Chief, DCAP, U.S. Army, regarding funding and travel of lay and expert witnesses at court-martial).

[632] 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, Director, DCAP, U.S. Navy).

[633] *Transcript of RSP Public Meeting* 374 (Dec. 12, 2013) (testimony of Ms. Amy Muth, Attorney-at-Law, Law Offices of Amy Muth).

[634] Section 1704 applies to any allegation of a violation of Articles 120, 120a, 120b, 120c, 125, or attempts to commit any of these offenses under Article 80 of the UCMJ.

[635] FY14 NDAA, *supra* note 4, at § 1704.

[636] 2012 MCM, *supra* note 79, 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 (or three days in the case of a special court-martial). 10 U.S.C. § 835.

[637] 2012 MCM, *supra* note 79, R.C.M. 503(b)(1).

[638] The only possible exception to this would be instances in which a court-martial is convened by the Service Secretary, the Secretary of Defense, or the President.

[639] 2012 MCM, *supra* note 79, R.C.M. 703(c)(2)(D).

[640] For an earlier study, see U.S. Dep't of the Army, Military Justice Review (2004), *currently available at* http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions-2/20131107-5/roc-20140312?highlight=WyJtaWxpdGFyeSBqdXN0aWNlIHJldmlldyJd. The Army's 2004 study included a detailed analysis and recommendation to insert the military judge earlier in the military justice process. The Army study provided this summary of their proposed change:

> Although the court-martial itself does not come into existence prior to referral, every case has a life of its own that begins at the time of the alleged offense, and significant legal issues arise prior to referral. This proposal recognizes that a military judge could play an important supervisory role in the military justice process prior to referral of charges. While commanders and convening authorities will continue to make all critical decisions in the case: preferral, level of referral,[be responsible for] funding witnesses and experts, and clemency, this proposal will relieve the Special Court-Martial Convening Authorities (SPCMCA) and General Court-Martial Convening Authorities (GCMCA) from the burden of making essentially judicial decisions on other matters.

Id.

[641] David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice" 6 (Nov. 2013) (submitted to RSP Jan. 7, 2014), *currently available at* http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/05-Nov-13/WhitePaper_Propposed_Amend_to_UCMJ_DavidSchlueter_201311.pdf.

[642] David A. Schlueter, "A White Paper on the Proposed Amendments to the Uniform Code of Military Justice," at 2 (Nov. 2013) (submitted to Response Systems Panel Jan. 7, 2014), *currently available at* http://responsesystemspanel.whs.mil/public/docs/Public_Comment_Unrelated/05-Nov-13/WhitePaper_Propposed_Amend_to_UCMJ_DavidSchlueter_201311.pdf.

[643] Some civilian defense attorneys use sex offender risk assessments at various stages of proceedings, including during plea bargain negotiations. These assessments can help promote rehabilitation and prevent recidivism by identifying appropriate therapy.

[644] Colin A. Kisor, *The Need for Sentencing Reform in Military Courts-martial,* 58 Naval L. Rev. 39 (2009), explains the plea process in the military as follows:

> During a judge-alone guilty plea with a pretrial agreement, a military judge conducts a "providence inquiry" to ensure the defendant is really guilty, and announces a sentence without knowing the punishment limitations of the pretrial agreement between the defendant and the officer convening the court-martial. If the military judge (or the members in a members' sentencing case with a pretrial agreement) adjudges less time than the confinement cap in the pretrial agreement, the defendant "beats the deal" and receives only what the sentencing authority has adjudged. On the other hand, if the judge sentences the defendant to more confinement time than contained in the agreement, the excess is typically either suspended or disapproved. A military judge is not permitted to remedy a pretrial agreement he perceives as too lenient but may make a clemency recommendation to the Convening Authority to reduce an adjudged sentence.

Id. at 46 (referring to R.C.M. 910(f)(3) and 1106(d)(3)).

[645] The convening authority's ability to enter into certain terms of a pretrial agreement will be limited based on statutory changes to Articles 18 and 60 of the UCMJ. *See* FY14 NDAA, *supra* note 4, at § 1702.

[646] *Id.* at §§ 1702(b), 1705.

[647] *See* Services' Responses to RSP Request for Information 41 (Nov. 21, 2013). In FY 2013, 70% of Army sexual assault cases involved not guilty pleas, compared to 77% of Navy cases. The Coast Guard's contested case rate was 22%, but that Service completed only nine trials. Data was not provided by the Air Force, and the percentage of total cases was not available for the Marine Corps. The Army was the only Service that tracked plea data prior to FY13.

[648] *Transcript of RSP Victim Services Subcommittee Meeting* 224-225 (Jan. 9, 2014) (testimony of Major Ryan Oakley, Office of the Under Secretary of Defense for Personnel and Readiness, Office of Legal Policy); U.S. Dep't of Def. Dir.. 1030.01Victim Witness Assistance ¶ 4 (Apr. 13, 2004) [hereinafter DoDD 1030.01], *available at* http://www.dtic.mil/whs/directives/corres/pdf/103001p.pdf.

[649] 18 U.S.C. § 3771. The Crime Victims' Rights Act was enacted in October 2004 as part of the Justice for All Act. It provides victims eight rights in federal criminal cases: (1) The right to be reasonably protected from the accused; (2) The right to reasonable, accurate, and timely notice of any public court proceeding or any parole proceeding involving the crime, or of any release or escape of the accused; (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding; (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding; (5) The reasonable right to confer with the attorney for the Government in the case; (6) The right to full and timely restitution as provided in law; (7) The right to proceedings free from unreasonable delay; (8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

[650] *Transcript of RSP Victim Services Subcommittee Meeting* 226 (Jan. 9, 2014) (testimony of Major Ryan Oakley, Office of the Under Secretary of Defense for Personnel and Readiness, Office of Legal Policy, that these rights were modeled on the Victims' Rights and Restitution Act of 1990, predecessor of CVRA); *see also* VSS Report to RSP, Annex, *infra*, at 136-38.

[651] 18 U.S.C. § 3771.

[652] FY14 NDAA, *supra* note 4, at § 1731.

[653] A detailed comparison of rights provided to crime victims under DoD policy, the CVRA, and the FY14 NDAA is provided at Appendix H, *infra*.

[654] *See* FY14 NDAA, *supra* note 4, at § 1701; DoDD 1030.01, *supra* note 648, ¶ 4.

[655] *See infra* Appendix H (comparing victim rights under CVRA, DoD policy, and FY14 NDAA).

[656] U.S. Dep't of Def. Inst. 1030.02, Victim Witness Assistance Procedures ¶ 6.3 (June 4, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/103002p.pdf.

[657] *Id.*

[658] *See* FY14 NDAA, *supra* note 4, at § 1701.

[659] *See* VSS Report to RSP, Annex, *infra*, at 136-38.

[660] FY14 NDAA, *supra* note 4, at §§ 1716, 1716 .

[661] *Id.* at § 1701(b); *see also* VSS Report to RSP, Annex, *infra*, at 111-17; and see discussion of special victim counsel, *supra* at Chapter 4, part D.

[662] *L.R.M. v. Kastenberg,* 72 M.J. 364 (C.A.A.F. 2013).

[663] *See* VSS Report to RSP, Annex, *infra*, at 114-17.

[664] *See* 2012 MCM, *supra* note 79, R.C.M. 1001-1007 (sentencing).

[665] *Id.*

[666] *See* Fed. R. Crim. P. 32.

[667] DoD SAPRO FY13 Report, *supra* note 66, encls. 2-5.

[668] *Id.*

[669] *See, e.g.*, "Navy Releases March Court-Martial Results," Navy Times (Apr. 15, 2014); *see also* "Navy, Marine Corps to Post Offender List on Homepages," Marine Corps Times (July 18, 2013); U.S. Marine Corps, "Marine Corps General and Special Court-Martial Dispositions: Oct 13 - Mar 14" (directly accessible at Marine Corps homepage, http://www.marines.mil/ at "Courts-Martial" link at bottom right), *at* http://www.hqmc.marines.mil/portals/61/Docs/courtsmartial0314.pdf.

[670] Major Steven M. Immel, *Development, Adoption, and Implementation of Military Sentencing Guidelines*, 165 Mil. L. Rev. 159, 161 (2000) (comparing 18 U.S.C. § 3553(a)(2) with U.S. Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook 64 (Sept. 30, 1996)).

[671] The term "federal judicial system" or "federal system" refers to the U.S. Federal Courts, established by Article III of the U.S. Constitution.

[672] *See* 18 U.S.C. § 3553(a)(2).

[673] *See* FY14 NDAA, *supra* note 4, § 1702(b). Section C of this Chapter, *supra*, explains the discretionary limits established by Section 1702(b).

[674] DoD SAPRO FY13 Report, *supra* note 66, encls. 2-5.

[675] The exceptions are Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. *See* Ark Code Ann. § 5-4-103(a) (1987) ("If a defendant is charged with a felony and is found guilty of an offense by a jury, the jury shall fix punishment in a separate proceeding as authorized by this chapter."); Ky. Rev. Stat. Ann. § 532.055(2) (2008) ("Upon return of a verdict of guilty or guilty but mentally ill against a defendant, the court shall conduct a sentencing hearing before the jury, if such case was tried before a jury."); Mo. Rev. Stat. § 557.036 (2003) ("If the jury at the first stage of a trial finds the defendant guilty of the submitted offense, the second stage of the trial shall proceed . . . . The jury shall assess and declare the punishment as authorized by statute."); Okla. Stat. Ann. tit. 22, § 926.1 (2003) ("In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law . . . ."); Tex. Code Crim. Proc. Ann. § 37.07(2)(b) (2007) ("[W]here the defendant so elects in writing before the commencement of the voir dire examination of the jury panel, the punishment shall be assessed by the same jury . . . ."); Va. Code Ann. § 19.2-295 (2009) ("Within the limits prescribed by law, the term of confinement in the state correctional facility or in jail and the amount of fine, if any, of a person convicted of a criminal offense, shall be ascertained by the jury . . . .").

[676] *See, e.g.*, Fed. R. Crim. P. 32; *see also, e.g.*, Administrative Office of the U.S. Courts, The Federal Court System in the United States: An Introduction for Judges and Judicial Administrators in Other Countries 29-30 (2010) [hereinafter AOUSC] (describing role of federal district judges in sentencing).

[677] *See* 2012 MCM, *supra* note 79, R.C.M. 903.

[678] *See id.*, R.C.M. 903 (forum selection); *id.*, R.C.M. 910 (pleas). For analysis and discussion of Rules 903 and 910, see *id.,* app. 21. The Service member also has the right to know the military judge's identity before making this election. 10 U.S.C. § 816 (UCMJ art. 16). The convening authority selects members "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825 (UCMJ art. 25). By default members are officers, unless the accused is enlisted and requests enlisted members; in that case, at least one-third must be enlisted, and must be from another unit. *Id.*

[679] *See* 2012 MCM, *supra* note 79, R.C.M. 903(b)(2) (noting that approval or disapproval of request for military judge alone is at discretion of military judge). The discussion following R.C.M. 903(b)(2)(B) states: "A timely request for trial by military judge alone should be granted unless there is substantial reason why, in the interest of justice, the military judge should not sit as fact finder. The military judge may hear arguments from counsel before acting on the request. The basis for denial of a request must be made a matter of record." *Id.*, R.C.M. 903(b)(2)(B) disc.

[680] *Id.,* R.C.M. 903 (forum selection).

[681] *Id.*

[682] *See, e.g.*, Military Justice Act of 1983 Advisory Commission, Advisory Comm'n Report (1984) [hereinafter Advisory Comm'n Report], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ACR-1983-I.pdf.

[683] *See* Services' Responses to RSP Request for Information 148 (Nov. 21, 2014).

[684] Major General (Retired) Kenneth J. Hodson, former Judge Advocate General of the Army, testified before the 1983 Commission, in part, as follows:

> I dealt with many convening authorities, and none have ever complained of the findings of a court, but many have been upset by the sentence . . . Incidentally, I have never had a convening authority complain about a sentence imposed by a judge . . . Sentences adjudged by court members are adjudged pretty much in ignorance, and they tend to vary widely for the same or similar offenses. They amount almost to sentencing by lottery.

Advisory Comm'n Report, *supra* note 682, at 90.

[685] *See, e.g.*, Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 Wash. U. J. Urb. and Contemp. L. 3, 39 (1994) (discussing jury sentencing in statistical analysis of sentences imposed by judges and juries demonstrating that jurors sentenced more severely and concluding that jurors "may be both more harsh and more erratic than judges").

[686] For a complete discussion of issues, including arguments to retain and eliminate the current sentencing authority of military panels, see CSS Report to RSP, Annex, *infra*, at 219, 239.

[687] *See, e.g.,* Army's Response to RSP Request for Information 147 (Apr. 11, 2014) (stating that military judges in Army are selected by The Judge Advocate General, upon recommendation by Chief Trial Judge, pursuant to criteria including legal and military justice experience, length of service, demonstration of mature judgment and high character, and other factors listed in Chapter 8 of JAGC Publication 1-1); *see* U.S. Dep't of the Army, Office of The Judge Advocate General, Pub. 1-1 ("Personnel Policies") (Jan. 1, 2014) (updated Mar. 17, 2014)..

[688] *See* 10 U.S.C. § 825 (UCMJ art. 25); *see generally, e.g.*, *United States v. Gutierrez*, 11 M.J. 122, 125 (C.M.A. 1981) (Everett, C.J., dissenting) (discussing maximum punishment advisement to members and stating about sentencing that "[w]hile court-martial members should not languish in ignorance, they should also be shielded from information which could well tend to confuse or mislead them").

[689] Sentencing complexity may be one reason: In the military, all known offenses committed by an accused may be tried at the same time, even if the offenses are not related to each other in any way. 2012 MCM, *supra* note 79, R.C.M. 307(c)(4) ("Charges and specifications alleging all known offenses by an accused may be preferred at the same time."). Further, punishments not available in civilian courts include: reprimand; reduction in pay grade; restriction to specified limits; hard labor without confinement; and punitive separation. *See id.,* R.C.M. 1006, R.C.M. 1007. Punishments typically available in the civilian setting include: the death penalty; incarceration; probation (remain at liberty but subject to certain conditions and restrictions such as drug testing or drug treatment); fines; and restitution. *See* Bureau of Justice Statistics, "The Justice System: What Is the Sequence of Events in the Criminal Justice System: Sentencing and Sanctions," *available at* http://www.bjs.gov/content/justsys.cfm#sentencing.

[690] Brigadier General John S. Cooke, *The Twenty Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 11, 25 (1998).

[691] *See, e.g.*, Fed. R. Crim. P. 32; *see also, e.g.*, AOUSC, *supra* note 676, at 29-30 (describing role of federal district judges in sentencing).

[692] *See, e.g.*, Advisory Comm'n Report, *supra* note 682, at 14.

[693] Cooke, *supra* note 690, at 20.

[694] UCMJ Article 25(d)(2) states, in pertinent part, that the convening authority should select members who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *See* 10 U.S.C. § 825.

[695] *See United States v. Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995); *Jackson v. Taylor*, 353 U.S. 569 (1957).

[696] FY14 NDAA, *supra* note 4, § 1702(b).

[697] *See, e.g.*, Fed. R. Crim. P. 32; *see generally* 18 U.S.C. § 3585 (calculating federal terms of imprisonment).

[698] *See, e.g., Setser v. United States,* 132 S. Ct. 1463 (2012) (discussing concurrent and consecutive sentences in the context of federal and state convictions); *see also Weymouth*, 43 M.J. 329, 336 (C.A.A.F. 1995) (discussing unitary sentencing and distinctions between military and federal law).

[699] *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission).

[700] *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission).

[701] *See id.* at 150-52 (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

[702] *See* 28 U.S.C. §§ 991-998.

[703] *Transcript of RSP Comparative Systems Subcommittee Meeting* 149 (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission, describing Sentencing Guidelines).

[704] *Transcript of RSP Comparative Systems Subcommittee Meeting* 242 (Feb. 11, 2014) (testimony of Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission).

[705] *See generally Transcript of RSP Comparative Systems Subcommittee Meeting* (Feb. 11, 2014) (testimony of Mr. L. Russell Burress, U.S. Sentencing Commission; Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission; and Mr. Mark Bergstrom, Pennsylvania Commission on Sentencing, discussing history and development of sentencing commissions and guidelines).

[706] *Id.* at 243 (testimony of Ms. Meredith Farrar-Owens, Virginia Criminal Sentencing Commission). For further information on study and implementation of sentencing guidelines, see Meredith Farrar-Owens, "Overview of State Sentencing Guidelines and Sentencing Guidelines for Sexual Assault Offenses in VA" (Feb. 11, 2014) (PowerPoint Presentation to RSP Comparative Systems Subcommittee).

[707] U.S. Dep't of Def., Memorandum from the Secretary of Defense to the Acting General Counsel of the Department of Defense (Sept. 4, 2013), *currently available at* http://responsesystemspanel.whs.mil/index.php/home/materials.

[708] Letter from the Acting General Counsel of the Department of Defense to the Honorable Barbara Jones, Chair, Response Systems Panel (Sept. 4, 2013), *see infra* Appendix A.

[709] *See* Letter from Robert S. Taylor, Acting General Counsel, Department of Defense, to The Honorable Barbara S. Jones, Panel Chair *supra* note 5.

[710] "Any person who in time of war is found lurking as a spy or acting as a spy in or about any place, vessel, or aircraft, within the control or jurisdiction of any of the Armed Forces, or in or about any shipyard, any manufacturing or industrial plant, or any other place or institution engaged in work in aid of the prosecution of the war by the United States, or elsewhere, shall be tried by a general court-martial or by a military commission and on conviction shall be punished by death." 10 U.S.C. § 906 (UCMJ art. 106).

[711] "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he—(1) has a premeditated design to kill . . . ." *Id.* at § 918 (UCMJ art. 118).

[712] "Any person subject to this chapter, who, without justification or excuse, unlawfully kills a human being, when he . . . (4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson; is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct." *Id.*

[713] FY14 NDAA, *supra* note 4, § 1705(a).

[714] *See, e.g.*, Human Rights Watch, An Offer You Can't Refuse: How U.S. Federal Prosecutors Force Defendants to Plead Guilty (2013) (discussing mandatory minimum sentences in context of drug crimes), *available at* http://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0.pdf.

[715] *See, e.g.*, *Transcript of RSP Comparative Systems Subcommittee Meeting* 353 (Feb. 11, 2014) (testimony of Ms. Annette Burrhus-Clay, President, National Alliance to End Sexual Violence and Executive Director, Texas Association Against Sexual Assault) ("My experience tells me that victims will be less likely to report sexual assault if we have mandatory minimums.").

[716] *See id.* at 356 ("From the perspective of the sexual assault victim, the system is broken. However, adopting mandatory minimum sentencing is unlikely to mend the justice system. The net result of this type of get tough on crime, make everybody feel better reform may very well be less reporting, fewer prosecutions for sexual assault, and ultimately a step backwards in justice for survivors."); *see also, e.g.*, Defense Manpower Data Center, 2013 Service Academy Gender Relations Focus Groups: Overview Report 164, *available at* http://www.sapr.mil/public/docs/research/2013_sagr_focus_group_report.pdf . ("The punishment of turning someone in is so extreme. If you were to turn someone in for touching your butt, they could honestly be sitting in confinement for the rest of the year. That's a huge punishment for probably not that big of a crime. But if you don't stop it, then it escalates. So it's a huge Catch-22, actually.").

[717] *See* 2012 MCM, *supra* note 79, R.C.M.'s 405(h)(1)(A), 1001(b)(4), and 1001(c)(2).

[718] *See* Fed. R. Crim. P. 32(i)(4)(B) (addressing a crime victim's opportunity to speak, "Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard.")

[719] *See, e.g.,* Ariz. Rev. Stat. § 13-4426.01 (amend. 2003) (providing that a victim giving victim impact statements at sentencing "is not subject to cross-examination"); Iowa Code § 915.21.3 (amend. 2002) ("A victim shall not be placed under oath and subjected to cross-examination at the sentencing hearing."); N.H. Rev. Stat. Ann. § 21-M:8-k (II)(p) (amend. 2007) ("No victim shall be subject to questioning by counsel when giving when giving an impact statement."); *see also Michael v. State*, Nos. A-7890, 4665, 2003 Alas. App. LEXIS 21 (Alaska Ct. App. Feb. 12, 2003) (finding where witness gave oral victim impact statement not under oath describing impact of defendant's conduct, defendant's right to confrontation was not violated).

