

**Report of the  
Joint Service Subcommittee  
Prosecutorial Authority Study (JSS-PAS)**



**2 September 2020**

The estimated cost of this report or study for the Department of Defense is approximately \$109,000 in Fiscal Year 2020. This includes \$18 in expenses and \$109,000 in DoD labor.

## **Membership**

The JSS-PAS is comprised of 15 members from all five branches of the Armed Forces. The subcommittee includes officers who have held command at all levels up to the special court-martial convening authority level, judge advocates, and civilian attorneys.

Members of the JSS-PAS have more than 15 years of collective experience commanding at the summary and special court-martial convening authority level, including command during operational deployments of a Marine battalion and Marine Expeditionary Unit, an Army squadron and brigade, a Navy aircraft carrier, more than 380 hours of combat flight hours as an Air Force command pilot, and two Coast Guard cutters. In total, members of the JSS-PAS have commanded, and have been responsible for the discipline of, more than 22,000 service members.

The JSS-PAS members possess a diverse array of education and experience. The subcommittee collectively holds numerous degrees and distinctions, including two National Defense Fellows at Harvard's Kennedy School of Government, 11 juris doctorates (J.D.), and numerous master's degrees including eight masters of law (LL.M.) from institutions such as The [Army] Judge Advocate General's Legal Center and School, George Washington University, and the University of Virginia. The judge advocates and civilian attorneys have advised commanders and served as staff judge advocates to general courts-martial convening authorities, served as Special Victims Prosecutors and prosecuting attorneys for large civilian jurisdictions, and performed duty in numerous other military justice assignments including prosecution, defense, and appellate counsel.

In addition, the co-chairs of the JSS-PAS possess broad experience in the practice of military justice. The Air Force co-chair is currently the Chief Prosecutor of the Air Force and previously served as a Special Victims Unit trial counsel and in numerous assignments as a military judge, including as the Deputy Chief Trial Judge of the Air Force, a Chief Circuit Military Judge, and an appellate military judge. The Army co-chair is currently the Chief of the Criminal Law Division of the Army's Office of the Judge Advocate General and has extensive litigation experience, having served numerous assignments as a trial and defense counsel, chief of military justice, Special Assistant U.S. Attorney, and a litigation attorney and branch chief for the U.S. Army's Litigation Division.

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## **I. EXECUTIVE SUMMARY**

Section 540F of the National Defense Authorization Act for Fiscal Year 2020 requires a study and report evaluating a proposal that, if implemented, would represent the most sweeping change to military justice in the United States since the inception of the Uniform Code of Military Justice (UCMJ) in 1950. Section 540F requires the Secretary of Defense to “submit to the Committees on Armed Services of the Senate and House of Representatives a report setting forth the results of a study, conducted for purposes of this report, on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial [for offenses under the UCMJ for which a maximum punishment authorized includes confinement for more than one year] are made by a judge advocate in the grade of O-6 or higher who has significant experience in criminal litigation and is outside the chain of command of the member subject to the charges rather than by a member who is in the chain of command of the member.” The Joint Service Committee on Military Justice formed the JSS-PAS to draft this study for consideration.

**Unlike other similar narratives, reports, or studies, the contributors to the JSS-PAS included not only lawyers, but commanders with significant command experience.**

The JSS-PAS finds that implementation of the alternative military justice system defined by Section 540F is neither feasible nor advisable. Section 540F requires the Services to submit a report on the results of a study on the feasibility and advisability of an alternative military justice system. Typically, feasibility and advisability are related concepts that would be evaluated independently. However, in the context of this report, feasibility and advisability will be addressed and evaluated as a unitary concept. With enough statutory changes, it is feasible to create the alternative military justice system proposed in Section 540F, as is made clear by the military justice systems of some of the United States’ allies. Part VI of this report discusses in great detail five of these systems. However, assessing the feasibility of the proposed military justice system under study separately from an assessment the advisability of doing so neglects the cumulative effect of the reasons why such a military justice system is inadvisable on the alternative military justice system’s feasibility. In other words, the effects of the alternative military justice system on the efficacy of the military justice are so severe that they render any changes, while textually possible, infeasible. These consequences are addressed primarily in Parts VIII and IX of this report. The benefits are intangible and dubious, while the risks and consequences are real and significant. This study makes the following conclusions:

- **It is neither feasible nor advisable to remove commanders as the central figure of the military justice system.** Doing so presents too great of a legal risk to a system that has continually survived the crucible of judicial review on the basis that its function is not only to promote justice, but also to enforce obedience to commanders’ lawful orders. Relegating commanders to a lesser role in military justice undermines the foundation and justification for the broad powers courts-

martial exercise as Article I tribunals. Moreover, such an attempt may be textually possible, as is seen in allied military justice systems, but it is difficult to reconcile how a distant lawyer with no connection with a certain chain of command is able to assess and impact the good order and discipline of a distinct unit.

- **Prior studies have shown that commanders have capably and reasonably exercised prosecutorial authority.** In 2012, Congress directed the organization of the Response Systems to Adult Sexual Assault Crimes Panel (RSP). In 2014, the RSP determined that there was no evidence that replacing commanders as court-martial convening authorities with independent prosecutors would improve the military justice system and recommended against doing so in the American military justice system. Additionally, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) determined that in fiscal year 2017, military commanders' disposition decisions were reasonable in the overwhelming majority (95%) of cases reviewed by the DAC-IPAD.
- Removing the authority to dispose of allegations of offenses, sexual assault or otherwise, and giving that authority to a judge advocate would not significantly change disposition decisions. Pursuant to Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, in any case where a general court-martial convening authority (GCMCA) decides not to refer any penetrative sex-related offense to trial by court-martial after receiving the SJA's Article 34 pretrial advice recommending that a sex-related offense be referred to trial by court-martial, the GCMCA must forward the case to the Secretary of the Military Department concerned. To date, this has never occurred in any Service.
- **Bifurcating the discipline authority between commanders and judge advocates will result in a system in which a court-martial is the default disposition.** Commanders would be reduced to persuading judge advocates, most of whom have never held command, on the disciplinary action necessary to preserve good order and discipline within their units. A decision adverse to a commander's recommendation under such circumstances would undercut their ability to enforce discipline and erode their ability to exercise regular command authority. In the alternative, this bifurcation calls for a significant duplication of effort, where commanders seemingly retain authority to convene courts-martial for some offenses, but not others.
- **The studied alternative system is unnecessarily complex and is not conducive to a justice system that strengthens national security through ensuring justice and preserving discipline.** Several of the offenses contemplated for judge advocate review under this alternative system are typically disposed of with disciplinary actions other than courts-martial. Requiring a senior central judge advocate to complete an initial review would overly burden the system and produce unacceptable delay for command actions that rely upon timeliness to preserve good order and discipline.

- **The scope of offenses and offenders covered under the alternative military justice system makes vesting this authority in a single judge advocate per Service too burdensome to promote effective and timely justice.** Allied services with military justice systems similar to the one contemplated in Section 540F are a fraction of the size of the 1.3 million active duty U.S. military service members and direct comparisons are tenuous.
- **There is little evidence that allied militaries' changes to a prosecutor-centric system resulted in any increase in sexual assault reporting.** Neither the alternative system articulated in Section 540F nor any similar proposal explain how this judge advocate would be held accountable or who would have authority to instill accountability without intruding on the prosecutor's independence. This contrasts with the current systems, which maintain various means to hold commanders and civilian prosecutors accountable for their failings. Vesting a lawyer with the authority to make military disciplinary decisions removes, rather than injects, accountability from the system.
- **No evidence that an alternative military justice system will achieve its intended goals.** Some commentators and published materials suggest that command authority presents an inherent conflict of interest with prosecutorial authority. The commentators argue that this results in commanders considering improper matters when making disposition decisions and discourages reporting in sexual assault cases. It is not clear why those advocating to replace commanders with judge advocates in the military justice system believe judge advocates would be less susceptible to improper considerations, particularly political pressures associated with sexual assault investigations and prosecutions. If anything, the consideration of improper motives could be amplified; for this alternative system to function, significant discretion would need to be delegated to junior prosecutors.