[720] FY14 NDAA, *supra* note 4, § 1701.

[721] 10 U.S.C. § 860 (UCMJ art. 60); 2012 MCM, *supra* note 79, R.C.M. 1107.

[722] 2012 MCM, *supra* note 79, R.C.M. 1107(b)(4).

[723] See 10 U.S.C. §§ 857, 857a, 858 (UCMJ Art. 57, 57a, 58); *see also* 2012 MCM, *supra* note 79, R.C.M. 1101(a)

[724] 10 U.S.C. §§ 857, 857a, 858b (UCMJ arts. 57, 57a, 58b); 2012 MCM, *supra* note 79, R.C.M. 1101.

[725] 10 U.S.C. § 857(a)(2) (UCMJ art. 57(a)(2)); 2012 MCM, *supra* note 79, R.C.M. 1101(c)(7).

[726] 10 U.S.C. § 854 (UCMJ art. 54).

[727] 10 U.S.C. § 860 (UCMJ art. 60).

[728] 2012 MCM, *supra* note 79, R.C.M. 1103, 1104, 1105; *see also* FY14 NDAA, *supra* note 4, § 1706(b) (prohibiting 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").

[729] 10 U.S.C. § 854(e) (UCMJ art. 54(e)). It merits noting that records of trial are only provided by statute to victims of offenses under Article 120 of the UCMJ who testified at trial. Other victims of crime normally must request a copy of the proceedings under the Freedom of Information Act, as the UCMJ does not provide for mandatory copies of the authenticated record of trial to assist in preparation of matters for submission to the clemency authority.

[730] FY14 NDAA, *supra* note 4, § 1706(a). Section 1706 does not specify what matters a victim may submit for consideration. *See id.*

[731] 10 U.S.C. § 860 (UCMJ art. 60(a)(4)).

[732] *See* 10 U.S.C. §§ 864, 866, 867, 869 (UCMJ arts. 64, 66, 67, 69).

[733] FY14 NDAA, *supra* note 4, § 1702(b).

[734] 2012 MCM, *supra* note 79, R.C.M. 1107(d).

[735] FY14 NDAA, *supra* note 4, § 1702(b).

[736] 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, *supra* note 4, § 1702(b).

[737] *Id.*

[738] 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, *supra* note 1, at § 572(a)(2).

[739] 10 U.S.C. §§ 864, 865 (UCMJ arts. 64, 65).

[740] 10 U.S.C. § 866 (UCMJ art. 66).

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

[742] *See* JSC-SAS Appendices, *supra* note 361, apps. C-P; *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 95-96 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, Director of Programs and Director, National Center for the Prosecution of Violence Against Women (NCPVAW), National District Attorneys Association (NDAA)). Ms. Mosley testified as follows:

> [O]ne of the things that I was asked was the relative level of experience of prosecutors handling these [sexual assault] cases. . . . [It] is just so varied. I mean, you would think that, obviously, promising practices would dictate that it would be a more seasoned prosecutor who has had some experience, has a certain number of trials and felonies, had maybe chiefed or supervised somebody in the misdemeanor division before going to a felony. But many offices across the country many people think are large urban offices and they are not. Many of the prosecutors that we have seen that come to training are in two- and three- person offices. There are, obviously, some that are very structured like New York and Houston, and Dallas, and large urban areas. But the majority of prosecutors' offices out there for state and local prosecutors are these smaller offices in rural areas. So, we get technical assistance requests constantly from a person who doesn't have trial experience and they have got the felony.

[743] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* 20 (Feb. 6, 2014) (on file at RSP) (interview of Mr. Mark Roe, Prosecuting Attorney, Snohomish County, Washington); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 183 (Jan. 7, 2014) (testimony of Ms. Candace Mosley, Director, NCPVAW, NDAA) ("There are prosecutors who only want to do sexual assault cases for their entire career and then there are some that shouldn't be in there for a long period of time. It really does, it depends on the individual, their passions."); *id.* at 186 (commentary of Ms. Rhonnie Jaus, RSP Comparative Systems Subcommittee Member). Ms. Jaus stated as follows:

> I also think it was unrealistic for them to conclude the other prosecutors that there was very little burn [out]. I think that is crazy. I have been doing this as a prosecutor for 30 years. I ran the sex crimes division for like 25. There is burnout. People get burned out. I mean, it is crazy to think they don't. People leave the job. Not everyone stays or else there would never be any movement. But I think that some people are, as Candace [Mosley] is saying, [there are prosecutors who] are incredibly committed and passionate, but there are people who do burn out and I think that it is the same as the military.

[744] *See generally* JSC-SAS Appendices, *supra* note 361, apps. C-P.

[745] *See generally id.*

[746] FY13 NDAA, Pub. L. No. 112-239, § 573(a), 126 Stat. 1632 (2013).

[747] Dawson Place; Everett, Washington; and Joint-Base Lewis-McChord (JBLM) share this structure. *See* JSC-SAS Appendices, *supra* note 361, app. P; *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP).

[748] At JBLM, the Army created a consolidated facility with representatives from Army CID, as well as a Special Victim Prosecutor, SARC, Victim Advocate, and the Special Victim Counsel, and Sexual Assault Care Coordinator. The sexual assault forensic exam takes place at Madigan Army Medical Center located on JBLM. Victims are not required to go to the consolidated facility for services. The facility is arranged so that a victim who makes a restricted report to the SARC or VA will not come into contact with those on the criminal justice side (investigators and prosecutors) unless the victim decides to convert his or her report to an unrestricted one. *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, JBLM* (Feb. 5, 2014) (on file at RSP).

[749] For example, while visiting Dawson Place, Subcommittee members observed a multidisciplinary meeting where both the SANE and victim advocate offered solutions to the prosecutor to deal with a witness cooperation problem in a pending case unrelated to the services they provided to the victim. *See Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP).

[750] In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a),"[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim." 2012 MCM, *supra* note 79, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule "when admission or disclosure of a communication is constitutionally required." *Id.,* M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. *Cf. Transcript of RSP Public Meeting* 231 (Nov. 8, 2013) (testimony of Ms. Marjory Fisher, Chief, Special Victims Bureau, Queens, New York).

[751] JSC-SAS Appendices, *supra* note 361, app. M (Philadelphia, PA).

[752] The Sexual Assault Response and Resource Team (SARRT) in Austin, Texas consists of the Austin Police Department Sex Crimes Unit, Advocates from SafePlace, prosecutors, and SANES. *See* http://www.austintexas.gov/department/sex-crimes. In Austin, sexual assault victims are taken to the emergency room at St. David's Hospital where they have a room dedicated for exams. *See* Jenni Lee, CrimeWatch: Sexual Assault Response, KTBC Channel 7 (Apr. 3, 2010, 8:54 PM), http://www.myfoxaustin.com/story/18298466/crimewatch-sexual-assault-response . A dedicated group of SANEs are on call and conduct examinations of survivors. Id. In 2010, Travis County went beyond the State's 96 hour period for obtaining a forensic exam and expanded it to 120 hours, or 5 days. *Id.* Jenny Black, the County's SANE Coordinator explained, "It lets us expand our services to care for more people. It helps them into the system where there's a lot of follow up and a lot of care as well as the medical services that we provide and collecting of evidence for criminal prosecution, so it's helpful in a lot of ways." *Id.*

[753] *See generally* JSC-SAS Appendices K, N, O (summarizing jurisdiction information for Bronx, NY; Austin, TX; and Arlington, VA); *see also id.,* app. M (Philadelphia, PA); *see also Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

[754] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP).

[755] In accordance with the victim advocate-victim privilege found in Military Rule of Evidence 514(a) ,"[a] victim has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made between the alleged victim and a victim advocate, in a case arising under the Uniform Code of Military Justice, if such communication was made for the purpose of facilitating advice or supportive assistance to the alleged victim." 2012 MCM, *supra* note 79, M.R.E. 514. However, the rule provides an exception that there is no privilege under the rule "when admission or disclosure of a communication is constitutionally required." *Id.,* M.R.E. 514(d)(6). If the victim advocate and prosecutor are co-located and have such a close working relationship, the victim advocate may be associated as part of the prosecutor team, in which case the prosecutor has a duty to turn over any exculpatory evidence as a constitutional right of the accused. Therefore, to avoid possible litigation of this issue, it is necessary to build a Chinese wall between the victim advocate and prosecutor. *Cf.* The Joint Service Committee's analysis indicates "constitutionally required" exception would be satisfied only in extraordinary circumstances, where the accused could show harm of constitutional magnitude if such communication was not disclosed." The JSC states,

> In drafting the "constitutionally required" exception, the Committee intended that the communication covered by the privilege would be released only in the narrow circumstances where the accused could show harm of constitutional magnitude if such communication was not disclosed. In practice, this relatively high standard of release is not intended to invite a fishing expedition for possible statements made by the victim, nor is it intended to be an exception that effectively renders the privilege meaningless.

[756] *Transcript of RSP Comparative Systems Subcommittee Meeting* 275-83 (Nov. 19, 2013) (testimony of Sue Rotolo, Ph.D., former SAFE Coordinator, INOVA Fairfax Hospital, Fairfax, Virginia).

[757] FY14 NDAA, *supra* note 4, § 1725.

[758] DoDI 6495.02 encl. 7. Healthcare providers conducting a forensic exam must be trained in accordance with the current version of the National Protocol of the Office on Violence Against Women of the Department of Justice. *See* OVW Protocol, *supra* note 323. Victims can choose to have a SAFE kit conducted regardless of whether they choose restricted or unrestricted reporting. The National Protocol identifies a number of clinical and educational programs through which medical providers can be qualified to conduct forensic examinations. *Id.*

[759] DTM 14-003, at 12, *supra* note 328.

[760] *Id.* (defining covered offenses as "[t]he designated criminal offenses of sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in accordance with the UCMJ").

[761] *See* DTM 14-003 . *supra* note 328 at 6.

[762] *See, e.g.,* OVW Protocol, *supra* note 323 at 51 ("Some victims . . . are unable to make a decision about whether they want to report or be involved in the criminal justice system in the immediate aftermath of an assault. Pressuring these victims to report may discourage their future involvement. Yet, they can benefit from support and advocacy, treatment, and information that focuses on their well-being. . . . Victims who are recipients of compassionate and appropriate care at the time of the exam are more likely to cooperate with law enforcement and prosecution in the future.").

[763] *See id.* at 3.

[764] *See* FY13 NDAA, Pub. L. No. 112-239, § 573(f), 126 Stat. 1632 (2013).

[765] DoD Special Victim Capabilities Report, *supra* note 469, at 10.

[766] *See Transcript of RSP Public Meeting* 133-34 (Dec. 11, 2013) (testimony of Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Undersecretary of Defense for Personnel and Readiness); *see also* DoD and Services' Responses to RSP Request for Information 50 (Nov. 21, 2013); DTM 14-003, *supra* note 328 at 9.

[767] DTM 14-003, *supra* note 328 at 9.

[768] *Written Statement of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army, to RSP* (Dec. 11, 2013).

[769] Jakob Rodgers, "Air Force Program Puts Lawyer in Victim's Corner," [Colo. Springs] Gazette (Mar. 25, 2013).

[770] *See id.*

[771] *See Transcript of RSP Public Meeting* 292 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, Trial Defense Service, U.S. Army) ("The mission of the U.S. Army Trial Defense Service is to provide independent, professional, and ethical defense services to soldiers."); *id.* at 305 (testimony of Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps Defense Services Organization, U.S. Marine Corps) ("The Marine Corps Defense Services Organization provides zealous, ethical, and effective defense counsel services to Marines and sailors who are facing administrative, nonjudicial, and judicial actions in order to protect and promote due process, statutory and constitutional rights, thereby ensuring the military justice system is both fair and just."); *id.* at 310-11 (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force) ("Our charge is to further the Air Force's mission by providing America's airmen with independent, world-class representation in a zealous, ethical, and professional manner."); *see also* Richard Klein, *The Role of Defense Counsel in Ensuring a Fair Justice System,* The Champion (June 2012) (noting that roles of military defense attorney and public defender are critical to ensure accused's "Sixth Amendment right to counsel . . . [and that] the procedural protections which exist on paper, are actually applied"); *Transcript of RSP Public Meeting* 313 (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency) (noting that military defense counsel, in particular, ensure the fair administration of the military justice system, which assists in maintaining good order and discipline and ultimately strengthens national security).

[772] Lieutenant Colonel R. Peter Masterton, *The Defense Function: The Role of the U.S. Army Trial Defense Service,* Army Lawyer 1 (Mar. 2001); *see also* U.S. Courts of Appeals for the Armed Forces, "Military Justice Personnel: Defense Function: Detailed Military Counsel," *available at* http://www.armfor.uscourts.gov/newcaaf/digest/IIA4.htm; *see also* 10 U.S.C. § 827 (UCMJ art. 27).

[773] *See Transcript of RSP Public Meeting* 311-12 (Nov. 8, 2013) (testimony of Colonel Dan Higgins, Chief, Trial Defense Division, Air Force Legal Operations Agency, U.S. Air Force).

[774] DoD did not establish defense capabilities analogous to the Special Victim Capability in the military trial defense organizations.

[775] *See generally Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and JBLM* (Feb. 5, 2014) (same); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (same).

[776] *See generally* JSC-SAS Appendices, *supra* note 361, apps. C-P; Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" (Nov. 6, 2013) (noting "the best public defender offices in the country have full-time criminal investigators") [hereinafter Stimson]; *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, former President, National Association of Criminal Defense Lawyers) ("I don't know a lawyer in the country that does sex offenses without an investigator, except in the military. Really, there is no such thing.").

[777] A public defender from the Washington, D.C. Public Defender's Office told the RSP:

> But as far as investigators are concerned, some lawyers share an investigator with just one other lawyer or some have their own specific investigator. And I was lucky enough to have my own specific investigator for awhile. I share one now. But it makes it much easier in terms of being able to defend our clients finding out that you could throw away all your kind of subjective beliefs about your client's guilt or innocence and then you do investigation and you investigate no matter how much bad evidence there seemingly is. You find out that there are some things — sometimes complainants do not tell the truth. So, you know, one word I kind of bristle at when I hear it all the time from I guess panels that are supposedly objective is the word "victim." When we talk about pre- trial matters that have not resulted in conviction or that have not resulted in the guilty plea, we deal with complainants, because a lot of times we understand that alleged victims aren't victims at all when we investigate and even the government finds out before we do that things have been made up. So I think that just reemphasizes the importance of having investigators and having all the different aspects of the case, whether or not it's legal or on the field, done in order to have a decent — not only a decent, but a zealous defense.

Transcript of RSP Public Meeting 380-81 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

[778] Stimson, *supra* note 776, at 18-19.

[779] *Transcript of RSP Public Meeting* 377-82 (Dec. 12, 2013) (testimony of Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

[780] *See* Transcript of RSP Public Meeting, 324, 393-95 (Nov. 8 2013) (testimony of Mr. David Court, attorney-at-law, Court and Carpenter, Stutgart, Germany); *see also id.* at 393-95 (Testimony of Captain Charles N. Purnell, Commanding Officer, Defense Service Office Southeast); *Transcript of RSP Comparative Systems Subcommittee Meeting* 229-235 (Jan. 7, 2014)(testimony of Ms. Lisa Wayne, National Association of Criminal Defense Lawyers).

[781] *Transcript of RSP Public Meeting* 326-27 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program (DCAP), Marine Corps Defense Services Organization, U.S. Marine Corps); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 221-30 (Mar. 11, 2014)

[782] *See generally* JSC-SAS Report, Appendix C-P (Sept. 2013) (on file at RSP); Charles D. Stimson, "Sexual Assault in the Military: Understanding the Problem and How to Fix It" (Nov. 6, 2013) (noting "the best public defender offices in the country have full-time criminal investigators"); *Transcript of RSP Comparative Systems Subcommittee Meeting* 230 (Jan. 7, 2014) (testimony of Ms. Lisa Wayne, NACDL) ("I don't know a lawyer in the country that does sex offenses without an investigator, except in the military. Really, there is no such thing.").

[783] *Id.* at 326-27 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps).

[784] *Transcript of RSP Comparative Systems Subcommittee Meeting* 220-23 (Mar. 11, 2014) (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member).

[785] *Id.* at 222.

[786] *Id.* at 229 (comments of Mr. Russ Strand, Subcommittee Member).

[787] *Id.* at 222 (comments of Colonel (Ret.) Lawrence Morris, Subcommittee Member). Civilian defense investigators have a variety of backgrounds and training; most have criminal justice training or education. *See generally* JSC-SAS Appendices, *supra* note 361, apps. C-P. Others have a law enforcement background or are former private investigators. But this is not always the case. *Id.* For example, the Bronx Public Defenders office, as a matter of policy, does not hire former police officers as investigators. *Id.,* app. K. Defense attorneys sometimes find that police detectives are more intimidating and not as approachable for defendants, their families, or other witnesses as others who do not possess a law enforcement background. *Id.*

[788] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 342-43 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

[789] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Detective Sergeant Rob Barnett, Special Investigations Unit, Snohomish County Sheriff's Office); *see also Transcript of RSP Comparative Systems Subcommittee Meeting* 341-42 (Nov. 19, 2013) (testimony of Major Martin Bartness, Baltimore Police Department).

[790] *See, e.g., Transcript of RSP Public Meeting* 212 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command (Army CID)).

[791] *See, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 82-84 (Nov. 19, 2013) (testimony of Ms. Donna Ferguson, U.S. Army Military Police School (USAMPS)); *id.* at 123-24 (testimony of Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation (AFOSI)).

[792] Cassia Spohn and Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles,* 74(2) Alb. L. Rev. 1381 (2011).

[793] PERF, *supra* note 501.

[794] End Violence Against Women International (EVAWI), "Effective Report Writing: Using the Language of Non-Consensual Sex," *available at* http://olti.evawintl.org/Courses.aspx.

[795] *See, e.g., Transcript of RSP Public Meeting* 278 (Dec. 11, 2013) (testimony of Sergeant Liz Donegan, Austin Police Department).

[796] *See Transcript of RSP Comparative Systems Subcommittee Meeting* 487 (Jan. 7, 2014) (testimony of Ms. Claudia Bayliff, Attorney at Law).

[797] *See e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 103 (Nov. 19, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, Army CID).

[798] Army's Response to RSP Request for Information 134 (Apr. 14, 2014).

[799] Services' Responses to RSP Request for Information 134 (Apr. 14, 2014).

[800] FY14 NDAA, *supra* note 4, § 1725(b); *see also* OVW Protocol, *supra* note 323.

[801] *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Everett, WA* (Feb. 6, 2014) (on file at RSP) (interview of Ms. Paula Newman-Skomski, SAFE Coordinator, Dawson Place).

[802] *See* CSS Report to RSP, Annex, *infra*, at 116 n.435.

[803] *See, e.g.*, *Transcript of RSP Public Meeting* 432 (Dec. 12, 2013) (testimony of Ms. Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office) ("The very, very minimal amount of experience is three years, and normally our entry level is at five or six years of prosecuting statements. . . . I want to know how many statements you've taken from defendants, how many search warrants have you done, how many DNA cases have you put on, how many fingerprint experts have you put on, how many defendants have you cross-examined, how many jury trials have you had, how many judge trials you've had[.]"); *see also id.* at 460 (testimony of Ms. Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office for the District of Columbia) ("Similar to what Martha just said, we have the same type of system where in order to get into that unit, people have to wait for a vacancy. They have to apply. We review their experience, we review their experience similar to what Martha said with DNA, with vulnerable victims.").

[804] *Transcript of RSP Public Meeting* 414, 416 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, Trial Counsel Assistance Program (TCAP), U.S. Army); *see also* Army's Response to RSP Request for Information 75(b),(c) (Dec. 19, 2013); Army's Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[805] For an in-depth discussion on counsel training and experience, *see* Appendix G to CSS Report to RSP, Annex, *infra*.

[806] Army's Response to RSP Request for Information 75(c) (Dec. 19, 2013).

[807] Air Force's Response to RSP Request for Information 1(d) (Nov. 1, 2013); Air Force's Response to Request for Information 75(c) (Dec. 19, 2013); *see also Transcript of RSP Public Meeting* 404-08 (Dec. 12, 2013) (testimony of Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force).

[808] *See* Air Force's Response to Request for Information 1(d) (Nov. 1, 2013). These courses include Trial and Defense Advocacy (Air Force); Advanced Trial Advocacy (Air Force); Advanced Sexual Assault Litigation (Air Force); Prosecuting Complex Cases (Navy); Intermediate Trial Advocacy (Department of Justice); Criminal Law Advocacy Course/Prosecuting Sexual Assaults (Army); Special Victims Unit Course (Army); Sex Crimes Investigation Training Program (Air Force); Prosecuting Alcohol-Fueled Sexual Assaults (Navy); and National District Attorneys Association Sexual Assault Prosecution. *Id.*

[809] Annual Report Submitted to the Committees on Armed Services of the United States Senate and the United States House of Representatives and to the Secretary of Defense, Secretary of Homeland Security, and the Secretaries of the Army, Navy, and Air Force Pursuant to the Uniform Code of Military Justice for the Period October 1, 2012 to September 30, 2013 [hereinafter CAAF FY13 Report], at 77-78 (Annual Report of the Judge Advocate General of the Navy), *available at* http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf.

[810] Navy's Response to RSP Request for Information 1(d) (Nov. 1, 2013); Navy's Response to Request for Information 75(c) (Dec. 19, 2013).

[811] *Transcript of RSP Public Meeting* 412-14 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

[812] For additional information regarding the Services' TCAPs, see Appendix G to CSS Report to RSP, Annex, *infra*.

[813] *Transcript of RSP Public Meeting* 412-14 (Dec. 12, 2013) (testimony of Lieutenant Colonel Jay Morse, Chief, TCAP, U.S. Army).

[814] *Id.* at 412.

[815] *But see* Air Force's Response to RSP Request for Information 146 (Apr. 11, 2014) (discussing figures in context).

[816] *Transcript of RSP Public Meeting* 427-30 (Dec. 12, 2013) (testimony of Major Mark Sameit, Branch Head, TCAP, U.S. Marine Corps).

[817] *Id.*

[818] Marine Corps' Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[819] *Id.*

[820] For a more in-depth analysis of the Navy's MJLCT, see Appendix G to CSS Report to RSP, Annex, *infra*.

[821] *Transcript of RSP Public Meeting* 304-35 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, DCAP, Trial Defense Service U.S. Army, Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force, Commander Don King, Director, DCAP, U.S. Navy, testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps).

[822] *Id.*

[823] For an in-depth discussion on counsel training and experience, see Appendix G to CSS Report to RSP, Annex, *infra*.

[824] *Transcript of RSP Public Meeting* 314-19 (Dec. 12, 2013) (testimony of Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force).

[825] *Id.*

[826] *Id.*

[827] Navy's Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[828] *Transcript of RSP Public Meeting* 304-09 (Dec. 12, 2013) (testimony of Commander Don King, Director, DCAP, U.S. Navy).

[829] *Id.*

[830] *Id.* at 319-35 (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps U.S. Marine Corps).

[831] *Id.*; *Transcript of RSP Comparative Systems Subcommittee Meeting* 426 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County).

[832] *See* MCO P5800.16A, *supra* note 378, ch. 2.

[833] Coast Guard's Response to RSP Request for Information 1(d) (Nov. 1, 2013); Coast Guard's Response to RSP Request for Information 75(c) (Dec. 19, 2013).

[834] *Id.*

[835] *See, e.g.*, *Transcript of RSP Public Meeting* 310-12 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, DCAP, Trial Defense Service U.S. Army).

[836] Services' Responses to RSP Request for Information 1(d) (Nov. 1, 2013); Services' Responses to RSP Request for Information 75(c) (Dec. 19, 2013).

[837] Counsel interviewed stated that defense counsel tour lengths may range from 12 to 24 months. *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Norfolk, VA* (Feb. 20, 2013) (on file at RSP); *Transcript of RSP Comparative Systems Subcommittee Meeting* 426-27 (Jan. 7, 2014) (testimony of Kate Coyne, Highly Qualified Expert and Deputy Public Defender, San Diego County); *Transcript of RSP Public Meeting* 321, 325 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Fort Hood, TX* (Dec. 10, 2013) (on file at RSP).

[838] *See generally, id.*

[839] For an in-depth discussion on counsel training and experience, see Appendix G to CSS Report to RSP, Annex, *infra*.

[840] In this report, the term "highly qualified expert" is used to refer to highly experienced civilian personnel employed to support litigation efforts.

[841] *Transcript of RSP Public Meeting* 312 (Dec. 12, 2013) (testimony of Lieutenant Colonel Fansu Ku, Chief, DCAP, U.S. Army Trial Defense Service).

[842] CAAF FY13 Report, *supra* note 809, at 68 (Annual Report of the Judge Advocate General of the Navy).

[843] *Id.*

[844] *Id.*

[845] *Transcript of RSP Public Meeting* 319-35 (Dec. 12, 2013) (testimony of Captain Scott (Russ) Shinn, Officer-in-Charge, DCAP, Marine Corps Defense Services Organization, U.S. Marine Corps).

[846] *Id.*

[847] *See, e.g.*, *Transcript of RSP Comparative Systems Subcommittee Meeting* 353-58 (Jan. 7, 2014) (testimony of Colonel Kenneth M. Theurer, Commandant, Air Force Judge Advocate General's School, U.S. Air Force); *id.* at 355-56 (testimony of Lieutenant Commander Justin R. McEwan, Head, Military Justice Department, Naval Justice School, U.S. Navy).

[848] Navy's Response to RSP Request for Information 1(d) (Nov. 1, 2013).

[849] *See, e.g.*, *id.* at 374, 382 (Dec. 12, 2013) (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department; and Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia).

[850] *See, e.g.*, *id.* at 374, 382 (testimony of Mr. Barry G. Porter, Attorney and Statewide Trainer, New Mexico Public Defender Department; and Mr. James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for District of Columbia).

[851] *Id.* at 329-31 (testimony of Captain Scott (Russ) Shinn, U.S. Marine Corps); *Transcript of RSP Comparative Systems Subcommittee Meeting* 437-39 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and former Deputy Public Defender, San Diego County); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel).

[852] *Id.*

[853] *Transcript of RSP Comparative Systems Subcommittee Meeting* 437-39 (Jan. 7, 2014) (testimony of Ms. Kate Coyne, Highly Qualified Expert and former Deputy Public Defender, San Diego County); *Minutes of RSP Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico* (Mar. 5, 2014) (on file at RSP) (interviews of defense counsel).

[854] CAAF FY13 Report, *supra* note 809, at 55, 68 (Annual Report of the Judge Advocate General of the Navy); *see also, e.g., Transcript of RSP Comparative Systems Subcommittee Meeting* 411 (Jan. 7, 2014) (testimony of Mr. Neal Puckett, Highly Qualified Expert, DCAP, U.S. Navy).

[855] Army's Response to RSP Request for Information 147 (Apr. 11, 2014).

[856] *Id.*

[857] *Id.*

[858] *Id.*

[859] *Id.*

[860] *Id.*

[861] *See Transcript of RSP Public Meeting* 237 (Dec. 11, 2013) (testimony of Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, Army CID); *see also id.* at 245 (Dec. 11, 2013) (testimony of Mr. Darrell Gillard, Deputy Assistant Director, NCIS).

[862] *See id.* at 90 (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School).

[863] For example, the Army obtained eighteen authorizations for SVPs beginning in 2009. *See Transcript of RSP Public Meeting* 181 (Dec. 11, 2013) (testimony of Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army). The Air Force maintained sixteen Senior Trial Counsel worldwide – ten of these designated as Senior Trial Counsel-Special Victim Units to comply with the Congressional SVC mandate. *Id.* at 158 (testimony of Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force). The Navy established its career litigation track in 2007, which enabled it to meet the SVC requirement for specialized prosecutors. *Id.* at 148-50 (testimony of Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy). In 2012, the Marine Corps completely reorganized its legal community into regional Complex Trial Teams. *Id.* at 146 (testimony of Captain Jason Brown, Military Justice Officer, Marine Corps Headquarters, U.S. Marine Corps).

[864] RoC Subcommittee Report to RSP, Annex, *infra*, at 94-97.

[865] RoC Subcommittee Report to RSP, Annex, *infra*, at 101-06.

[866] *Id.* at 104-05.

[867] *Id.* at 105-06.

[868] For further discussion on barriers to reporting, *see* Chapter Two, *supra,* at Part A.

[869] RoC Subcommittee Report to RSP, Annex, *infra* at 113-14; *see* Memorandum from RoC Subcommittee to RSP on Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes (Nov. 6, 2013), *reprinted in* RoC Subcommittee Report to RSP, Annex, *infra,* at app. F.

[870] *Id.*

[871] RoC Subcommittee Report to RSP, Annex, *infra*, at 113.

[872] *Id.*; *see Transcript of RSP Public Meeting* 198-290 (Nov. 8, 2013).

[873] White House Report, *supra* note 16, at 5.

[874] *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).

[875] *Id.*

[876] RoC Subcommittee Report to RSP, Annex, *infra*, at 88.

[877] *Id.*

[878] RoC Subcommittee Report to RSP, Annex, *infra*, at 113; *see also Transcript of RSP Public Meeting* 135-36 (Jan. 30, 2014) (testimony of General (Retired) Roger A. Brady, U.S. Air Force).

[879] 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 RSP Request for Information 1(c) (Nov. 21, 2013).

[880] RoC Subcommittee Report to RSP, Annex, *infra*, at 114.

[881] *See, e.g., Transcript of RSP Public Meeting* 325-26 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Out Defenders); *Transcript of SASC Hearing, supra* note 34, at 122 (testimony of Ms. Parrish); *Transcript of RSP Role of the Commander Subcommittee Meeting* 45-48 (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Marty Evans, U.S. Navy); *id.* at 100 (testimony of Ms. K. Denise Rucker Krepp, former Chief Counsel, U.S. Maritime Administration).

[882] RoC Subcommittee Report to RSP, Annex, *infra*, at 113.

[883] *See* H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevision Act (2013) [hereinafter H.R. 1593]; S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013) [hereinafter S. 1752]; S. 1917, 113th Congress, Victims Protection Act of 2014 (2014) [hereinafter S. 1917]. The "Fair Military Act" or "Furthering Accountability and Individual Rights within the Military Act of 2014," H.R. 4485, 113th Cong., was filed in the House of Representatives by Representatives Michael Turner (R-OH) and Niki Tsongas (D-MA) on April 10, 2014. The Act, which contains five provisions from the Victims Protection Act of 2014, was referred to Committee and is not discussed separately in this report.

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

[885] *See* FY14 NDAA, *supra* note 4, § 1744, discussed, *supra,* at Chapter 8, Part C.

[886] *Id.* at § 1744(c)(d); S. 1917 § 2.

[887] *See* Chapter 8, *supra*, at Part C.

[888] *Id.* at § 3(b). In addition, Section 3(a) would add to the responsibilities of special victim counsel the requirement to advise victims of the advantages and disadvantages of prosecution by courts-martial versus in a civilian jurisdiction.

[889] There may be a misperception surrounding the manner by which character evidence can be introduced in courts-martial. Civilian and military rules about introducing character evidence in criminal trials are nearly identical, and both permit admission of relevant character evidence at trial. Consistently, military courts have broadly interpreted the evidentiary rule to permit a Service member to seek to admit good military character evidence as part of his or her defense.

[890] S. 1917 at § 3(g); CSS Report to RSP, Annex, *infra*, at 196-200.

[891] H.R. 1593, at § 5.

[892] S. 1752, at § 2. The UCMJ does not classify offenses as misdemeanors or felonies.

[893] H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2012).

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

[895] *Id.* at § 4.

[896] *Id.* at § 3.

[897] *Id.* at § 5. 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. *Id.*

[898] Library of Congress, "Summary: H.R. 1593 – 113th Congress (2013-2014)," *available at* http://beta.congress.gov/bill/113th-congress/house-bill/1593?q=%7B%22search%22%3A%5B%22Speier%22%5D%7D.

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

[900] S. 1197, § 552, amend. no. 2099 (2013).

[901] *See* Senator Kirsten E. Gillibrand, "Floor Speech on Technical Issues," *available at* http://www.gillibrand.senate.gov/mjia/technical-fixes.

[902] S. 1752 at § 2(a)(2).

[903] *Id.* § 2(a)(3).

[904] *Id.* at § 3.

[905] *Id.* at § 3(c).

[906] *Id.* at § 3(a).

[907] RoC Subcommittee Report to RSP, Annex, *infra*, at 42-43; *see* S. 1752, § 4.

[908] *See*, *supra*, this chapter at Section A.

Appendix A:
LEGISLATION ESTABLISHING THE PANEL AND CHARTER

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

SECTION 576. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) INDEPENDENT REVIEWS AND ASSESSMENTS REQUIRED.—

(1) RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES.—
The Secretary of Defense shall establish a panel 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) JUDICIAL PROCEEDINGS SINCE FISCAL YEAR 2012 AMENDMENTS.— The Secretary of Defense shall establish a panel to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the H. R. 4310—128 amendments made to the Uniform Code of Military Justice by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112–81; 125
Stat. 1404) for the purpose of developing recommendations for improvements to such proceedings.

(b) ESTABLISHMENT OF INDEPENDENT REVIEW PANELS.—

(1) COMPOSITION.—
(A) RESPONSE SYSTEMS PANEL.—The panel required by subsection (a)(1) shall be composed of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the chairman and ranking member of the Committees on Armed Services of the Senate and the House of Representatives.
(B) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall be appointed by the Secretary of Defense and consist of five members, two of whom must have also served on the panel established under subsection (a)(1).

(2) QUALIFICATIONS.—The members of each panel shall be selected from among private United States citizens who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in State and Federal criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes.

(3) CHAIR.—The chair of each panel shall be appointed by the Secretary of Defense from among the members of the panel.

(4) PERIOD OF APPOINTMENT; VACANCIES.—Members shall be appointed for the life of the panel. Any vacancy in a panel shall be filled in the same manner as the original appointment.

(5) DEADLINE FOR APPOINTMENTS.—
(A) RESPONSE SYSTEMS PANEL.—All original appointments to the panel required by subsection (a)(1) shall be made not later than 120 days after the date of the enactment of this Act.
(B) JUDICIAL PROCEEDINGS PANEL.—All original appointments to the panel required by subsection (a)(2) shall be made before the termination date of the panel established under subsection (a)(1), but no later than 30 days before the termination date.

(6) MEETINGS.—A panel shall meet at the call of the chair.

(7) FIRST MEETING.—The chair shall call the first meeting of a panel not later than 60 days after the date of the appointment of all the members of the panel.

(c) REPORTS AND DURATION.—

(1) RESPONSE SYSTEMS PANEL.—The panel established under subsection (a)(1) shall terminate upon the earlier of the following:
(A) Thirty days after the panel has submitted a report of its findings and recommendations, through the Secretary of Defense, to the Committees on Armed Services of the Senate and the House of Representatives.
(B) Eighteen months after the first meeting of the panel, by which date the panel is expected to have made its report.

(2) JUDICIAL PROCEEDINGS PANEL.—
(A) FIRST REPORT.—The panel established under subsection (a)(2) shall submit a first report, including any proposals for legislative or administrative changes the panel considers appropriate, to the Secretary of Defense and the Committees on Armed Services of the Senate and the House of Representatives not later than 180 days after the first meeting of the panel.
(B) SUBSEQUENT REPORTS.—The panel established under subsection (a)(2) shall submit subsequent reports during fiscal years 2014 through 2017.
(C) TERMINATION.—The panel established under subsection (a)(2) shall terminate on September 30, 2017.

(d) DUTIES OF PANELS.—

(1) RESPONSE SYSTEMS PANEL.—In conducting a systemic review and assessment, the panel required by subsection (a)(1) 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 section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice). The review shall include the following:
(A) Using criteria the panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the Uniform Code of the Military Justice, and the investigation, prosecution, and adjudication, of adult sexual assault crimes during the period 2007 through 2011.

(B) A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims and the identification of civilian best practices that may be incorporated into any phase of the military system.
(C) An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial.
(D) An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems.
(E) An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences.
(F) An assessment of the roles and effectiveness of commanders at all levels in preventing sexual assaults and responding to reports of sexual assault.
(G) An assessment of the strengths and weakness of 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.
(H) An assessment of the adequacy of the systems and procedures to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by section 3771 of title 18, United States Code, Department of Defense Directive 1030.1, and Department of Defense Instruction 1030.2.
(I) Such other matters and materials the panel considers appropriate.

(2) JUDICIAL PROCEEDINGS PANEL.—The panel required by subsection (a)(2) shall perform the following duties:
(A) Assess and make recommendations for improvements in the implementation of the reforms to the offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice that were enacted by section 541 of the National Defense Authorization Act for Fiscal Year 2012 (Public Law 112– 81; 125 Stat. 1404).
(B) Review and evaluate current trends in response to sexual assault crimes whether by courts-martial proceedings, non-judicial punishment and administrative actions, including the number of punishments by type, and the consistency and appropriateness of the decisions, punishments, and administrative actions based on the facts of individual cases.
(C) Identify any trends in punishments rendered by military courts, including general, special, and summary courts-martial, in response to sexual assault, including the number of punishments by type, and the consistency of the punishments, based on the facts of each case compared with the punishments rendered by Federal and State criminal courts.
(D) Review and evaluate court-martial convictions for sexual assault in the year covered by the most-recent report required by subsection (c)(2) and the number and description of instances when punishments were reduced or set aside upon appeal and the instances in which the defendant appealed following a plea agreement, if such information is available.
(E) Review and assess those instances in which prior sexual conduct of the alleged victim was considered in a proceeding under section 832 of title 10, United States Code (article 32 of the Uniform Code of Military Justice),and any instances in which prior sexual conduct was determined to be inadmissible.
(F) Review and assess those instances in which evidence of prior sexual conduct of the alleged victim was introduced by the defense in a court-martial and what impact that evidence had on the case.

(G) Building on the data compiled as a result of paragraph (1)(D), assess the trends in the training and experience levels of military defense and trial counsel in adult sexual assault cases and the impact of those trends in the prosecution and adjudication of such cases.
(H) Monitor trends in the development, utilization and effectiveness of the special victims capabilities required by section 573 of this Act.
(I) Monitor the implementation of the April 20, 2012, Secretary of Defense policy memorandum regarding withholding initial disposition authority under the Uniform Code of Military Justice in certain sexual assault cases.
(J) Consider such other matters and materials as the panel considers appropriate for purposes of the reports.

(3) UTILIZATION OF OTHER STUDIES.—In conducting reviews and assessments and preparing reports, a panel may review, and incorporate as appropriate, the data and findings of applicable ongoing and completed studies.

(e) AUTHORITY OF PANELS.—

(1) HEARINGS.—A panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the panel considers appropriate to carry out its duties under this section.

(2) INFORMATION FROM FEDERAL AGENCIES.—Upon request by the chair of a panel, a department or agency of the Federal Government shall provide information that the panel considers necessary to carry out its duties under this section.

(f) PERSONNEL MATTERS.—

(1) PAY OF MEMBERS.—Members of a panel shall serve without pay by reason of their work on the panel.

(2) TRAVEL EXPENSES.—The members of a panel shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance or services for the panel.

(3) STAFFING AND RESOURCES.—The Secretary of Defense shall provide staffing and resources to support the panels, except that the Secretary may not assign primary responsibility for such staffing and resources to the Sexual Assault Prevention and Response Office.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

SECTION 1722. ADVANCEMENT OF SUBMITTAL DEADLINE FOR REPORT OF INDEPENDENT PANEL ON ASSESSMENT OF MILITARY RESPONSE SYSTEMS TO SEXUAL ASSAULT.

SECTION 576(C)(1)(B) OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013 (PUBLIC LAW 112–239; 126 STAT. 1759) IS AMENDED BY STRIKING "EIGHTEEN MONTHS" AND INSERTING "TWELVE MONTHS".