Likewise, the JSS-PAS finds that conducting a pilot program for such a system would be infeasible and inadvisable.

- **A pilot program would create a system that arbitrarily subjects a subset of a uniform population to a different jurisdictional scheme.** A separate jurisdictional scheme is bound to face significant and credible equal protection and due process challenges.
- **There are no legal authorities permitting execution of an alternative system.** This risk of successful legal challenge to the alternative system is particularly acute for a pilot program because there are no legal authorities permitting execution of an alternative system where a judge advocate makes decisions to prefer and refer cases. Such a system would require parallel UCMJ-like legislation.

- **A pilot program of this nature would pose a costly and dangerous experiment with the lives of service members.** This echoes the concerns of the superintendents of the United States Military Academy, the United States Naval Academy, and the United States Air Force Academy.
- **Because the JSS-PAS finds that a pilot program of the proposed alternative military justice system is neither feasible nor advisable, the JSS-PAS makes no recommendations as to the development or implementation of a pilot program.**

## II. INTRODUCTION

Military commanders rely on a triad of inspirational leadership, professional expertise, and the UCMJ to lead their organizations and carry out their legal and moral responsibility of "...safeguard[ing] the morale, physical well-being, and the general welfare of the officers and enlisted persons under their command or charge."<sup>1</sup> Simply put, commanders are responsible for ensuring the readiness of their commands. The triad is not severable or made of distinct functions, but is blended and emphasized by commanders based on the circumstances and the mission. Like an uneven stool, a weakness in any part of the triad diminishes the commander's capability to fulfill her obligations. The awesome role and authority of command has few parallels in society. A commander is singular; she alone is legally and morally responsible for carrying out her duties. The best commanders, the ones our service members are entitled to and our nation trusts the military to produce, rely mostly on their inspirational leadership and professional competence forged through experience, augmented with the UCMJ when necessary. Absent the authority stemming from the UCMJ, an inspirational and competent leader is impotent. Similarly, a commander who relies on UCMJ authority alone is an ineffective tyrant.

The purpose of the UCMJ is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment and thereby to strengthen the national security of the United States."<sup>2</sup> By itself, the UCMJ does not inspire. It affords the commander a wide range of options to fulfill her statutory duty to suppress indiscipline and disobedience by holding accountable those who fail to abide by the standard and break the trust of their fellow service members.<sup>3</sup> Trust is what the inspirational and professionally competent leader engenders and why the commander is essential.

An inspirational leader motivates and provides the purpose and direction to bridge the current condition to a future, better condition. It was commanders who led their units through desegregation. It was commanders who led service members to accomplish nearly impossible tasks in spite of the carnage of war. It was commanders who led through gender integration. While laws and policy changes provided an avenue, and a coercive tool if necessary, only the commander can successfully lead and effect change based on authority that comes from the trust of the service members in her charge. Unlike in any civilian organization, it is the sacred duty of the military commander to inspire a better tomorrow for the service members that they alone are charged to care for in peace and war.

The armed forces select professionally competent commanders who have demonstrated exemplary conduct and a potential for continued service through rigorous training, education and developmental experiences. Most importantly, they volunteer. No one is placed in command against his or her will. A commander must take the

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<sup>1</sup> 10 U.S.C. § 7233 (2018).

<sup>2</sup> MANUAL FOR COURTS-MARTIAL, United States, Pt. I (2019).