SEC. 1731. INDEPENDENT REVIEWS AND ASSESSMENTS OF UNIFORM CODE OF MILITARY JUSTICE AND JUDICIAL PROCEEDINGS OF SEXUAL ASSAULT CASES.

(a) ADDITIONAL DUTIES FOR RESPONSE SYSTEMS PANEL.—

(1) ADDITIONAL ASSESSMENTS SPECIFIED.—The independent panel established by the Secretary of Defense under subsection (a)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013 (Public Law 112–239; 126 Stat. 1758), known as the "response systems panel", shall conduct the following:

(A) An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), would have on overall reporting and prosecution of sexual assault cases.

(B) An assessment regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance under section 1044e of title 10, United States Code, as added by section 1716, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

(C) An assessment of the feasibility and appropriateness of extending to victims of crimes covered by chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), the right afforded a crime victim in civilian criminal legal proceedings under subsection (a)(4) of section 3771 of title 18, United States Code, and the legal standing to seek enforcement of crime victim rights provided by subsection (d) of such section.

(D) An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel only for the purposes of identifying individuals who are subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report of sexual assault in those cases in order to facilitate increased prosecutions, particularly of serial offenders. The assessment should include an evaluation of the appropriate content to be included in the database, as well as the best means to maintain the privacy of those making a restricted report.

(E) As part of the comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes, as required by subsection (d)(1)(B) of section 576 of the National Defense Authorization Act for Fiscal Year 2013, an assessment of the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the

military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

(F) 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.

(2) SUBMISSION OF RESULTS.—The response systems panel shall include the results of the assessments required by paragraph (1) in the report required by subsection (c)(1) of section 576 of the National Defense Authorization Act for Fiscal Year 2013, as amended by section 1722.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

SEP - 4 2013

The Honorable Barbara S. Jones
Chair, Response Systems Panel
Response Systems Panel

Dear Judge Jones:

Once again, I would like to thank you and the other members of the Response Systems Panel for assisting the Department in addressing the problem of sexual assault in the military. I understand from my staff that the Panel's work is well underway and that resources are being provided to assist the Panel with this very important endeavor.

On behalf of the Secretary of Defense, I am writing to request that the Response Systems Panel, in addition to its statutory requirement to evaluate sentencing guidelines, study the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy. Additionally, the Department requests that the Panel assess the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates). Finally, if the Panel proposes mandatory minimum sentences, I request that the Panel also address whether Congress should establish such mandatory minimums itself or should authorize the President to do so.

Please let me know if there are any additional resources the Panel needs to ensure it can accomplish its taskings.

Sincerely,

Robert S. Taylor
Acting

Charter
Response Systems to Adult Sexual Assault Crimes Panel

1. Committee's Official Designation: The Committee shall be known as the Response Systems to Adult Sexual Assault Crimes Panel ("the Response Systems Panel").

2. Authority: The Secretary of Defense, as required by Section 576(a)(1) of the National Defense Authorization Act for Fiscal Year 2013 ("the FY 2013 NDAA") (Public Law 112-239) and in accordance with the Federal Advisory Committee Act of 1972 (FACA) (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established the Response Systems Panel.

3. Objectives and Scope of Activities: The Response Systems Panel will conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses, under 10 U.S.C. § 920 (Article 120, Uniform Code of Military Justice (UCMJ)), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.

4. Description of Duties: Section 576(d)(1) of the FY 2013 NDAA 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). Additionally, Section 1731(a) of the National Defense Authorization Act for Fiscal Year 2014 ("the FY 2014 NDAA") (Public Law 113-66) established additional tasks. The Response Systems Panel's review shall include the following:

   a. Using criteria the Response Systems Panel considers appropriate, an assessment of the strengths and weaknesses of the systems, including the administration of the UCMJ, and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period 2007 through 2011.

   b. A comparison of military and civilian systems for the investigation, prosecution, and adjudication of adult sexual assault crimes. This comparison shall include an assessment of differences in providing support and protection to victims, and the identification of civilian best practices that may be incorporated into any phase of the military system. It shall also include an assessment of the opportunities for clemency provided in the military and civilian systems, the appropriateness of clemency proceedings in the military system, the manner in which clemency is used in the military system, and whether clemency in the military justice system could be reserved until the end of the military appeals process.

   c. An assessment of advisory sentencing guidelines used in civilian courts in adult sexual assault cases and whether it would be advisable to promulgate sentencing guidelines for use in courts-martial. Such assessment should include a study of the advisability of adopting mandatory minimum sentences for the most serious sexual assault offenses, including rape and sodomy, and the possible collateral consequences of such mandatory minimum sentences (including likely effects on sexual assault reporting, the ratio of guilty pleas to contested cases, and conviction rates). If the Response Systems Panel proposes mandatory minimum sentences, it should address whether Congress should establish such mandatory minimums itself or authorize the President to do so.

Charter
Response Systems to Adult Sexual Assault Crimes Panel

d. An assessment of the training level of military defense and trial counsel, including their experience in defending or prosecuting adult sexual assault crimes and related offenses, as compared to prosecution and defense counsel for similar cases in the Federal and State court systems.

e. An assessment and comparison of military court-martial conviction rates with those in the Federal and State courts and the reasons for any differences.

f. An assessment of the roles and effectiveness of commanders, at all levels, in preventing sexual assaults and responding to reports of sexual assault, including the role of a commander under Article 60, UCMJ.

g. An assessment of the strengths and weaknesses of 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.

h. An assessment of the adequacy of the systems and proceedings to support and protect victims in all phases of the investigation, prosecution, and adjudication of adult sexual assault crimes, including whether victims are provided the rights afforded by 18 U.S.C. § 3771, Department of Defense (DoD) Directive 1030.1, and DoD Instruction 1030.2.

i. 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.

j. An assessment regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance under 10 U.S.C. § 1044e, as added by Section 1716 of the FY 2014 NDAA, to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

k. An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ, the rights afforded a crime victim in civilian criminal legal proceedings under 18 U.S.C. § 3771(a)(4), and the legal standing to seek enforcement of crime victim rights provided by 18 U.S.C. § 3771(d).

l. An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel only for the purposes of identifying individuals who are subjects of multiple accusations of sexual assault and encouraging victims to make an unrestricted report of sexual assault in those cases in order to facilitate increased prosecutions, particularly of serial offenders. The assessment should include an evaluation of the appropriate content to be included in the database, as well as the best means to maintain the privacy of those making a restricted report.

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m. An assessment of whether the DoD 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.

n. Such other matters and materials the Response Systems Panel considers appropriate.

In conducting reviews and assessments and preparing reports, the Response Systems Panel may review and incorporate, as appropriate, the dates and findings of applicable ongoing and completed studies. The Response Systems Panel may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Response Systems Panel considers appropriate to carry out its duties. Upon request by the Chair of the Response Systems Panel, a department or agency of the Federal Government shall provide information that the Response Systems Panel considers necessary to carry out its duties.

5. Agency or Official to Whom the Committee Reports: The Response Systems Panel shall provide the Committees on the Armed Services of the Senate and the House of Representatives, through the General Counsel of the Department of Defense and the Secretary of Defense, a report of its findings and recommendations.

6. Support: 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, shall provide staffing and resources as deemed necessary for the performance of the Response Systems Panel's functions, and shall ensure compliance with the requirements of the FACA, the Government in the Sunshine Act of 1976 ("the Sunshine Act"), and governing Federal regulations and the DoD policies and procedures.

7. Estimated Annual Operating Costs and Staff Years: The estimated annual operating cost, to include travel, meetings, and contract support, is approximately $4,000,000 and 15 full-time equivalents.

8. Designated Federal Officer: The Response Systems Panel's Designated Federal Officer (DFO), pursuant to DoD policy, shall be a full-time or permanent part-time the DoD employee, and shall be appointed, in accordance with governing DoD policies and procedures.

   In addition, the Response Systems Panel's DFO is required to be in attendance at all meetings of the Response Systems Panel and its subcommittees for the entire duration of each and every meeting. However, in the absence of the Response Systems Panel's DFO, a properly approved Alternate DFO, duly appointed to the Response Systems Panel, according to DoD policies and procedures, shall attend the entire duration of the Response Systems Panel and its subcommittee meetings.

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The DFO, or the Alternate DFO, shall approve the meeting of the Response Systems Panel and its subcommittees called by the Chair; prepare and approve all meeting agendas; and adjourn any meeting when the DFO or the Alternate DFO determines adjournment to be in the public interest or required by governing regulations or the DoD policies and procedures.

9. Estimated Number and Frequency of Meetings: Consistent with Sections 576(b)(6) and (7) of the FY 2013 NDAA, the Response Systems Panel shall meet at the call of the Chair, and the Chair shall call the first meeting of the Response Systems Panel not later than 60 days after the date of the appointment of all the members of the Response Systems Panel. The Committee shall meet, at a minimum, once per year.

10. Duration: The duration of the Response Systems Panel shall not exceed 12 months after the first meeting of the panel.

11. Termination: According to Section 576(c)(1) of the FY 2013 NDAA, as amended by Section 1722 of the FY 2014 NDAA, the Response Systems Panel shall terminate upon the earlier of the following:

    a. Thirty days after the Response Systems Panel has submitted a report of its findings and recommendations, through the DoD General Counsel and the Secretary of Defense, to the Committees on Armed Services of the Senate and the House of Representatives.

    b. Twelve months after the first meeting of the Response Systems Panel, by which date the Response Systems Panel is expected to have made its report.

12. Membership and Designation: Pursuant to Section 576(b)(1)(A) of the FY 2013 NDAA, the Response Systems Panel shall be comprised of nine members, five of whom are appointed by the Secretary of Defense and one member each appointed by the Chairmen and Ranking Members of the Committees on Armed Services of the Senate and the House of Representatives, respectively. Appointments shall be made not later than 120 days after the date of the enactment of the FY 2013 NDAA.

    The members shall be selected from among private United States citizens, who collectively possess expertise in military law, civilian law, the investigation, prosecution, and adjudication of sexual assaults in Federal and State criminal courts, victim advocacy, treatment for victims, military justice, the organization and missions of the Armed Forces, and offenses relating to rape, sexual assault, and other adult sexual assault crimes. The Chair shall be appointed by the Secretary of Defense from among the members of the Response Systems Panel. Members shall be appointed for the life of the Response Systems Panel. Any vacancy in the Response Systems Panel shall be filled in the same manner as the original appointment. Members of the Response Systems Panel, who were appointed by the Secretary of Defense, shall be appointed as experts or consultants, under the authority of 5 U.S.C. § 3109, to serve as special government employee (SGE) members. With the exception of travel and per diem for official travel, Response Systems Panel members shall serve without compensation.

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The DoD General Counsel, according to DoD policies and procedures, may select experts and consultants as subject matter experts, under the authority of 5 U.S.C. § 3109, to advise the Response Systems Panel or its subcommittees; these individuals do not count toward the Response Systems Panel's total membership nor do they have voting privileges. In addition, these subject matter experts, when appointed, shall not participate in any discussions dealing with the substantive matters before the Response Systems Panel or its subcommittees.

13. Subcommittees: The DoD, when necessary and consistent with the Response Systems Panel's mission and DoD policies and procedures, may establish subcommittees, task forces, or working groups to support the Response Systems Panel. Establishment of subcommittees will be based upon a written determination, to include terms of reference, by the Secretary of Defense, the Deputy Secretary of Defense, or the DoD General Counsel as the DoD Sponsor.

    These subcommittees shall not work independently of the Response Systems Panel and shall report all of their recommendations and advice to the Response Systems Panel for full deliberation and discussion. Subcommittees, task forces, or working groups have no authority to make decisions and recommendations, verbally or in writing, on behalf of the Response Systems Panel. No subcommittee or any of its members can update or report, verbally or in writing, on behalf of the Response Systems Panel directly to the DoD or any Federal officer or employee.

    The Secretary of Defense shall appoint subcommittee members even if the member in question is already a member of the Response Systems Panel. Such individuals, if not full-time or part-time government personnel, shall be appointed as experts or consultants, under the authority of 5 U.S.C. § 3109, to serve as SGE members. Subcommittee members shall serve for the life of the subcommittee. With the exception of travel and per diem for official travel related to the Response Systems Panel or its subcommittees, subcommittee members shall serve without compensation.

    All subcommittees operate pursuant to the provisions of FACA, the Sunshine Act, governing Federal statutes and regulations, and established DoD policies and procedures.

14. Recordkeeping: The records of the Response Systems Panel and its subcommittees shall be handled according to Section 2, General Records Schedule 26, and governing DoD policies and procedures. These records shall be available for public inspection and copying, subject to the Freedom of Information Act of 1966 (5 U.S.C. § 552, as amended).

15. Filing Date: April 29, 2013
    Modified:

Appendix B:
PANEL MEMBER BIOGRAPHIES

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. Prior to her nomination to the bench in 1995, Judge Jones was the Chief Assistant to Robert M. Morgenthau, then the District Attorney of New York County. In that role she supervised community affairs, public information and oversaw the work of the Homicide Investigation Unit. 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 serves as Interim Dean and Distinguished Scholar in Residence at the Dickinson School of Law, Penn State University. Admiral Houck joined Dickenson after retiring as the 41st Judge Advocate General (JAG) of the U.S. Navy, where he 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.

BRIGADIER GENERAL MALINDA DUNN, U.S. ARMY (RETIRED)

Brigadier General (Retired) Malinda Dunn is Executive Director of the American Inns of Court. Previously, BG Dunn served 28 years in the U.S. Army as a judge advocate, including assignments as Assistant Judge Advocate General for Military Law and Operations, Commander of the U.S. Army Legal Services Agency, and Chief Judge of the Army Court of Criminal Appeals. While serving as Staff Judge Advocate of XVIII Airborne Corps, she served tours of duty in both Afghanistan and Iraq. During her career with the Army, BG Dunn performed some groundbreaking assignments. She was the first female staff judge advocate of the 82nd Airborne Division, with which she did two tours. She was also the first female chief of personnel for the Army JAG Corps, the first female staff judge advocate of the XVIII Airborne Corps, and the first woman selected as a general officer in the active duty Army Judge Advocate General's Corps.

BRIGADIER GENERAL COLLEEN MCGUIRE, U.S. ARMY (RETIRED)

Brigadier General (Retired) Colleen McGuire is the 7th Executive Director of Delta Gamma Fraternity. In August 2012, BG McGuire retired from the United States Army after having served over 32 years, including deployments to Somalia and Iraq. She last served at the Pentagon as Director of Manpower and Personnel on The Joint Staff. As a military police officer, BG McGuire is the first woman in the history of the U.S. Army to hold the highest law enforcement office, Provost Marshal General of the Army; first woman to command the U.S. Army's premier felony investigative organization, Criminal Investigations Command; and the first woman to command the Department of Defense all-male maximum security prison at Fort Leavenworth, Kansas. BG McGuire also served as the director of the Army's Suicide Prevention Task Force.

COLONEL HOLLY COOK, U.S. ARMY (RETIRED)

Colonel (Retired) Holly Cook is the Director, American Bar Association D.C. Operations, Washington, D.C. Previously, COL Cook served 23 years in the U.S. Army as a judge advocate, including assignments as Chief of the Administrative Law Division in the Office of the Judge Advocate General, Chief, Investigations and Legislative Division, Staff Judge Advocate to the 1st Cavalry Division, Deputy Staff Judge Advocate to Multinational Division North, Bosnia, Chief, Criminal Law Division, U.S. Forces Korea, and as Trial Counsel at the U.S. Army Garrison, Fort Huachuca, Arizona.

DEAN ELIZABETH HILLMAN, UC HASTINGS COLLEGE OF LAW

Elizabeth Hillman is Provost & Academic Dean and Professor of Law, University of California Hastings College of the Law. Her scholarship focuses on military law and legal history, and she has taught at UC Hastings, Rutgers University School of Law-Camden, Yale University, and the U.S. Air Force Academy. She 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 addressing military law and culture. She is a Director of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide, and Co-Legal Director of the Palm Center, a think tank that seeks to inform public policy on issues of gender, sexuality, and the military. Dean 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.

HARVEY BRYANT, FORMER COMMONWEALTH'S ATTORNEY, CITY OF VIRGINIA BEACH

For almost 14 years Harvey Bryant led a 90 member office prosecuting approximately 16,000 criminal charges per year in Virginia's largest city. He retired at the end of 2013. Since his election as Commonwealth's Attorney in Virginia Beach, he has served as Virginia Association of Commonwealth's Attorneys' president, Commonwealth's Attorneys' Services Council chairman, and served on the board of directors of both organizations for 13 years, representing the Second Congressional District. He has served as chairman of the Criminal Law Section of the Virginia State Bar Association and represented Virginia on the National District Attorneys' Association board of directors. He is a gubernatorial appointee to Virginia's Criminal Sentencing Commission and serves on the board of directors for the Virginia Criminal Justice Foundation. He served as chairman of the Governor's task force on asset forfeiture in 2012 and on Virginia's Attorney General's advisory committee on restoration of civil rights in 2013.He was awarded the Human Rights Award for Achievement in Government by the Virginia Beach Human Rights Commission in 2013. From 1987-2000 he was a supervisor in the Criminal Division of the U.S. Attorney's Office, Eastern District of Virginia, Norfolk and Newport News Divisions, which duties included supervising Special Assistant United States Attorneys from every branch of the service. After graduating from the College of William and Mary, he served in the U.S. Army for three years followed by five years in the Army Reserves. He graduated from the University Of Richmond School Of Law, was in private practice for nine years and was a prosecutor for over 30 years.

MAI FERNANDEZ, EXECUTIVE DIRECTOR, NATIONAL CENTER FOR VICTIMS OF CRIME

Mai Fernandez has been Executive Director of the National Center for Victims of Crime since June 2010. Ms. Fernandez has had a distinguished 25-year career in the criminal justice, nonprofit, and policy arenas. She has served as the acting executive director of the Latin American Youth Center, a DC-based nonprofit organization that provides multicultural, underserved youth with education, social, and job training services. Ms. Fernandez has spent the last 13 years managing programs that serve victims of child abuse, sex trafficking, and gang violence. Before joining the Latin American Youth Center, Fernandez served as Assistant District Attorney for New York County, helping victims navigate the criminal justice system and pleading their cases before the court. She also developed policy for victims of domestic and youth violence at the U.S. Department of Justice, Office of Justice Programs, and served as a Congressional aide to U.S. Representatives Mickey Leland and Jim Florio.