<sup>3</sup> 10 U.S.C. § 7233 (2018).

affirmative step of saying, “follow me.” Commanders assume command knowing they are legally and morally responsible for not only what their unit does, but also fails to do. The commander is singularly responsible for good order and discipline. The nation deserves nothing less from those given the authority to engage in the controlled use of legitimate violence, the skill that defines our military profession. Commanders are fallible; however, those who fail to meet the responsibilities of command are relieved of the privilege of leading our nation’s greatest treasure. The notion of exemplary conduct is foreign to many but not to a commander. Our nation demands it.

There are times when inspirational leadership and professional competence alone are not enough. The fair administration of military justice by commanders enables them to enforce discipline when necessary. The UCMJ sets out standards for the conduct expected of our service members, including the commander. Grounded in constitutional law and supporting international norms, service members’ compliance with commanders’ orders and the law is the bedrock of good order and discipline. The commander provides the example. A commander does not whimsically apply the tools provided her to fix transgressions. It is with a great deal of reverence and deliberation that she considers available options that strike the balance between effectiveness, fairness, and good order and discipline. Because the law does not bifurcate commanders’ roles between those in peace and in war, a commander cannot simply pick up the mantle of the UCMJ in a time of conflict. A system only exercised during contingencies will atrophy. As such, the commander must continually have and use UCMJ authority to properly exercise that responsibility and prevent injustice. The singular nature and the authority of command in peace and war demand the commander’s active role in administering the UCMJ.

The commander, although singularly responsible for good order and discipline, does not administer punishment arbitrarily or without the advice of trained judge advocates. A commander typically does not possess the technical expertise to understand the elements of a particular crime or have time to personally investigate every allegation. Instead, a commander relies on military criminal investigators and judge advocates to proceed with preferring charges and inform her decision on whether to ultimately refer those charges to courts-martial. The commander also relies on judge advocates to ensure accused receive the legal defense to which they are entitled.

For 245 years, through war and peace, Congress and the nation have entrusted its commanders to lead service members charged with protecting and defending this nation, against all enemies both foreign and domestic. During trials and tribulations that ripped at the fabric of our nation, it was not compliance to a law that ensured the military’s success. It was the commander’s triad of inspirational leadership, professional competence, and the commander’s ability to use a congressionally-enacted military justice code to enforce the law that led change. Reducing the commander’s authority under the UCMJ to dispose of certain classes of offenses would make more difficult an already Herculean task: mission accomplishment while demonstrating the American values enshrined in the Constitution.

### **III. BACKGROUND**

Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 (2019), requires the Department of Defense—not later than October 15, 2020—to submit a report to the Committees on Armed Services of the Senate and House of Representatives setting forth the results of a study on the feasibility and advisability of an alternative military justice system. In that system, the determinations as to whether to prefer or refer charges for trial by court-martial for any offense for which the maximum punishment includes confinement for more than one year is made by a judge advocate. He or she would be in the grade O-6 or higher, possess significant experience in criminal litigation, and be outside the chain of command of the member subject to the charges rather than by a commanding officer of the member who is in the chain of command of the member.

The 540F report is to include the following elements:

- Relevant procedural, legal, and policy implications and considerations of the alternative military justice system described above;
- Implementation and maintenance analysis of legal personnel requirements, changes in force structure, amendments to law, impacts on the timeliness and efficiency of legal processes and court-martial adjudications, potential legal challenges to the system, potential changes in prosecution and conviction rates, potential impacts on the preservation of good order and discipline, including the ability of a commander to carry out nonjudicial punishment and other administrative actions, and such other considerations as the Secretary of Defense considers appropriate;
- A comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military justice system, including whether or not approaches of the military justice systems of such allies to determinations are appropriate for the military justice system of the United States; and
- An assessment of the feasibility and advisability of a pilot program to assess the feasibility and advisability of the alternative military justice system, including an analysis of potential legal issues in connection with the pilot program, including potential issues for appeals, recommendations as to the populations subject to the pilot program, the duration of the pilot program, metrics to measure the effectiveness of the pilot program, and resources to be used to conduct the pilot program.

On February 4, 2020, the Department of Defense Office of the General Counsel referred the report to the Joint Service Committee on Military Justice (JSC).<sup>4</sup> The JSC

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<sup>4</sup> Appendix A, *infra*.

formed the Joint Service Subcommittee—Prosecutorial Authorities Study (JSS-PAS), the charter for which the Department of Defense General Counsel approved on April 14, 2020.<sup>5</sup> In conducting this study, the JSS-PAS considered arguments and scholarly articles written by military justice experts for and against similar proposals, past legislative proposals, reports and studies of Department of Defense advisory committees, Service policy statements and views, past Service and JSC reports submitted to Congress and to the Department of Defense Office of the General Counsel, and various other research materials pertaining to the subject under review.

The proposal mirrors several other proposals to change the UCMJ since its inception on May 5, 1950. One such proposal was advanced in the early 1970s by Senator Birch Bayh from Indiana, who submitted “[a] bill to protect the constitutional rights of those subject to the military justice system...”<sup>6</sup> that would create a Courts-Martial Command, under the supervision of the Judge Advocates General, to “take over the functions now performed by the commander.”<sup>7</sup> Senator Bayh found it problematic that the prosecuting attorney (and at the time, the defense counsel) were “directly responsible to the commanding officer of the command which brings the charges...”<sup>8</sup> None of Senator Bayh’s bills advanced beyond the Senate Armed Services Committee.<sup>9</sup>

Since 2013, several versions of the Military Justice Improvement Act (MJIA) have been proposed.<sup>10</sup> The premise of each is that instead of the commander of an accused making a prosecutorial decision for specified felony-level offenses,<sup>11</sup> the decision would be made by an officer in the grade of O-6 or higher and each Chief of Staff of the Armed Forces and Commandant must establish an office to convene courts-martial in lieu of commanders. In 2012, Congress directed the organization of the Response Systems to Adult Sexual Assault Crimes Panel (RSP) in order to study such a system. In June 2014, the RSP recommended against the adoption of the 2013 MJIA proposal to remove courts-martial convening authority from commanders.<sup>12</sup> These proposals to alter the military justice system have not been enacted.

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<sup>5</sup> Appendix B, *infra*.

<sup>6</sup> 117 Cong. Rec. 5304 (1971) (statement of Sen. Birch Bayh).

<sup>7</sup> Id. at 5307 (statement of Sen. Birch Bayh).

<sup>8</sup> Id. at 5305 (statement of Sen. Birch Bayh).

<sup>9</sup> See, e.g., Military Justice Act of 1973, S. 987, 93d Cong. (1973).

<sup>10</sup> See, e.g., Military Justice Improvement Act of 2013, S. 967, 113th Cong. (2013); Military Justice Improvement Act of 2013, S. 1752, 113th Cong. (2013); Military Justice Improvement Act of 2017, S. 2141, 115th Cong. (2017); Military Justice Improvement Act of 2019, S. 1789, 116th Cong.; Military Justice Improvement Act of 2020, S.4049, 117th Cong. (2020).

<sup>11</sup> A felony-level offense is defined as an offense where the maximum confinement that may be adjudged exceeds one year.

<sup>12</sup> U.S. DEP’T OF DEFENSE, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, June 27, 2014, 171 (hereinafter RSP Report).

## **IV. LAWYERS AND NON-LAWYERS IN THE AMERICAN SYSTEM OF JUSTICE**

The criminal justice system in America combines the lawyer and the non-lawyer at all stages of processing—from the probable cause determinations made by law enforcement officials while obtaining search and arrest warrants, through the bill of indictment issued by a grand jury, to, ultimately the greatest role of the non-lawyer in criminal justice, the role of rendering a verdict in criminal cases. Parole determinations and clemency are granted by personnel who are not required to be lawyers.