Appendix C:
SUBCOMMITTEES AND STAFF LIST

ROLE OF THE COMMANDER SUBCOMMITTEE

Honorable Barbara S. Jones, U.S. District Court for the Southern District of New York (Retired), Chair

Former Rep. Elizabeth Holtzman

Vice Admiral James Houck, U.S. Navy (Retired)

Dean Elizabeth Hillman, UC Hastings College of Law

Major General John D. Altenburg, Jr., U.S. Army (Retired)

General Carter F. Ham, U.S. Army (Retired)

Colonel Lisa Turner, U.S. Air Force

Professor Geoffrey Corn, South Texas College of Law (Lieutenant Colonel, U.S. Army (Retired))

Joye E. Frost, Director of the Office for Victims of Crime, Department of Justice

COMPARATIVE SYSTEMS SUBCOMMITTEE

Dean Elizabeth Hillman, UC Hastings College of Law, Chair

Honorable Barbara S. Jones, U.S. District Court for the Southern District of New York (Retired)

Brigadier General Malinda Dunn, U.S. Army (Retired)

Harvey Bryant, Former Commonwealth's Attorney, City of Virginia Beach

General John Cooke, U.S. Army (Retired)

Colonel Stephen Henley, U.S. Army (Retired)

Colonel Dawn Scholz, U.S. Air Force (Retired)

Colonel Larry Morris, U.S. Army (Retired)

Rhonnie Jaus, Former Division Chief, Sex Crimes/ Crimes Against Children Division, Kings County District Attorney's Office

Russell W. Strand, Chief of the U.S. Army Military Police Behavioral Sciences Education & Training Division

VICTIM SERVICES SUBCOMMITTEE

Mai Fernandez, Executive Director, National Center for Victims of Crime, Chair

Honorable Barbara S. Jones, U.S. District Court for the Southern District of New York (Retired)

Former Rep. Elizabeth Holtzman

Brigadier General Colleen McGuire, U.S. Army (Retired)

Michelle J. Anderson, Dean and Professor of Law, CUNY School of Law

Colonel Lisa M. Schenck, Associate Dean for Academic Affairs, The George Washington University Law School, U.S. Army (Retired)

Judge Christel E. Marquardt, Kansas Court of Appeals, Topeka, Kansas

Meg Garvin, Executive Director of the National Crime Victim Law Institute (NCVLI) and clinical professor of law at Lewis & Clark Law School

William E. Cassara, Attorney at Law, U.S. Army (Retired)

DESIGNATED FEDERAL OFFICERS

Ms. Maria Fried, Designated Federal Officer

Mr. William Sprance, Alternate Designated Federal Officer

Lieutenant Colonel Candace Hunstiger, U.S. Air Force, Alternate Designated Federal Officer

RSP STAFF

Colonel Patricia Ham, U.S. Army, Staff Director

Ms. Terri Saunders, Deputy Staff Director

Mr. Dale Trexler, Chief of Staff

Mr. Roger Capretta, Supervising Paralegal

Ms. Sharon Zahn, Senior Paralegal

Ms. Shannon Green, Legislative Analyst

Lieutenant Colonel Kyle Green, U.S. Air Force, Role of the Commander Branch Chief

Lieutenant Colonel Kelly McGovern, U.S. Army, Comparative Systems Branch Chief

Commander Sherry King, U.S. Navy, Victim Services Branch Chief

Ms. Julie Carson, Attorney

Ms. Janice Chayt, Investigator

Major Ranae Doser-Pascual, U.S. Air Force, Attorney

Mr. Dillon Fishman, Attorney

Ms. Joanne Gordon, Attorney

Ms. Rachel Landsee, Attorney

Ms. Kristin McGrory, Attorney

Mr. Douglas Nelson, Attorney

Lieutenant Benjamin Voce-Gardner, U.S. Navy, Attorney

Ms. Amy Grace Peele, Technical Editor

Ms. Laurel Prucha Moran, Graphic Designer

Appendix D:
PANEL METHODOLOGY

To conduct its required assessments and reviews, the Response Systems Panel and its subcommittees used a variety of methods to gather information for Panel consideration. The Panel and its subcommittees held meetings to hear witnesses; conducted site visits at military installations and civilian agencies; requested information from the Department of Defense (DoD), the Services, and victim advocacy organizations; and reviewed publicly available information, data, and articles, in accordance with the Federal Advisory Committee Act of 1972.[1]

A designated federal officer, appointed by the Acting General Counsel of the DoD, attended all Panel and subcommittee meetings and ensured Panel activities complied with statutory mandates, governing regulations, and Department of Defense policies and procedures.

SUBCOMMITTEE FORMATION

To assist the Panel in completing its task in the twelve months allotted by Congress, the Secretary of Defense, at the Panel Chair's request, established three subcommittees: Role of the Commander; Comparative Systems; and Victim Services. Each subcommittee was comprised of at least four members of the Panel and five additional members. The Secretary of Defense charged the subcommittees with investigating and assessing certain objectives and preparing a report with findings and recommendations for the full Panel.

MEETINGS

Since June 2013, the Panel has held 14 days of public meetings to hear from 154 witnesses with different perspectives, experiences, and expertise on topics tasked to the Panel for consideration.[2] Information provided by crime victim rights advocates and organizations, sexual assault victim advocacy groups, military and civilian victim advocates, military sexual assault response coordinators (SARCs), and survivors of sexual assault[3] informed the Panel's understanding of victims' perspectives. Seasoned criminal justice experts such as military and civilian criminal investigators, civilian prosecutors, defense counsel, and victims' counsel as well as medical professionals such as sexual assault nurse examiners (SANE) and other first responders provided technical information and their professional perspectives to the Panel. A variety of social science professors, law professors, statisticians, criminologists, and behavioral health professionals provided independent academic assessments. Current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; Judge Advocates General from each of the Services; and current United States Senators shared their perspectives on sexual assault prevention and response in the military, command, the maintenance of good order and discipline, operational requirements and perspectives, and the military justice system.

Panel members heard testimony from witnesses and asked questions. Many witnesses provided additional documents, studies, and other materials for the Panel's consideration. In accordance with Federal Advisory

Committee Act requirements, the Panel also considered written submissions from members of the public and heard public comments at each meeting.

In addition to public meetings, Panel members attended 65 subcommittee meetings and preparatory sessions. During these meetings and sessions, the members heard from more than 456 witnesses on issues related to the individual objectives of the subcommittees.

SITE VISITS

Panel and subcommittee members visited military installations and civilian agencies to speak with local personnel involved in sexual assault prevention and response efforts and programs. Several site visits used a non-attribution environment to foster candor on the part of participants. This non-attribution environment allowed participants to provide honest, candid, and unguarded opinions about their experiences, their impressions of victim services, military prosecutions, sexual assault response measures, and other relevant topics.

The Role of the Commander, Victims Services, and Comparative Systems Subcommittees visited Fort Hood and Joint Base San Antonio in Texas. Each of the subcommittees used these site visits to gather information related to their assigned objectives. The Comparative Systems Subcommittee also visited the Defense Forensic Science Center/United States Army Criminal Investigation Laboratory and Georgia Bureau of Investigation Lab in Atlanta, Georgia; Naval Base Kitsap, Bremerton and Joint Base Lewis-McChord in Washington; Dawson Place in Everett, Washington; Naval Station Norfolk, Virginia; the Philadelphia Sexual Assault Response Center in Philadelphia, Pennsylvania; and Marine Corps Base Quantico, Virginia. Additional information about the subcommittees' site visits is available in their respective subcommittee reports to the Panel, provided in the annex to this report.

REQUESTS FOR INFORMATION

In addition to meetings, the Panel Chair sent letters with more than 150 requests for information relevant to the duties of the Panel and objectives of the subcommittees to the Secretary of Defense and the Secretaries of the Military Services. In response, the Department of Defense and the Services submitted almost 15,000 pages of narrative responses and attached documents including policies, procedures, statistics, correspondence, and surveys.

The Panel also sent letters to eighteen victim advocacy organizations around the country, including organizations working specifically with military sexual assault, soliciting their input to assist the Panel and subcommittees in their review. 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 provided information to the Panel.

PUBLIC DOCUMENT REVIEW AND RESEARCH

The Panel also completed a comprehensive review of publicly available information. Panel members and staff reviewed government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. One particular source, the data collected by the Joint Service Committee Sexual Assault Subcommittee, provided the Comparative Systems Subcommittee with recent information about investigation, prosecution, defense, and adjudication in civilian jurisdictions.[4]

Additionally, the Panel and subcommittee members conducted legal research including reviewing federal and state court opinions related to the Crime Victims' Rights Act, case law and articles on victim's rights in the military justice system, military case law, and law review articles. General research focused on historical texts on the role of the commander in the military justice system and the legislative history of the UCMJ and other federal statutes.

SUBCOMMITTEE REPORTS TO THE PANEL

When finished with gathering evidence, each subcommittee held a series of meetings to discuss the content of their individual reports and to deliberate on its findings and recommendations. The subcommittee members developed their reports, including their findings and recommendations, based on the evidence collected during Subcommittee meetings and site visits as well as the extensive documentary evidence received from the Services, guided by the terms of reference set forth by the Secretary of Defense.

Once the subcommittees completed their reports, each subcommittee chair presented their findings and recommendations to the full Panel. During these presentations, the subcommittee chairs explained the evidentiary and factual basis for the subcommittee's findings and recommendations. Members of the Panel thoroughly questioned the subcommittee chairs and members on issues and conclusions in their reports. In total, the subcommittees presented 154 recommendations to the Panel for consideration.

PANEL DELIBERATION AND FINAL REPORT OF THE PANEL

Panel members deliberated on each subcommittee recommendation, holding six days of public deliberative hearings to discuss and finalize the Panel's recommendations based on the subcommittees' reports and evidence presented. Ultimately, the Panel approved 132 recommendations consistent with the Panel's statutory responsibilities and issues referred to it for consideration and assessment.

The Panel developed its final report based on the wealth of information gathered over the course of its assessment. The Panel's report responds to its statutory responsibilities and summarizes the information gathered throughout the Panel's study leading to its recommendations.

The reports from the Panel's subcommittees are included as an annex to the Panel's report.

1 5 U.S.C. App. (1972) *as amended*; 41 C.F.R. § 102-3.50(a).

2 A complete list of meetings, preparatory sessions, and site visits conducted by the Response Systems Panel and Subcommittees including witnesses is provided at Appendix E of this report. Agendas, transcripts, and materials for all Panel and subcommittee meetings are available at the Response Systems Panel website, http://responsesystemspanel.whs.mil/.

3 Survivors were afforded the opportunity to keep their identities and Service affiliation confidential. Those who chose to do so are referred to throughout the report by only their initials.

4 The JSC-SAS traveled to eighteen civilian jurisdictions in 2013, gathering information and conducting interviews of law enforcement, prosecutors, public defenders, victims' attorneys, and victim advocates for comparative analysis. *See generally* JSC-SAS Report, Appendices (Sept. 2013) (on file at RSP).

Appendix E:

PANEL AND SUBCOMMITTEE SESSIONS AND PRESENTERS

DATE	RESPONSE SYSTEMS PANEL SESSIONS	PRESENTERS
May 17, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session
June 5, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/Administrative matters/ Planning session
June 14, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference Colonel Patricia A. Ham, Staff Director, Response Systems Panel Basic overview of the military justice process
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 W. Galbreath, Senior Executive Advisor, DoD SAPRO. Mr. Fred Borch, Army JAG Corps Regimental Historian Captain Robert Crow, U.S. Navy, Joint Service Committee Representative
July 16, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session
July 18, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session
July 22, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	Teleconference/ Administrative matters/ Planning session

Aug. 1, 2013	Preparatory Session of Selected Members of the RSP One Liberty Center, Arlington, Virginia	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 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 Selected Members of the RSP One Liberty Center, Arlington, Virginia	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 Selected Members of the RSP One Liberty Center, Arlington, Virginia	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

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 Ms. Miranda Peterson (Public Comment)

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)

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

Dec. 11, 2013	Public Meeting of the RSP University of Texas – Austin, Austin, Texas	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 Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army 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, Texas	Ms. Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office Mr. 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 Ms. Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia Ms. 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 Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force Ms. 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 Mr. 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 Ms. Anne Munch, Owner, Anne Munch Consulting, Inc. Ms. Amy Muth, Attorney-at-Law, The Law Office of Amy Muth Ms. 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 Mr. Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program 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 Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University Mr. 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

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 Ms. Melissa Davis (Public Comment) Ms. Ginny Lee (Public Comment) Ms. Sarah Zak (Public Comment)
May 5, 2014	Public Meeting of the RSP The George Washington University Law School, Washington, D.C.	Major General Jeffrey J. Snow, Director, DoD, SAPRO Panel Deliberations
May 6, 2014	Public Meeting of the RSP The George Washington University Law School, Washington, D.C.	Panel Deliberations Ms. Ginny Lee (Public Comment) Not a Veteran (Public Comment) (*telephonic)*
May 16, 2014	Public Meeting of the RSP U.S. District Court for the District of Columbia, Washington, D.C.	Panel Deliberations Ms. Jen McClendon (Public Comment)
May 29, 2014	Public Meeting of the RSP U.S. District Court for the Southern District of New York	Panel Deliberations
May 30, 2014	Public Meeting of the RSP U.S. District Court for the Southern District of New York	Panel Deliberations Ms. Monisha Rios (Public Comment)
June 16, 2014	Public Meeting of the RSP U.S. District Court for the Southern District of New York	Panel Deliberations Ms. Caprice Nicolette Manos (Public Comment)

DATE	ROLE OF THE COMMANDER SUBCOMMITTEE	PRESENTERS
Oct. 23, 2013	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel Alan Metzler, Deputy Chief, DoD SAPRO Dr. Nathan W. Galbreath, Senior Executive Advisor, DoD SAPRO Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center
Nov. 5, 2013	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Nov. 13, 2013	Subcommittee Meeting One Liberty Center, Arlington, Virginia	Brigadier General Charles Pede, U.S. Army Senator Claire McCaskill (Missouri)
Nov. 20, 2013	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	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, Texas	General Courts-Martial Convening Authorities Special Courts-Martial Convening Authorities and Subordinate Commanders Senior Enlisted Leaders Defense Counsel
Dec. 13, 2013	Site Visit Role of the Commander Subcommittee Joint Base San Antonio - Lackland, Texas	Basic Military Training Commanders and Training Instructors Basic Military Training Trainees Special Courts-Martial Convening Authorities and Subordinate Commanders Senior Enlisted Leaders Defense Counsel

Jan. 8, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	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. 13 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Jan 24, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Jan 28, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session

Feb. 12, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	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. Nathan W. 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
Mar. 12, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	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)
Apr. 8, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 16, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 17, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 21, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session
Apr. 25, 2014	Role of the Commander Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session

DATE	VICTIM SERVICES SUBCOMMITTEE	PRESENTERS
Nov. 21, 2013	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Ms. Shawn Wren, Director, U.S. Coast Guard Sexual Assault and Prevention Office Ms. Tanya Rogers, Program Analyst, US Navy Sexual Assault and Prevention Office Lieutenant Colonel Mike Lewis, Victim Witness Liaison Ms. Peggy Cuevas, Director US Marine Corps, MARFORRES, Sexual Assault Response Coordinator Ms. Carolyn Collins, U.S. Army Ms. Bette Stebbins Inch, Senior Victim Services Advisor, Department of Defense Sexual Assault Response and Prevention Office Lieutenant Colonel Michael Lewis, U.S. Air Force, Joint Services Committee on the UCMJ Commander Sherry King, U.S. Navy, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS) Captain Nicholas Carter, U.S. Air Force, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
Dec. 10, 2013	Site Visit Victim Services Subcommittee Fort Hood, Texas	Military Justice Personnel Behavior Health Personnel Representatives from the Family Advocacy Program Sexual Assault Response Coordinator Victim Advocates Representatives from the Victim Witness Assistance Program Special Victim Counsel
Dec. 13, 2013	Site Visit Victim Services Subcommittee Joint Base San Antonio - Lackland, Texas	Basic Military Training Instructors Basic Military Training Trainees Members of the Special Victim Counsel Office Sexual Assault Response Coordinators Victim Advocates Victim Witness Liaisons
Jan. 9, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Professor Doug Beloof, Lewis and Clark Law School Mr. Russell Butler, Executive Director, Maryland Crime Victims' Resource Center Mr. Jonathan Jeffress, Assistant Federal Public Defender, Washington D.C. Major Ryan Oakley, U.S. Air Force, Department of Defense
Jan. 23, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/Preparatory and Planning Session
Jan. 29, 2014	Victim Services Subcommittee Meeting The George Washington University Law School, Washington, DC	Phone Conference/Preparatory and Planning Session

Feb. 26, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Captain Mike Colston, M.D., U.S. Navy, Director, Mental Health Program, Clinical and Program Policy, Office of the Assistant Secretary of Defense Captain John A. Ralph, Assistant Deputy Chief, Wounded, Ill, and Injured, Navy Bureau of Medicine and Surgery Colonel Marie Colasanti, U.S. Air Force, Chief, Family Advocacy Program, Lackland-Kelly AFB. Colonel Tracy Neal-Walden, Deputy Director, Psychological Health, Air Force Medical Support Agency Lieutenant Colonel Todd Yosick, U.S. Army, Behavioral Health Strategic Integrator and Liaison to the Department of Defense and Veterans Administration. Commander Kristie Robson, Department Head, Clinical Programs, Navy Bureau of Medicine and Surgery Mr. Scott Berkowitz, Founder and President, Rape, Abuse and Incest National Network Ms. Crystel Griffen, U.S. Navy, Family Advocacy Program Ms. Patricia Haist, Director of Clinical Services, YWCA West Central Michigan Ms. Paulette Hubbert, PhD, LCSW, ADC II, USMC (Retired) Ms. Katherine Robertson, DoD, Service Family Advocacy Program Ms. Jacqueline Richardson, U.S. Army, Family Advocacy Program
Mar. 13, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Military Sexual Assault Survivors Subcommittee Deliberation/Report Planning
Mar. 20, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Planning
Mar. 27, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Planning
Apr. 3, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 10, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 16, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 18, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review

Apr. 24, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
Apr. 25, 2014	Victim Services Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Deliberation/ Report Review
DATE	**COMPARATIVE SYSTEMS SUBCOMMITTEE**	**PRESENTERS**
Oct. 21, 2013	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Phone Conference/ Preparatory Session
Nov. 14, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Defense Forensic Science Center (DFSC)/U.S. Army Criminal Investigation Laboratory (USACIL), Atlanta, Georgia	Dr. Jeff Salyards, Exec. Director, DFSC Mr. Robert Abernathy, Chief of Staff, DFSC Ms. Lauren Reed, Dir. USACIL Mr. Mike Hill, Operations Officer, USACIL Mr. Scott Larson, Chief, Security, Plans and Operations Ms. Jennifer Coursey, Supervisory Biologist-DNA Branch Ms. Debra E. Glidewell, Chief, DNA-Branch Ms. Anece l. Baxter-White, Attorney Advisor Ms. Donna Ioannidis, DNA Examiner Ms. Elizabeth D. Johnson, CODIS Dr. Kim E. Mooney, Acting Chief, Trace Evidence Mr. Michael A. Villarreal, Trace Evidence Examiner Mr. William G. Doyne, Technical leader, Latent Prints Ms. Monica Garcia, Latent Print Examiner Mr. Garold Warner, Office of the Chief Scientist Dr. Brigid F. O'Brien, Research Physical Scientist
Nov. 14, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Georgia Bureau of Investigation (GBI) Lab, Atlanta, Georgia	Mr. Mark R. Maycock, Assistant Deputy Director, GBI Ms. Kathryn P. Lee, Assistant Deputy Director, GBI Mr. Cleveland Miles, Forensic Biology Manager, GBI Ms. Tammy Jergovich, Trace Evidence Manager, GBI Mr. Jim Sebestyn, Forensic Biology, GBI

Nov. 19, 2013	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Mr. Scott Russell, Director of the Violent Crime Division, DoD Inspector General Mr. Guy Surian, HQ, US Army Criminal Investigation Command Ms. Donna Ferguson, US Army Military Police School Mr. Kevin Poorman, Office of Special Investigations, US Air Force, Quantico Headquarters Mr. Robert Vance, Programs and Policy, Naval Criminal Investigative Service Chief Warrant Officer Five Shannon Wilson, Marine Corps Investigator MAC Amy Pearson, Naval Investigator Commander Kristie Robson, Department Head of Clinical Programs and Sexual Assault Medical, Program Manager, US Navy Bureau of Medicine and Surgery Colonel Todd Poindexter, Chief of Clinical Operations, Air Force Medical Support Agency, Office of The Surgeon General Ms. Carol Haig, Army Sexual Assault Clinical Provider, Office of the Surgeon General Major Gwendolyn Foster, U.S. Air Force, SAFE, Andrews Air Force Base Dr. Sue Rotolo, Ph.D., SANE, Inova Fairfax Hospital Major Martin Bartness, Baltimore City Police Department Detective Lanis Geluso, Virginia Beach Police Department Lieutenant Joe Carter, Falls Church City Police Department Detective Missy Elliott, Falls Church City Police Department Lieutenant Paul Thompson, Assistant Commander, Major Crimes Division, Fairfax County Police Department Lieutenant Mark Kidd, Sex Squad, Fairfax County Police Department Detective Stephen Wallace, Sex Squad, Fairfax County Police Department Detective Greg Sloan, Arlington Police Department
Dec. 10, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Fort Hood, Texas	General Courts-Martial Convening Authorities Special Courts-Martial Convening Authorities and Subordinate Commanders Senior Enlisted Leaders Defense Counsel Trial Counsel/ Special Victim Prosecutors Medical Personnel Law Enforcement Agencies
Dec. 13, 2013	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Joint Base-San Antonio, Lackland Air Force Base, Texas	Defense Counsel Staff Judge Advocates Medical Personnel Law Enforcement Personnel

Jan. 7, 2013	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel (Retired) Francis Gilligan, Director of Training for of Military Commission Prosecutors Ms. Candace Mosley, Director of Programs, National District Attorneys Association Ms. Viktoria Kristiansson, AEquitas Ms. Lisa Wayne, former President, NACDL and Training Director of Colorado State Public Defender System Ms. Yvonne Younis, Defender Association of Philadelphia Lieutenant Colonel Matthew Calarco, Chair, Criminal Law Department, U.S. Army Colonel Vance Spath, Director, Training and Readiness, U.S. Air Force Lieutenant Commander Justin McEwen, Military Justice Department Head, Naval Justice School Lieutenant Colonel George Cadwalader, Executive Officer, Naval Justice School Ms. Bridget Ryan, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program Ms. Sandra Tullius, Highly Qualified Expert, U.S. Army, Trial Counsel Assistance Program Mr. Ron White, Subject Matter Expert, consultant U.S. Army Trial Defense Services Mr. Edward O'Brien, DCAP Colonel Ken Theurer, Commandant, Air Force Judge Advocate General's School Mr. David M. Houghland, Chief of Education & Training Development, Training and Readiness Directorate, HQ USAF/JAI Mr. Neal Puckett, Highly Qualified Expert, Naval Defense Counsel Assistance Program Ms. Teresa Scalzo, Deputy Director, Navy Judge Advocate General, Trial Counsel Assistance Program (TCAP) Ms. Kathleen Coyne, USMC, Highly Qualified Expert-Defense Ms. Claudia Bayliff, Attorney at Law
Jan. 15, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Planning and Deliberation Session.
Jan. 31, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Planning and Deliberation Session
Feb. 5, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Naval Base Kitsap and Joint Base Lewis-McChord, Washington	Commanders Defense Counsel Civilian Prosecutors Staff Judge Advocate Law Enforcement Personnel Victim Services Personnel

Feb. 6 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Everett, Washington	Ms. Brittany Blancarte - CAP Therapist, Compass Health Ms. Linda Lasz - CAP Supervisor, Compass Health Ms. Heidi Scott - Child Interview Specialist, Dawson Place Child Advocacy Center Ms. Lisa Paul - Lead Deputy Prosecuting Attorney, Snohomish County Prosecutor's Office Sergeant. Rob Barnett -SIU Supervisor, Snohomish County Sheriff's Office Ms. Lori Vanderburg - Director, Dawson Place & CAP Manager, Compass Health Ms. Paula Newman-Skomski - ARNP, Providence Intervention Center for Assault & Abuse Ms. Alicia Coragiulo - Advocate Specialist, Providence Intervention Center for Assault & Abuse Ms. Kristine Petereit - Fund Development Coordinator, Dawson Place Child Advocacy Center Mr. Mark Roe - County Prosecutor, Snohomish County Prosecutor's Office Ms. Annette Tupper - Victim Advocate, Snohomish County Prosecutor's Office Ms. Vicki Steffen - Office Manager II, Dawson Place Child Advocacy Center
Feb. 11 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Colonel (Retired) Francis Gilligan, Office of Military Commission Colonel (Retired) Steve Andraschko, Army Clemency & Parole Board Colonel John Baker, U.S. Marine Corps Mr. Mark Bergstrom, Pennsylvania State Sentencing Commission Mr. Bruce Brown, Air Force Clemency & Parole Board Mr. L. Russell Burress, U.S. Sentencing Commission Ms. Annette Burrhus-Clay, National Alliance to End Sexual Violence (NAESV) Lieutenant Colonel Craig Burton, U.S. Air Force Captain Robert Crow, U.S. Navy Ms. Meredith Farrar-Owens, Virginia State Sentencing Commission Ms. Molly Gill, Families Again Mandatory Minimums (FAMM) Lieutenant Commander Stuart Kirkby, U.S. Navy Mr. A.J. Kramer, Civilian Defense Counsel Mr. Michael LoGrande, Air Force Review Boards Agency Colonel Michael Mulligan, U.S. Army Mr. Michael Nachmanoff, Civilian Defense Counsel Mr. Jonathan Wroblewski, U.S. Department of Justice
Feb. 20, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Norfolk, Virginia	Commanders Defense Counsel Trial Counsel Staff Judge Advocates Victim Legal Counsel Victim Services Personnel Law Enforcement Personnel

Feb. 20, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Philadelphia, Pennsylvania	Mr. Michael Boyle, PSARC Director Captain Johan Darby, Commanding Officer, SVU Philadelphia PD Dr. Ralph Riviello, Drexel University College of Medicine Ms. Pat Roussell, Sexual Assault Nurse Examiner (SANE) Ms. Erin O'Brien, Assistant District Attorney, Family Violence & Sexual Assault Section
Feb. 25, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Dr. Robin Wilson, Ph.D. ABPP Mr. David Prescott. LICSW LTC David Johnson, U.S. Army, M.D. Program Director, Center for Forensic Behavioral Sciences (CFBS) Dr. Jennifer Yeaw, Psy.D. CFBS *(telephonic)*
Mar. 5, 2014	Comparative Systems Subcommittee Site Visit/ Preparatory Meeting Quantico Marine Corps Base, Quantico, Virginia	Commanders Defense Counsel Civilian Prosecutors Staff Judge Advocate Law Enforcement Personnel Victim Services Personnel
Mar. 11, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session.
Mar. 25, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Deliberation Session.
Apr. 11, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Dr. Jim Lynch, former Director, Bureau of Justice Statistics (BJS), Professor and Chair, Department of Criminology and Criminal Justice, University of Maryland Dr. Bill Sabol, Acting Director BJS Dr. Allen Beck, BJS, Senior Statistical Advisor
Apr. 24, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session
Apr. 25, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session
Apr. 29, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session
May 2, 2014	Comparative Systems Subcommittee Meeting One Liberty Center, Arlington, Virginia	Conference Call/ Deliberation Session

Appendix F:
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1. U.S. CONSTITUTION

2. LEGISLATIVE SOURCES

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5 U.S.C. App §§ 1-16 (Federal Advisory Committee Act)

10 U.S.C. § 654 (repealed Dec 22, 2010) ("Don't Ask, Don't Tell")

10 U.S.C. §§ 801-946 (2012) (Uniform Code of Military Justice)

18 U.S.C. § 3771 (2012) (Crime Victims' Rights Act)

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3. JUDICIAL DECISIONS

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b. U.S. Court of Appeals for the Armed Forces

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5. MEETINGS AND HEARINGS[1]

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Transcript of RSP Public Meeting (Sept. 24, 2013)

Transcript of RSP Public Meeting (Sept. 25, 2013)

Transcript of RSP Public Meeting (Nov. 7, 2013)

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1 Materials pertaining to meetings of the Response Systems Panel and its subcommittees are currently available at http://responsesystemspanel.whs.mil/index.php/meetings.

Transcript of RSP Public Meeting (Dec. 11, 2013)

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Written Statement of Colonel Michael Mulligan, Office of The Judge Advocate General, U.S. Army (Dec. 12, 2013)

PowerPoint Presentation of Dr. Cassia Spohn, Arizona State University, "Statistical Analysis of Waterfall Slides" (Dec. 12, 2013)

b. Meetings of the Response Systems Panel Subcommittees

Transcript of Role of the Commander Subcommittee Meeting (Oct. 23, 2013)

Transcript of Role of the Commander Subcommittee Meeting (Nov. 13, 2013)

Transcript of Comparative Systems Subcommittee Meeting (Nov. 19, 2013)

Transcript of Role of the Commander Subcommittee Meeting (Nov. 20, 2013)

Transcript of Victim Services Subcommittee Meeting (Nov 21, 2013)

Transcript of Comparative Systems Subcommittee Meeting (Jan. 7, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Jan. 8, 2014)

Transcript of Victim Services Subcommittee Meeting (Jan 9, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Jan. 15, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 11, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Feb. 12, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 25, 2014)

Transcript of Victim Services Subcommittee Meeting (Feb 26, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Mar. 11, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Mar. 12, 2014)

Transcript of Victim Services Subcommittee Meeting (Mar 13, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Mar. 25, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Apr. 11, 2014)

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PowerPoint Presentation of James P. Lynch, "Measuring Rape and Sexual Assault in Self-Report Surveys" (Apr. 11, 2014)

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Minutes of Comparative Systems Subcommittee Preparatory Session, Joint Base San Antonio (JBSA) (Dec. 13, 2013)

Minutes of Comparative Systems Subcommittee Preparatory Session, Naval Base Kitsap and Joint Base Lewis-McChord (JBLM) (Feb. 5, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Everett, WA (Feb. 6, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Philadelphia Sexual Assault Response Center (PSARC) (Feb. 20, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Norfolk, VA (Feb. 20, 2014)

Minutes of Comparative Systems Subcommittee Preparatory Session, Marine Corps Base Quantico (Mar. 5, 2014)

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Appendix G:

SUMMARY OF LEGISLATION PASSED IN NATIONAL DEFENSE AUTHORIZATION ACTS FOR FISCAL YEARS 2004 – 2014

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2004[1]

Section 526. Secretary of Defense to establish defense task force on sexual harassment and violence at the military service academies.

- Note: Section 576 of the FY05 NDAA renamed the task force to the Defense Task Force on Sexual Assault in the Military Services and extended its life for the broader purpose of examining sexual assault in the Armed Forces.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2005[2]

Section 571. Review of the manner in which sex-related offenses are handled under the Uniform Code of Military Justice and the Manual for Courts-Martial to determine what changes are needed to create a system that more closely aligns with other Federal laws addressing sex-related offenses.

Section 576. Examination of sexual assault in the Armed Forces by the Defense Task Force established to examine sexual harassment and violence at the military service academies. Changed the name of the task force to Defense Task Force of Sexual Assault in the Military Services (DTF-SAMS); extended task force for an additional 18 months; and added to the task force the responsibility of examining matters related to sexual assault involving members of the Armed Forces.

Section 577. No later than January 1, 2005, Secretary of Defense to develop comprehensive policy for the Department of Defense on the prevention and response to sexual assaults involving members of the Armed Forces. Policy should be based on recommendations from the Department of Defense Task Force on Care for Victims of Sexual Assault, and on other matters as the Secretary of Defense considers appropriate. Also requires annual report on sexual assaults no later than January 15 of each year.

Section 591. Protection of Armed Forces personnel from retaliatory actions for communications made through the chain of command.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2006[3]

Section 552. Comprehensive revision to Article 120 under the Uniform Code of Military Justice into a far more expansive punitive article.

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1 National Defense Authorization Act for Fiscal Year 2004, PUB. L. No. 108-136, 117 Stat. 1466 (2003).

2 National Defense Authorization Act for Fiscal Year 2005, PUB. L. No. 108-375, 118 Stat. 1811 (2004).

3 National Defense Authorization Act for Fiscal Year 2006, PUB. L. No. 109-163, 119 Stat. 3136 (2006).

Section 553. Amends Article 43 under the Uniform Code of Military Justice to make clear that no statute of limitations apply to murder, rape, and child abuse offenses.

Section 596. Improvement to Department of Defense capacity to respond to sexual assault affecting members of the Armed Forces.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2007[4]

Section 532. Revision and clarification of requirements with respect to surveys and reports concerning sexual harassment and sexual violence at the service academies.

Section 583. Inclusion in annual Department of Defense report on sexual assaults of information on results of disciplinary actions.

Section 701. TRICARE coverage for forensic examination following sexual assault or domestic violence.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008[5]

Section 716. Review of gender and ethnic group specific mental health services and treatment for members of the Armed Forces. Comprehensive review to include, among other elements, the availability of gender and ethnic group specific services and treatment for members of the Armed Forces who experienced sexual assault or abuse.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2009[6]

Section 563. Implementation of information database on sexual assault incidents in the Armed Forces. Database must be available for use by SAPRO; and must be used to develop and implement Congressional reports.

4 National Defense Authorization Act for Fiscal Year 2007, PUB. L. No. 109-364, 120 Stat. 2083 (2006).

5 National Defense Authorization Act for Fiscal Year 2008, PUB. L. No. 110-181, 122 Stat. 3 (2008).

6 National Defense Authorization Act for Fiscal Year 2009, PUB. L. No. 110-417, 122 Stat. 4356 (2008).

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010[7]

Section 566. Deadline for report on sexual assault in the Armed Forces by DTF-SAMS.

Section 567. Improved prevention and response to allegations of sexual assault involving members of the Armed Forces.

(a) Submit report with revised plan for implementation of the policies aimed at preventing and responding effectively to sexual assaults involving members of the Armed Forces.
(b) Sexual Assault Medical Forensic Examinations.
  (1) Submit report evaluating the protocols and capabilities of the Armed Forces to conduct sexual assault medical forensic examinations in combat zones.
  (2) Submit report on progress made to implement requirement from FY2007 NDAA pertaining to Tricare coverage for forensic medical examinations following sexual assaults.
(c) Military Protective Orders.
  (1) Military Protective Order information to be included in annual SAPRO report to Congress. Required information includes that pertaining to orders issued in cases involving the victim or alleged perpetrator of a sexual assault; and whether order was violated in the course of substantiated incidents of sexual assaults against members of the Armed Forces.
  (2) Submit report with measures taken to ensure member protected by order is informed of option to request a transfer from the command.
(d) Comptroller General report on each Service's ability to timely and effectively investigate and adjudicate allegations of sexual assault against members of the Armed Forces. This report should refer to and incorporate recommendations from the DTF-SAMS report.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2011

Section 1601. Definition of Department of Defense sexual assault prevention and response program and other definitions.

Section 1602. Comprehensive Department of Defense policy on sexual assault prevention and response program.

Section 1611. Sexual Assault Prevention and Response Office established.

Section 1612. Oversight and evaluation standards.

Section 1613. Report and plan for completion of acquisition of centralized Department of Defense sexual assault database.

Section 1614. Restricted reporting of sexual assaults. Secretary of Defense to clarify limitations on restricted reports and circumstances under which information contained in such reports may no longer be confidential.

Section 1621. Improved protocols for providing medical care for victims of sexual assault.

Section 1622. Sexual assault victims access to victim advocate services.

7 National Defense Authorization Act for Fiscal Year 2010, PUB. L. No. 111-84, 123 Stat. 2190 (2009).

Section 1631. Annual report regarding sexual assaults involving members of the Armed Forces and improvement to sexual assault prevention and response program.

Section 1632. Additional reports.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012

Section 541. Reform of offenses relating to rape, sexual assault, and other sexual misconduct under the Uniform Code of Military Justice. Article 120 to cover only adult offenses; separates stalking, child offenses, and other sexual misconduct, into separate punitive articles.

Section 542. Authority to compel production of documentary evidence.

- Article 47 (refusal to appear or testify) was expanded to include the case of a subpoena *duces tecum* for an Article 32 investigation.

Section 581. Access of sexual assault victims to legal assistance and services of Sexual Assault Response Coordinators and Sexual Assault Victim Advocates.

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.

Section 583. Director of Sexual Assault Prevention and Response Office.

Section 584. Sexual Assault Response Coordinators and Sexual Assault Victim Advocates.

Section 585. Training and education programs for sexual assault prevention and response program.

Section 586. Department of Defense policy and procedures on retention and access to evidence and records relating to sexual assaults involving members of the Armed Forces.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2013

Section 570. Armed Forces Workplace and Gender Relations Surveys.

Section 571. Authority to retain or recall to active duty reserve component members who are victims of sexual assault while on active duty.

Section 572. Additional elements in comprehensive Department of Defense policy on sexual assault prevention and response.

Section 572(a)(1). Requires tracking unrestricted reports, to include whether disposition by court-martial, non-judicial punishment or other administrative action.

Section 572(a)(2). Requires administrative discharge 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.

Section 572(a)(3). Requires commander to conduct climate assessments within 120 days after commander assumes command and annually thereafter so long as in command.

Section 572(a)(4). Requirement to post and widely disseminate information about resources available to report and respond to sexual assaults, including establishment of hotline numbers and Internet sites.

Section 572(a)(5). Requires an education campaign to clearly inform members about authorities available to correct military records if a member experiences a retaliatory personnel action for making a report of sexual assault or sexual harassment.

Section 573. Establishment of special victim capabilities within the military departments to respond to allegations of certain special victim offenses.

Section 574. Enhancement to training and education for sexual assault prevention and response.

Section 575. Added additional reporting requirements to the case synopses portion of the annual SAPR report.

Section 576. Independent reviews and assessments of Uniform Code of Military Justice and judicial proceedings of sexual assault cases.

Section 577. Retention of certain forms (for 50 years) in connection with restricted reports on sexual assault at request of the member of the Armed Forces making the report.

- *The FY14 NDAA requires retention for 50 years.*

Section 578. General or flag officer review of and concurrence in separation of members of the Armed Forces making an Unrestricted Report of sexual assault.

Section 579. Department of Defense policy and plan for prevention and response to sexual harassment in the Armed Forces.

Section 579(a). Required the Secretary of Defense to develop a comprehensive policy to prevent and respond to sexual harassment in the Armed Forces.

Section 579(b). Requires a plan to collect data on substantiated incidents of sexual harassment involving members of the armed forces for the purpose of identifying cases in which a member is accused of multiple incidents of sexual harassment.

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2014

Section 1701. Extension of crime victims' rights to victims of offenses under the Uniform Code of Military Justice.

- *December 26, 2014, Secretary of Defense to recommend to President changes to the Manual for Courts-Martial for implementation; and the Secretary of Defense and Secretary of Homeland Security shall prescribe appropriate regulations to implement.*

Section 1702(a). Revises Article 32, Uniform Code of Military Justice, narrowing the Article 32 to a preliminary hearing for the narrow purpose of determining whether probable cause exists to believe a crime has been committed and that the accused committed the crime; whether the convening authority has court-martial jurisdiction over the offense and the accused; considering the form of the charges; and recommending the disposition that should be made in the case.

- *Effective December 26, 2014 (one year after enactment of the Act).*

Section 1702(b). Revises Article 60, Uniform Code of Military Justice, to curtail a convening authority's ability to alter findings and sentences post-trial.

- *Effective June 24, 2014 (180 days after enactment of the Act).*

Section 1703. Eliminates five-year statute of limitations on trial by court-martial for additional offenses involving sex-related crimes.

Section 1704. Upon notice by trial counsel to defense counsel of the name of an alleged victim of a sex-related offense who trial counsel intends to call to testify at a preliminary hearing under Article 32 or a court-martial, defense counsel must make request to interview victim through trial counsel; and the interview of victim must take place in presence of trial counsel, counsel for the victim, or a Sexual Assault Victim Advocate.

Section 1705(a). Discharge or dismissal for certain sex-related offenses.

Section 1705(b). Jurisdiction limited to general courts-martial for certain sex-related offenses.

- *Effective June 24, 2014 (180 days after enactment of the Act).*

Section 1706. Participation by victim in clemency phase of courts-martial process.

- *Effective June 24, 2014 (180 days after enactment of the Act).*

Section 1707. Repeal of the offense of consensual sodomy under the Uniform Code of Military Justice.

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.

- *By June 24, 2014 (180 days after enactment of the Act) the discussion pertaining to Rule 306 of the Manual for Courts-Martial shall be amended to reflect this change.*

Section 1709. Requires the Secretary of Defense to proscribe regulations that prohibits retaliation against members of the Armed Forces for reporting a criminal offense.

- *Regulations required by April 25, 2014 (120 days after enactment of the Act).*
- *Report to Congress due June 24, 2014 (180 days after enactment of the Act) regarding whether a new punitive article is required to prohibit retaliation against an alleged victim or other member of the Armed Forces who reports a criminal offense.*

Section 1711. Prohibition on service in the Armed Forces by individuals who have been convicted of certain sexual offenses.

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.

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.

Section 1714. Expansion and enhancement of authorities relating to protected communications of members of the Armed Forces and prohibited retaliatory actions.

Section 1715. Inspector General investigation of allegations of retaliatory personnel actions taken in response to making protected communications regarding sexual assault.

Section 1716. Requires Special Victims' Counsel be made available to sexual assault victims.

- *Implementation required by June 24, 2014 (180 days after enactment of the Act).*

Section 1721. Tracking of compliance of commanding officers in conducting organizational climate assessments for purposes of preventing and responding to sexual assaults.

Section 1722. Advancement of submittal deadline for report of independent panel on assessment of military response systems to sexual assault (from 18 months to 12 months).