### **a. Probable Cause Determinations**

#### *Charging and the Grand Jury in the Federal System*

No grand jury exists within the military justice system. The Fifth Amendment to the United States Constitution requires that, for all federal felony cases, there must be a presentment or indictment of a grand jury.<sup>13</sup> However, the Fifth Amendment explicitly exempts military cases, stating “except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of War, or public danger.”<sup>14</sup> Accordingly, the lack of a grand jury in the military justice system is embedded within the Constitution itself.

In the federal system, the primary purpose of the grand jury is to determine whether there is probable cause to believe an individual committed a federal offense within the venue of the federal district court that impaneled the grand jury. Therefore, its primary function is to indict or to return a “no-bill.”<sup>15</sup> However, as the Supreme Court has noted, the power of the grand jury extends beyond just indictments or declinations to indict: it may also choose the number and manner of charges, and “is not bound to indict in every case where a conviction can be obtained.”<sup>16</sup> Both the grand jury and petit jury must be a “body truly representative of the community, and not the organ of any special group or class.”<sup>17</sup> Attorneys for the government present the case before the grand jury; there is no right for a criminal defense attorney to be present at a grand jury hearing.<sup>18</sup> While the prosecutor presents the case, it is twelve members of the grand jury who must vote to indict before a case may proceed.<sup>19</sup>

There exists no statutory or regulatory limitation upon the authority of a prosecutor to submit the same matter to a new grand jury after return of a “no-bill.” However, the

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<sup>13</sup> U.S. Const. amend. V.

<sup>14</sup> Id.

<sup>15</sup> See Wright, *Federal Practice and Procedure, Criminal Section 110*.

<sup>16</sup> *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986) (citing *United States v. Ciambrone*, 601 F.2d 616, 629 (2d Cir. 1979)).

<sup>17</sup> *Glasser v. United States*, 315 U.S. 60, 86 (1942) (internal citation omitted).

<sup>18</sup> Fed. R. Crim. P. 6(d).

<sup>19</sup> Fed. R. Crim. P. 6(f).

policy of the United States Attorney General is to require approval of the responsible United States Attorney prior to resubmitting a case to the grand jury.<sup>20</sup>

It is the Article III district court's responsibility to manage a random selection of qualified citizens for both grand and petit (trial) juries.<sup>21</sup> Generally, jurors are selected by voter registration lists.<sup>22</sup> While lawyers are not prohibited from sitting on grand juries, there is no requirement that one have a law degree to perform this duty.

Prosecutors for the responsible United States Attorney's Office determine what offenses should be charged. They prepare the indictment and, finally, present the indictment to the grand jury. But it is ultimately the decision of the laypersons on the grand jury to determine whether probable cause exists and, if it does exist, whether to indict.

### *Charging and Grand Juries Within the State Systems*

While the Fifth Amendment requires that all felony trials be prosecuted only upon the indictment from a grand jury, that requirement has never been incorporated to the States.<sup>23</sup> Some states, such as New York, require indictments for felony cases. Many other states allow for prosecution without a grand jury.

In California, felony crimes may be prosecuted by indictment or information.<sup>24</sup> Indictments are submitted to a grand jury, while an information is vetted for probable cause through a preliminary hearing before a judge.<sup>25</sup> Under California law, preliminary hearings may not be used as a method of discovery.<sup>26</sup> In contrast to felonies, misdemeanors are prosecuted by written complaint.<sup>27</sup> In effect, the only probable cause determination made for misdemeanors in criminal cases is the request for a warrant of arrest. No preliminary hearing or grand jury indictment is necessary to prosecute a misdemeanor offense under California law.

California is not alone in allowing felony trials to proceed without grand jury indictments. Missouri and Indiana prosecutors similarly have the discretion to either indict through a grand jury or file an information independently.<sup>28</sup> In Indiana, unlike in the federal system, if a grand jury returns a no-bill, the prosecutor is prohibited from filing a new information or submitting a new indictment.<sup>29</sup>

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<sup>20</sup> U.S. Dep't of Justice, Justice Manual, §9-11.120 (hereinafter Justice Manual).