Section 1723. Retention of certain forms in connection with Restricted Reports and Unrestricted Reports on sexual assault involving members of the Armed Forces.

Section 1724. Timely access to Sexual Assault Response Coordinators by members of the National Guard and Reserves.

Section 1725. Qualifications and selection of Department of Defense sexual assault prevention and response personnel and required availability of Sexual Assault Nurse Examiners.

Section 1726. Additional responsibilities of Sexual Assault Prevention and Response Office for Department of Defense sexual assault prevention and response program.

Section 1731. Independent reviews and assessments of Uniform Code of Military Justice and judicial proceedings of sexual assault cases.

(a) additional duties for the Response Systems Panel
(b) additional duties to the Judicial Proceedings Panel.

Section 1731(a)(1)(A). 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.

Section 1731(a)(1)(B). An assessment regarding whether the roles, responsibilities, and authorities of Special Victims' Counsel to provide legal assistance to victims of alleged sex-related offenses should be expanded to include legal standing to represent the victim during investigative and military justice proceedings in connection with the prosecution of the offense.

Section 1731(a)(1)(C). An assessment of the feasibility and appropriateness of extending to victims of crimes covered by the UCMJ the right afforded a crime victim in civilian criminal proceedings and the legal standing to seek enforcement of crime victims' rights.

Section 1731(a)(1)(D). An assessment of the means by which the name, if known, and other necessary identifying information of an alleged offender that is collected as part of a restricted report of a sexual assault could be compiled into a protected, searchable database accessible only to military criminal investigators, Sexual Assault Response Coordinators, or other appropriate personnel.

Section 1731(a)(1)(E). An assessment of the clemency opportunities provided in the military and civilian systems, appropriateness of clemency proceedings in the military system, and whether clemency in the military could be reserved until the end of the military appeals process.

Section 1731(a)(1)(F). An assessment of whether the Department of Defense should promulgate a formal statement of accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response.

Section 1731(b)(1)(A). An assessment of the likely consequences of amending the definition of rape and sexual assault under Article 120, UCMJ, to expressly cover a situation in which a person subject to the UCMJ commits a sexual act upon another person by abusing one's position in the chain of command of the other person to gain access to or coerce the other person.

Section 1731(b)(1)(B). An assessment of the implementation and effect of section 1716 requirement for Special Victims Counsel, and make recommendations for modification of such section as the judicial proceedings panel considers appropriate.

Section 1731(b)(1)(C). An assessment of the implementation and effect of the mandatory minimum sentences established by section 1705, and the appropriateness of statutorily mandated minimum sentencing provisions for additional offenses under the UCMJ.

Section 1731(b)(1)(D). An assessment of the adequacy of the provision of compensation and restitution for victims of offenses under the UCMJ and develop recommendations on expanding such compensation and restitution.

Section 1732. Requires the Secretary of Defense to review practices of MCIOs in response to allegations of Uniform Code of Military Justice violations and develop policy regarding use of case determinations to record results of MCIO investigations, similar to uniform crime report if feasible.

- *Review completed no later than June 24, 2014 (180 days after enactment of the Act).*

Section 1733. Review of training and education provided members of the Armed Forces on sexual assault prevention and response.

- *Report due no later than April 25, 2014 (120 days after enactment of the Act).*

Section 1734. Report on implementation of Department of Defense policy on the retention of and access to evidence and records relating to sexual assaults involving members of the Armed Forces.

- *Report due no later than June 24, 2014 (180 days after enactment of the Act).*

Section 1735. Review of the Office of Diversity Management and Equal Opportunity role in sexual harassment cases.

Section 1741. Enhanced protections for prospective members and new members of the Armed Forces during entry-level processing and training.

- *Secretary of Defense to submit report to Congress no later than April 25, 2014, to assess whether a new punitive article is needed for prohibition of inappropriate senior-subordinate relationships with entry-level personnel.*

Section 1742. Commanding officer action on reports on sexual offenses involving members of the Armed Forces.

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

- *Requires the Secretary of Defense to prescribe regulations to carry out this section by June 24, 2014.*

Section 1744. Review of decisions not to refer charges of certain sex-related offenses for trial by court-martial.

Section 1745. Inclusion and command review of information on sex-related offenses in personnel service records of members of the Armed Forces.

Section 1746. Prevention of sexual assault at military service academies (within 14 days of arriving at school).

Section 1747. Required notification whenever members of the Armed Forces are completing Standard Form 86 of the Questionnaire for National Security Positions.

Section 1751. Sense of Congress on commanding officer responsibility for command climate free of retaliation.

Section 1752. Sense of Congress on disposition of charges involving certain sexual misconduct offenses under the Uniform Code of Military Justice through courts-martial.

Section 1753. Sense of Congress on the discharge in lieu of court-martial of members of the Armed Forces who commit sex-related offenses.

PENDING LEGISLATION

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

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

S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).

H.R. 4485, 113th Cong., Fair Military Act (2014).

H.R. 4435, 113th Cong., Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (2014).

S. 2410, 113th Cong., Carl Levin National Defense Authorization Act for Fiscal Year 2015 (2014).

Appendix H:
COMPARISON OF CRIME VICTIM RIGHTS UNDER FEDERAL LAW, DEPARTMENT OF DEFENSE POLICY, AND RECENTLY ENACTED CHANGES TO THE UNIFORM CODE OF MILITARY JUSTICE

Comparison of Victim Rights: the NDAA, the CVRA, and DOD Policy

CVRA Rights Granted	DoD Rights Granted (prior to FY14 NDAA)	NDAA Rights Granted
18 U.S.C. § 3771 CVRA	DoD Directive 1030.01 Victim and Witness Assistance	FY14 NDAA §1701
1. The right to be reasonably protected from the accused	1. The right to be reasonably protected from the accused	1. The right to be reasonably protected from the accused
2. The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused	2. The right to be notified of court proceedings and to be provided information about the conviction, sentencing, imprisonment, and release of the offender.	2. The right to reasonable, accurate, and timely notice of any of the following: (A) A hearing on confinement of accused prior to trial (B) An Article 32 hearing relating to the offense (C) A court-martial relating to the offense (D) Service clemency and parole board relating to the offense (E) The release or escape of the accused, unless such notice may endanger the safety of any person
3. The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.	3. The right to be present at all public court proceedings related to the offense, unless the court determines that testimony by the victim would be materially affected if the victim heard other testimony at trial.	3. The right not to be excluded from any public hearing or proceeding described above unless the military judge or investigating officer, after receiving clear and convincing evidence, determines that testimony by the victim of an offense would be materially altered if the victim heard other testimony at that hearing or proceeding.

CVRA Rights Granted (con't)	DoD Rights Granted (con't)	FY14 NDAA Rights Granted (con't)
4. The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.	4. No similar provision.	4. The right to be reasonably heard at any of the following: (A) A public hearing concerning the continuation of confinement prior to trial of the accused (B) A sentencing hearing relating to the offense (C) A public proceeding of the service clemency and parole board relating to the offense
5. The reasonable right to confer with the attorney for the Government in the case.	5. The right to confer with the attorney for the Government in the case.	5. The reasonable right to confer with the counsel representing the Government in any of the above listed proceedings.
6. The right to full and timely restitution as provided in law.	6. The right to receive available restitution.	6. The right to receive restitution as provided in law.
7. The right to proceedings free from unreasonable delay.	7. No similar provision.	7. The right to proceedings free from unreasonable delay.
8. The right to be treated with fairness and with respect for the victim's dignity and privacy.	8. The right to be treated with fairness and respect for the victim's dignity and privacy.	8. The right to be treated with fairness and with respect for the dignity and privacy of the victim.
CVRA Implementation	**DoD Implementation**	**FY14 NDAA Implementation**
In general. In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described above. Before making a determination to exclude the victim from a public proceeding, the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.	No similar provision	Not later than one year after the date of enactment of this act, the SECDEF and CCG must implement mechanisms for ensuring that victims are notified of, and accorded, the rights specified in UCMJ Article 6(b). §1701(b)(2)
CVRA Definition of Victim	**DoD Definition of Victim**	**NDAA Definition of Victim**
The term "crime victim" means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia	Victim. A person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the Uniform Code of Military Justice	The term victim means a person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under the Uniform Code of Military Justice

CVRA Enforcement	DoD Enforcement	NDAA Enforcement
The rights described above shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals will decide the motion within 72 hours. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.	No similar provision	Not later than one year after the date of enactment of this act, the SECDEF and CCG must implement mechanisms for the enforcement of the rights specified in UCMJ Article 6(b), including for application for such rights and for consideration and disposition of applications for such rights. §1701(b)(2)

Procedures to Promote Compliance	Procedures to Promote Compliance	Procedures to Promote Compliance
The Department of Justice Regulation will designate an administrative authority within the DOJ to receive and investigate complaints relating to the provision or violation of the rights of a crime victim; require a course of training for employees and offices of the DOJ that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims; contain disciplinary sanctions, including suspension or termination from employment, for DOJ employees who willfully or wantonly fail to comply with provisions of Federal Law pertaining to the treatment of crime victims; and provide that the Attorney General, or his designee, shall be the final arbiter of the complaint.	No similar provision	Not later than one year after the date of enactment of this act, the SECDEF and CCG must implement mechanisms to ensure that Service Members and civilian employees of DoD and USCG make their best efforts to ensure that victims are notified of, and accorded, the rights specified in this Act; the designation of an authority within each Armed Force to receive and investigate complaints relating to violation or provision of such rights; and disciplinary sanctions for Service Members and civilian employees who willfully or wantonly fail to comply with requirements relating to such rights. §1701(b)(2)
Limitations	**Limitations**	**Limitations**
The failure to afford a right under the CVRA will not provide grounds for a new trial. A victim may make a motion to re-open a plea or sentence only if the victim asserted the right to be heard before or during the proceeding at issue and such right was denied; the victim petitions the court of appeals for a writ of mandamus within 14 days; and, in the case of a plea, the accused has not pled to the highest offense charged. The CVRA creates no cause of action for damages and does not create, enlarge, or imply any duty or obligation to any victim or other person for the breach of which the United States, or any of its officers or employees, could be held liable in damages. Nothing in the CVRA is construed to impair the prosecutorial discretion of the Attorney General or any officer under his or her direction.	No similar provision	Nothing in this section shall be construed- (1) to authorize a cause of action for damages; or (2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. §1701(a)"(d)

Appendix I: SEXUAL ASSAULT RESPONSE COORDINATOR AND SAPR VICTIM ADVOCATE PROGRAMS

	USARMY	USAF	USNAV	USMC	USCG
Governing Policy or Regulation	AR 600-20 Chapters 7 and 8 (20 Sep 2012)	AFI 36-6001, Sexual Assault Prevention And Response (SAPR) Program, 14 October 2010, paragraph 2.3.	SECNAVINST 1752.4B Sexual Assault Prevention and Response (Aug 8, 2013)	MCO 1752.5B, MFB, 1 March 2013, Sexual Assault Prevention and Response Program	The SAPR Program released the SAPR Program policy in April 2012
Military USARC/UVA eligibility criteria	Recommended by chain of command Outstanding duty performance evaluation reports Demonstrate stability in personal affairs USARC – (SFC or higher) or (MAJ/CW3 or higher) UVA – (SSG or higher) or (1LT/CW2 or higher)	UVAs all volunteer completed application, interview, criminal background check and mental health background check. USARC (Capt or higher) UVA – (E-4 or higher) or (O-2 or higher)	Selected by commanders – good moral character, professional abilities and willingness to perform the duties. SARC: no rank requirement VA: no rank requirements	No adverse fitness reports in grade Good communication skills, empathetic Discreet, able to maintain confidentiality SARC: (Maj/CWO3-5) VA: (Sgt)	UVAs – level of emotional maturity of the candidate to maintain the necessary confidentiality. VAs must also have at least one year left at their unit, and possess a desire to assist victims. No military SARCs UVAs - no rank requirement
Civilian SARC/SAPR VA –eligibility criteria	SARC – civilian (GS–11 or higher). UVA – civilian (GS–9 or higher).	SARC – civilian (GS-12) must possess a social science degree SAVA – civilian: must possess knowledge of a wide range of generally accepted practices and procedures associated with victim advocacy	SARC – civilian (GS-9): minimum of one year experience working with victims of sexual assault or working in victim advocacy.	SARC – civilian (GS-9): four-year degree in behavioral health or social science and three years of experience.	SARCs – all civilian (GS-12) bachelor's or master's degree in a behavioral science and are often mental health professionals. No civilian VAs
SARC/SAPR VA – Numbers	281 VAs at brigade level, full-time 10,496 VAs (*as of end of FY13) 307 SARCs at brigade level, full-time 1,214 Credentialed SARCS	2,237 (military) volunteer VAs, deployable. 46 (military) full-time SARCS – deployable 75 (civilian) full-time SARCs – non deployable	4,402 UVAs (military) deployable, part time 77 VAs (civilian) 5 military SARCS – not deployable 81 civilian SARCs – deployable (66 full-time SARCs and VAs at brigade level)	1510 –UVAs – (military) deployable, part time 21 VAs (civilian) full-time 40 SARCS (military) – deployable, part time 6 SARCs (civilian) – not deployable, part-time 40 SARCs (civilian) – not deployable, full time	1000 UVAs (military) volunteer, part-time, No military SARCs 1 full-time civilian SARC – not deployable 44 part-time civilian SARCs – not deployable
Victim Advocacy Program	**In Garrison – 3 echelons of VAs:** 1. **Installation SARC** – (civilian) Responsible for coordinating local implementation of SAPR. Works for FAPM, reports directly to installation commander. 2. **Installation VAs (IVA)** (civilian) Work directly with Installation SARC, victims, UVAs, and other installation response agencies 3. **Unit VAs (UVAs) –** (mil. or civ.) – provide limited victim advocacy as collateral duty **Deployed Environment 2 echelons of VAs:** 1. **Deployable SARC (**mil or civ) coordinate SAPR program as collateral duty. 1 at each brigade level and higher. 2. **UVAs** (mil or civ) collateral duty. 2 UVAs for each battalion-sized unit.	**MAJCOM SARC –** Administers SAPR program w/in that MAJCOM and provides functional oversight and guidance for Installation SARCs **Installation SARC –** Reports directly to the installation WG/CV. Is installation's single point of contact for integrating and coord. SA victim care services. Tracks status of SA cases in AOR & updates WG/CV. **Installation SARC Admin Assist. –** performs clerical duties to directly support the SARC and installation's SAPR program. **VAs – (military or civilian)**. All are volunteers. **Deployed Environment:** Can be trained military SARC or civilian SARCs who volunteer. Normally, each AEW will warrant at least 1 SARC. For smaller deployments, cdrs must provide a sexual assault response capability.	**Installation SARC –** (civilian or military) Provides local management of SAVI program **SAVI Command POC –** responsible for facilitating awareness and prevention training and oversight of command compliance with SAVI program requirements. **Command Data Collection Coordinator (DCC) –** responsible for obtaining data on sexual assault incidents to meet reporting requirements **Installation VAs** **Uniformed VAs –** (military) respond to victims whenever sexual assault occurs in locations where installation VAs not available (e.g., when deployed).	**Command SARC** – (civilian or military) **Installation SARC** – (civilian) Full-time **Uniformed VAs** – (military) a minimum of 2 appointed at each battalion, squadron or equivalent level - garrison or deployed. Each region, MCD, recruiting station, and MARFORRES site must have a minimum of 1 UVA. UVAs report to Command and Installation SARC for SA duties. The Marine reg sometimes lists UVA and sometimes UVA/VA, indicating that there can be civilian VAs though the civilian VA is never defined or specifically referred to in the reg.	**Employee Assistance Program Coordinator(EAPC)/SARC** (military or civilian). If a dedicated SARC is not co-located, serves as central POC at the Command or within a geographic area to conduct SAPR awareness, prevention and response training. **Family Advocacy Specialist (FAS)** (military or civilian). Handle cases of family violence within FAP. May also act as a SARC if needed and trained. **VAs** – (military) COs/OICs should designate command member(s) as VAs. Commands are strongly encouraged to have at least one VA especially on afloat units.

Appendix J: SPECIAL VICTIM COUNSEL PROGRAMS STRUCTURE AND ORGANIZATION

	FY14 NDAA	USARMY	USAF	USNAV	USMC	USCG
Number of SVCs and Locations	Not Addressed in FY14 NDAA	91 Active Counsel 47 ARNG 70 Reserve 32 installations world-wide SVC Program Manager (PM) may allocate assets as needed	24 SVCs and 10 paralegals Will add 5 SVCs in 2014 22 locations world-wide.	18 active component JAs assigned 11 reservists are assigned 23 Installations At or near Fleet & Family Service Centers. 8 are located near or with SARC/VAs.	15 active duty counsel, 9 paralegals (civ) Includes 4 regional VLCs (O-4) 3 part-time active duty auxiliary VLC Regional VLC offices established	17 active duty part time JAs (currently) (will be 6 full-time active duty JAs) Located at various Coast Guard units across the U.S.
Caseload	Not Addressed in FY14 NDAA	11/1/13 – 2/14/14 536 victims received SVC services 1,587 counseling sessions with victims 393 interviews attended with victims 49 appearances at courts-martial	1/28/13 - 2/21/14 712 victims received SVC services 112 courts-martial attended 125 Article 32 hearings attended 973 interviews attended with victims	11/1/13 - 4/4/14 300 victims received VLC services 360 educational briefs given to 8,400+ personnel	11/1/13 - 2/21/14 227 victims received VLC services Includes 15 minors. Majority of cases were sexual assault and domestic violence.	7/12/13 - 3/8/14 56 victims received SVC services
SVC – Reporting Structure	Service TJAGS are responsible for the establishment and supervision of individuals designated as Special Victims' Counsel. §1716(a)(1)(e)	SVC reports directly to Chief of Legal Assistance within the command. SVC Program manager (PM) has technical supervision over all Army SVCs.	SVC Reports directly to the HDQ (O-6) Division Chief. Deputy Chief is a GS-14. Under independent chain of command in AFLOA, Special Victims' Counsel Division	VLC reports to Commander, Naval Legal Service Command through the Chief of Staff, VLC. Program is an independent line of operation separate from the prosecution and the convening authority.	VLC reports to Officer in Charge VLCO (OIC). OIC reports to SJA to the Commandant of the Marine Corps. VLCO supervisory and reporting chain is independent of convening authorities, OICs, and staff judge advocates.	To be led by GS-15 civilian attorney within the Office of Member Advocacy and Legal Assistance. (Currently a reserve O-6 JA and O-3 SVC Coordinator run program)
SVC – Screening and Selection Process	SVC must meet the qualifications specified in 10 U.S.C. 1044(d)(2); and be certified as competent to be designated as a Special Victims' Counsel by theT JAG of the armed force in which the JA is a member or by which the civilian attorney is employed. § 1716(a)(1)(d)	Active duty JAs selected by SJAs based on military justice experience, sound judgment, and maturity.	Active duty JAs hand-selected by TJAG. Experience level same as JAGs entering Area Defense Counsel (ADC) positions.	Active duty JAs. TJAG personally approves candidates. Must have prior court-room experience.	Active duty JAs. OIC, VLCO reviews each nominee. Must have at least six months of military justice experience, unless waived.	All Coast Guard SVCs are certified, Active Duty JAs.
SVC Training	Services must implement in-depth and advanced training for all military and civilian attorneys providing legal assistance to support victims of alleged sex-related offenses. § 1716(b)	Sexual Assault Expert Symposium: 3-day training. Classes are taught by some of the leading experts in their fields.	4 Day training at AF JAG School in May and October 2013.	Navy is developing a 2-day course in Newport, RI for newly-reported VLC.	Marine Corps VLC attorneys attend training conducted by the Air Force.	The Coast Guard does not have an independent SVC training program.

Service data found in RSP RFI #4 (Nov 8, 2013) and Department of Defense Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (Apr 4, 2014).

Appendix K: SPECIAL VICTIM COUNSEL PROGRAMS VICTIM SERVICES COMPARISON

	FY14 NDAA §1716	USARMY	USAF	USNAV	USMC	USCG
SVC–Mission & Scope of representation	The Secretary concerned shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance to military victims of sexual assault.	Represents victim's best interests even if not aligned with those of the U. S. or the accused. May advocate a victim's interests to civilian prosecutors and others, but not in civilian court. Cannot advocate to the Dept of Veterans Affairs or represent a victim in the disability evaluation system.	Help victim understand investigation and military justice processes; protect victim's rights under the UCMJ; empower victim; assist with state and federal victim compensation and restitution; advocate a victim's interests to civilian prosecutors and others, but not in civilian court.	Provide independent legal counsel to eligible sexual assault victims; to represent them during investigation and military justice process; advocate on behalf of victim to authorities; protect victims' rights; assist with personal civil legal matters and obtaining benefits.	Assist eligible victims of crime; advise victims of their rights under the UCMJ; represent victims at military justice proceedings.	The SVC assists the member in negotiating the legal process and ensures the victim understands their rights and feels respected and included in the process.
SVC–Who is eligible for services?	Service Secretaries shall designate legal counsel (to be known as 'Special Victims' Counsel') for the purpose of providing legal assistance to an individual eligible for military legal assistance under 10 U.S.C. §1044 who is the victim of an alleged sex-related offense, regardless of whether the report of that offense is restricted or unrestricted.	All active duty, Army Reserve, ARNG sexual assault victims and adult dependents. Victims in other Services (and dependents) only if perpetrator is Army member.	All active duty, AF Reserve sexual assault victims and adult dependents. Victims in other Services (and dependents) only if perpetrator is AF member.	All active duty and Navy Reserve sexual assault victims. Adult dependents, retirees and other Service members only if perpetrator is Navy member. By 6/24/14 will include child victims.	All active duty, MC Reserve, adult and child dependents. Available to victims of ALL crimes under the UCMJ, not limited to sexual assault.	All active duty CG and Reserve members and adult dependents who are victims of sexual assault.
When is a victim eligible for an SVC?	Upon report of an alleged sex-related offense or at the time the victim seeks assistance from a SARC, SAPR VA, MCIO, VWL, a trial counsel, a healthcare provider, or any other personnel designated by the Secretary concerned for purposes of this subsection.	At first contact, SARC, VA, FAP, MCIO, VWL, or legal office personnel must inform victim of the availability of SVC services. SVC must consult with victim within 24 hours of victim's request.	At first contact, SARC, VA, FAP, MCIO, VWL, or legal office personnel must inform the victim of the availability of SVC services. Victims may contact SVC offices directly. SJA or SARC/FAP must provide SVC contact info to victim w/in 48 hours of initial request.	Victim must be informed by SARC, VA, VWL, MCIO or trial counsel that they have a right to a VLC.	Upon seeking assistance from a SARC, VA, FAP, MCIO, VWL, or trial counsel, all eligible persons who are victims of sexual assault must be informed of and given the opportunity to consult with a VLC.	When victim of sexual assault makes a report, they are notified through the SARC that they are eligible for a SVC. SVC contact info will be provided to the victim by the SARC and victim may initiate contact.
SVC–Duration of Relationship	Not addressed in FY14 NDAA	Representation ends at initial action by the General Court-Martial Convening Authority (GCMCA) or when client determines services are no-longer required. Transfer of counsel coordinated by SJA. Victim will be consulted throughout the process.	SVC-client relationship terminates when case disposition is complete. SVC remains the counsel for all matters relating to the sexual assault, unless released by the victim.	The VLC-client relationship continues until victim releases the VLC; the legal aspects are concluded (after a disposition decision is made); after action is taken on the findings and sentence by the Convening Authority; or one of the parties transfers to a new duty station or terminates military service.	Complete when the convening authority has taken action in the case; unless the case is resolved sooner. Ends if VLC reassigned or discharged/retired (new VLC will be assigned)	Information not provided to RSP
SVC–Post-trial Role	Authorized to provide legal consultation in any proceedings of the military justice process in which a victim can participate as a witness or other party.	Assist the victim with post-trial submissions to include victim impact statements.	Post-Trial - matters submitted to CA; Clemency and Parole Boards; assist with victim impact statements	Response not provided to RSP	Post-trial assistance will be evaluated on a case-by-case basis.	Response not provided to RSP
SVC–Collateral Misconduct	Authorized to provide legal consultation regarding collateral misconduct related to the SA and the victim's right to seek military defense services.	SVC will refer the victim to the U.S. Army Trial Defense Service (TDS).	An SVC may represent an AF victim for collateral misconduct if it has a direct nexus to the sexual assault, with the victim's consent.	VLC provides limited personal representation advice. May advocate on the victim's behalf to military authorities and with the defense counsel to protect the victim's rights and interests.	VLC will refer victims to defense services. VLC may advise victim on legal options such as seeking testimonial or transactional immunity.	Response not provided to RSP

Service data found in RSP RFI #4 (Nov 8, 2014); Department of Defense Report on Implementation of Section 1716 of the National Defense Authorization Act for Fiscal Year 2014 (Apr 4, 2014); and NDAA for Fiscal Year 2014.

Appendix L:

GLOSSARY AND LIST OF ACRONYMS

A

ADA: assistant district attorney

AFOSI: Air Force Office of Special Investigations

AOUSC: Administrative Office of the U.S. Courts

ASALC: Advanced Sexual Assault Litigation Course

ATAC: Advanced Trial Advocacy Course

B

BJS: Bureau of Justice Statistics

C

CA: convening authority

CAAF: United States Court of Appeals for the Armed Services

CAPE: Center for the Army Profession and Ethic

CAPE: Cost Assessment and Program Evaluation

CDC: Centers for Disease Control and Prevention

CGIS: Coast Guard Investigative Service

CID: Army Criminal Investigation Command

CM: court-martial

CMA: Court of Military Appeals

CNSTAT: National Research Council Committee on National Statistics

CO: commanding officer

CSS: Comparative Systems Subcommittee

CTT: complex trial team

CVRA: Crime Victims' Rights Act

CY: calendar year

D

DA: district attorney

DAVA: domestic abuse victim advocate

DC: defense counsel

DCAP: Defense Counsel Assistance Program

DD Form: Department of Defense Form

DEOCS: Defense Equal Opportunity Climate Survey

DEOMI: Defense Equal Opportunity Management Institute

DIBRS: Defense Incident-Based Reporting System

DFSC: Defense Forensic Science Center

DMDC: Defense Manpower Data Center

DoD: Department of Defense

DoDD: Department of Defense Directive

DoDI: Department of Defense Instruction

DODM: Department of Defense Manual

DOJ: Department of Justice

D-SAACP: DoD Sexual Assault Advocate Certification Program

DSAID: Defense Sexual Assault Incident Database

DSO: Defense Service Office

DTFSAMS: Defense Task Force on Sexual Assault in the Military Services

DTM: Directive-Type Memorandum

E

EVAWI: End Violence Against Women International

F

FAP: Family Advocacy Program

FBI: Federal Bureau of Investigation

FSC: Family Support Center

FY: fiscal year

G

GCM: general court-martial

GCMCA: general court-martial convening authority

H

HQE: highly qualified expert

I

IDA: initial disposition authority

J

JAG: judge advocate general

JBSA: Joint Base San Antonio

JBLM: Joint Base Lewis-McChord

JPP: Judicial Proceedings Panel

JSC: Joint Service Committee on Military Justice

JSC-SAS: Joint Service Committee-Sexual Assault Subcommittee

L

LCSW: licensed clinical social worker

LDT: leadership development training

LL.M.: Master of Laws

M

MARADMIN: Marine Corps Administrative Message

MCIO: military criminal investigative organization

MCM: Manual for Courts-Martial

MCO: Marine Corps Order

MEPS: Military Entrance Processing Station

MJIA: Military Justice Improvement Act of 2013

MJLCT: Military Justice Litigation Career Track

MRE: Military Rules of Evidence

MTF: medical treatment facility

N

NACP: National Advocate Credentialing Program

NAS: National Academy of Sciences

NAVADMIN: Navy Administrative Message

NCIS: Naval Criminal Investigative Service

NCO: noncommissioned officer

NCPVAW: National Center for the Prosecution of Violence Against Women

NCVS: National Crime Victim Survey

NDAA: National Defense Appropriations Act

NISVS: National Intimate Partner and Sexual Violence Survey

NJP: nonjudicial punishment

NJS: Naval Justice School

NOVA: National Organization of Victim Advocates

NSVRC: National Sexual Violence Resource Center

P

PD: police department

PERF: Police Executive Research Forum

PME: professional military education

POD: Protect Our Defenders

PSARC: Philadelphia Sexual Assault Response Center

PSR: presentence report

R

RAINN: Rape, Abuse and Incest National Network

RCM: Rules for Courts-Martial

RoC: Role of the Commander

RSP: Response Systems to Adult Sexual Assault Crimes Panel

S

SAFE: sexual assault forensic exam

SAFE: sexual assault forensic examiner

SAMFE: sexual assault medical forensic examiner

SANE: sexual assault nurse examiner

SAPR: Sexual Assault Prevention and Response

SAPRO: Sexual Assault Prevention and Response Office

SARC: sexual assault response coordinator

SART: sexual assault response team

SASC: Senate Armed Services Committee

SCMCA: summary court-martial convening authority

SHARP: Sexual Harassment/Assault Response and Prevention

SJA: staff judge advocate

SPCMCA: special court-martial convening authority

STC: senior trial counsel

STOP Act: Sexual Assault Training Oversight and Prevention Act

SVC: special victim counsel

SVC: Special Victim Capability

SVP: special victim prosecutor

SVTC: special victim qualified trial counsel

SVU: special victim unit

SVUI: special victim unit investigator

SWAN: Service Women's Action Network

T

TCAP: Trial Counsel Assistance Program

TDAC: Trial and Defense Advocacy Course

TJAG: The Judge Advocate General

TJAGLCS: The Judge Advocate General's Legal Center and School

U

UCI: unlawful command influence

UCMJ: Uniform Code of Military Justice

UCR: Uniform Crime Reporting

USACIL: United States Army Criminal Investigation Laboratory

USAMPS: United States Army Military Police School

USC: United States Code

V

VA: victim advocate

VLC: victim legal counsel

VPA: Victims Protection Act of 2014

VSS: Victim Services Subcommittee

VWAP: Victim Witness Assistance Program

VWL: victim witness liaison

W

WGRA: Workplace and Gender Relations Survey of Active Duty Members

WGRR: Workplace and Gender Relations Survey of Reserve Component Members

WGRS: Workplace Gender Relations Survey

WOAR: Women Organized Against Rape

Y

YWCA: Young Women's Christian Association

TERMS

Accessions training: Training that a Service member receives upon initial entry into military service through basic military training.

Administrative separation: Early termination of military service based upon conduct on the part of the Service member.

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.

Collateral misconduct: Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident. Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (e.g., underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders). *See* DoDI 6495.02.

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.

Confidential reporting: For the purposes of the policies and procedures of the SAPR Program, confidential reporting is restricted reporting that allows a Service member to report or disclose to specified officials that he or she has been the victim of a sexual assault. This reporting option gives the member access to medical care, counseling, and victim advocacy, without requiring those specific officials to automatically report the matter to law enforcement or initiate an official investigation.

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.

Criminal intelligence: Information compiled and analyzed in an effort to anticipate, prevent, or monitor possible or potential criminal activity. *See* DoDI 5525.18, AR 195-2, p. 41.

Defense Forensic Science Center: Department of Defense forensic science center of excellence, delivering full-spectrum, forensic services around the globe and across the entire range of military operations, providing training and conducting research to further forensic science.

Defense Incident-Based Reporting System: Department of Defense crime reporting system designed to collect statistical information on criminal incidents in the Department of Defense

Defense Sexual Assault Incident Database (DSAID): A DoD database that captures uniform data provided by the Military Services and maintains all sexual assault data collected by the Military Services. *See* DoDD 6495.01.

Domestic abuse victim advocate: DAVAs are victim advocates in the Family Advocacy Program. They are civilians with a bachelor's or master's degree in social work or a related field, who provide assistance to victims of spousal or intimate partner domestic abuse, including sexual abuse, as well as child victims of abuse, sexual violence, or neglect.

Family Advocacy Program: A program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence. The Family Advocacy Programs across the Services consist of coordinated efforts designed to prevent and intervene in cases of family distress, and to promote healthy family life. *See* DoDD 6400.1.

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 court-martial: A court-martial consisting of a military judge and usually at least five members and having authority to impose a sentence of up to dishonorable discharge or death.

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, 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.

Joint basing: A location at which the 2005 Base Closure and Realignment Committee directed that installation management functions be consolidated between two or more Military Services operating at two or more locations within close proximity.

Judge advocate: A military attorney who is 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): Refers to the Army Criminal Investigation Command (CID), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). The Coast Guard Investigative Service (CGIS) is not formally considered an MCIO, because it falls under the Department of Homeland Security, but it provides the same function and capability. For purposes of this report, CGIS is treated as an MCIO.

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.

Military training: Structured training to enhance the capacity of Service members to understand issues and concepts, as well as to perform specific tasks.

National Incident Based Reporting System: Incident-based reporting system in which agencies collect data on each crime occurrence. Data comes from local, state, and federal automated systems.

Panel: Military equivalent of a jury; short for court-martial panel or members panel. Also used to identify the Response Systems to Adult Sexual Assault Crimes Panel in this report.

Permanent change of station (PCS): To permanently move from an assignment at one military installation to an assignment at another installation.

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. *See* DODI 6495.02.

Reserve Component: Reserve Components of the Armed Forces of the United States, including the National Guard (Army and Air Force) and Reserves (Army, Air Force, Navy, Marine Corps, and Coast Guard).

Responders: Includes first responders, generally composed of personnel in the following disciplines or positions: SARCs, SAPR victim advocates, healthcare personnel, law enforcement, and MCIOs. Other responders are judge advocates, chaplains, and commanders, but they are usually not first responders. *See* DoDI 6495.02.

Restricted reporting: A process used by a Service Member to report or disclose that he or she is the victim of a sexual assault to specified officials on a requested confidential basis. Under these circumstances, the victim's report and any details provided to healthcare personnel, the SARC, or a VA will not be reported to law enforcement to initiate the official investigative process unless the victim consents or an established exception is exercised under DODD 6495.01. Restricted reporting applies to Service members and their military dependents 18 years of age or older.

Re-victimization: Process by which a victim experiences acts of violence, power, or control imposed by systems, professionals, peers, or others, causing the victim to be traumatized after the original incident. Also used to describe 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.

SAFE kit: The medical and forensic examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process and the collection, handling, analysis, testing, and safekeeping of any bodily specimens and evidence meet the requirements necessary for use as evidence in criminal proceedings. *See* DoDD 6495.01.

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.

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.

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 Homeland Security, with respect to matters concerning the Coast Guard, when it is not operating as a service in the Navy.

Sexual assault: Intentional sexual contact, characterized by use of force, threats, intimidation, abuse of authority, or when the victim does not or cannot consent. Sexual assault includes rape, forcible sodomy (oral or anal sex), and other unwanted sexual contact that is aggravated, abusive, or wrongful (to include unwanted and inappropriate sexual contact), or attempts to commit these acts. "Consent" means words or overt acts indicating a freely given agreement to the sexual conduct as issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the accused's use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating relationship by itself or the manner of dress of the person involved with the accused in the sexual conduct as issue shall not constitute consent.

Sexual assault forensic examination (SAFE): The medical examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process, and the collection, handling, analysis, testing, and safekeeping of any bodily specimens meet the requirements necessary for use as evidence in criminal proceedings.

Sexual assault forensic examiner/sexual assault medical forensic examiner (SAFE/SAMFE): Medical personnel who are clinically trained to perform a sexual assault exam, and who have obtained an additional forensic certification to collect forensic evidence from sexual assault victims. Often, the SAMFE is a SANE nurse who has completed the forensic certification. *See* A National Protocol for Sexual Assault Medical Forensic Examinations (2d Ed; April 2013).

Sexual assault nurse examiner (SANE): A registered nurse who receives specialized education and fulfills clinical requirements to perform the sexual assault medical forensic exam. *See* A National Protocol for Sexual Assault Medical Forensic Examinations (2d Ed; April 2013).

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. *See* DoDD 6495.01.

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.

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. *See* DoDD 6495.01.

Sexual assault response team (SART): A multidisciplinary team that provides specialized immediate response to victims of recent sexual assault. The team typically includes health care personnel, law enforcement representatives, victim advocates, prosecutors (usually available on-call to consult with first responders, although some may be more actively involved at this stage), and forensic lab personnel (typically available to consult with examiners, law enforcement, or prosecutors, but not actively involved at this stage). *See* A National Protocol for Sexual Assault Medical Forensic Examinations (2d Ed; April 2013).

Sexual harassment: A form of discrimination that involves unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that create an intimidating, hostile, or offensive environment.

Sexual violence: A term without a specific federal legal meaning, but widely used to denote sexual acts of force against the will of victims.

Special court-martial: A court-martial that consists of at least three officers, a military judge, a trial counsel, and a defense counsel and that has authority to impose a limited sentence and hear only noncapital cases.

Special Victim Capability: A distinct, recognizable group of appropriately skilled professionals, including MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel, who work collaboratively to (1) investigate and prosecute allegations of child abuse (involving sexual assault and/or aggravated assault with grievous bodily harm), domestic violence (involving sexual assault and/or aggravated assault with grievous bodily harm), and adult sexual assault (not involving domestic offenses) and to (2) provide support for the victims of such offenses. *See* DoDI 6495.02.

Special Victim Counsel Program and special victim counsel: The Special Victim Counsel (SVC) Program was created by the Services and mandated by Congress to support victims of sexual assault and enhance their rights within the military justice system while neither causing unreasonable delay nor infringing upon the rights of an accused.

An SVC's primary duty is to represent the clients' rights and interests during the investigation and court-martial process. In general, SVC services include, but are not limited to, accompanying and advising the victim during interviews, examinations and hearings, advocating to government counsel and commanders on behalf of the victim, and advising the victim on collateral civil matters which stem from the alleged sexual assault. SVC are also able to advise a victim on the difference between a restricted and unrestricted report and on what to expect if they decide to make an unrestricted report and their case is referred to court-martial. SVC may coordinate with the Sexual Assault Response and Victim Witness Assistance personnel on available resources. *See* United States Army Special Victim Counsel Handbook & U.S. Air Force Special Victim Counsel Rules of Practice and Procedure.

Specification: A specification is a plain, concise, and definite statement of the essential facts of the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. *See* Rule for Courts-Martial 307(c)(3).

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.

Summary court-martial: Lowest level court-martial in terms of punishment authority. The court-martial is composed of one commissioned officer who need not be an attorney. A Service member can be represented by a civilian attorney but has no right to representation by a military counsel.

Titling: Placing the name, and other identifying data, of an individual or entity on the subject block of an investigative report and central index, for the potential retrieval and analysis for law enforcement and security purposes.

Trial defense counsel: A judge advocate who represents a Service member in any adverse action, such as a court-martial, administrative separation, or nonjudicial punishment proceedings.

Unfounded: False or baseless.

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.

Unitary sentencing: In a court-martial, the sentencing authority (military judge or court-martial members) adjudges a single sentence for all the offenses of which the accused was found guilty. A court-martial may not impose separate sentences for each finding of guilt, but may impose only a single, unitary sentence covering all of the guilty findings in their entirety, no matter how many such findings there may be.

Unrestricted reporting: A process 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 and any details provided to healthcare personnel, the SARC, a victim advocate, command authorities, or persons are reportable to law enforcement and may be used to initiate the official investigative process.

US Army Criminal Investigation Laboratory (USACIL): Located within the Defense Forensic Science Center at Fort Gillem, Georgia, provides forensic laboratory services to DoD investigative agencies and other federal law enforcement agencies.

Victim: A person who asserts direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault. *See* DoDD 6495.01.

Victim Witness Assistance Program (VWAP): A program designed to coordinate efforts and ensure that systems are in place at the installation level to provide information to victims and witnesses on available benefits and services and to provide assistance in obtaining those benefits and services. The program ensures that victims and witnesses are informed on the military justice process and available medical and social services. *See* DoDD 1030.2.

Victim witness liaison (VWL): Coordinates efforts to ensure systems are in place at the installation level to provide information on available benefits and services; assists victims and witnesses in obtaining those benefits and services; and may delegate duties as appropriate but retains responsibility to coordinate the delivery of required services.