<sup>21</sup> 28 U.S.C. §1863; Fed. R. Crim. P. 6(a)(1).

<sup>22</sup> 28 U.S.C. §1863.

<sup>23</sup> Hurtado v. California, 110 U.S. 516, 538 (1884).

<sup>24</sup> Cal. Gov. Code § 737.

<sup>25</sup> Cal. Gov. Code § 866.

<sup>26</sup> Id.

<sup>27</sup> Cal. Pen. Code § 740.

<sup>28</sup> Mo. Const. Art. I, § 17; Mo. Ann. Stat. § 545.010; Ind. Const. § 35-33-7-3.

<sup>29</sup> Ind. Code. § 35-34-1-6(b); Ind. Code. § 35-34-2-12(d).

Some states even allow for effective charging to be done by laypersons. In Virginia, a citizen may bring a complaint directly to a judge.<sup>30</sup> If the magistrate determines there is probable cause, he will then issue an arrest warrant. For misdemeanors, warrants may be issued absent any coordination with the prosecuting attorney, though for felonies there must be authorization by either the commonwealth's attorney or a law enforcement agency. However, once the arrest has been effected, it returns to the commonwealth's attorney who is responsible for filing an information for a misdemeanor offense, or obtaining an indictment by the grand jury in the case of a felony charge.<sup>31</sup>

There is no uniform charging system throughout the states, though most distinguish between the methods of charging misdemeanors and felonies. Those that require grand juries effectively require a layperson determination of probable cause before proceeding to trial: those with preliminary hearings require that a judicial officer review charges.

### *Charging in the Military System*

No grand jury system exists within military law. However, similar to most states, charges must be submitted to a preliminary hearing before a charge may proceed to the most serious trial forum, the general court-martial.<sup>32</sup> As in the state systems requiring preliminary hearings, one of the purposes of the hearing is to determine whether probable cause supports the charged offense.<sup>33</sup> While in civilian courts it is generally a magistrate judge who oversees the hearing, within the military context, the hearing officer must, "whenever practicable" be a judge advocate who is certified pursuant to Article 27(b)(2), UCMJ. The preliminary hearing officer makes four non-binding determinations for the convening authority's consideration: whether the specification alleges an offense under the UCMJ; whether there is probable cause to believe that the accused committed the offense or offenses charged; whether the convening authority has court-martial jurisdiction over the accused; and a recommendation as to disposition.<sup>34</sup>

In addition to the probable cause determination made at a preliminary hearing, an SJA must also provide written advice before a convening authority may refer charges to a general court-martial.<sup>35</sup> The advice must include a legal determination as to whether there is probable cause to support the charges.<sup>36</sup> A charge may not be referred to a general court-martial without the SJA's determination that probable exists to support that charge.<sup>37</sup> The SJA's advice must also include a recommendation as to disposition.<sup>38</sup> Although an SJA's recommendation to refer charges to general court-

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<sup>30</sup> Va. Code Ann. § 19.2-72.

<sup>31</sup> Va. Code Ann. § 19.2-217.

<sup>32</sup> UCMJ art. 32(a)(1)(A) (2019).

<sup>33</sup> UCMJ art. 32(a)(2)(B) (2019).

<sup>34</sup> UCMJ art. 32(a)(2) (2019).

<sup>35</sup> UCMJ art. 34 (2019).

<sup>36</sup> UCMJ art. 34(a)(1) (2019).

<sup>37</sup> Id.

<sup>38</sup> UCMJ art. 34(a)(2) (2019).

martial is not binding upon the convening authority, the SJA's input carries significant weight. Notably, with respect to penetrative sex-related offenses, when a commander chooses to not refer charges after receiving the SJA's pretrial advice recommending that a sex-related offense be referred to trial by court-martial, the case must be forward to the Secretary of the Military Department concerned.<sup>39</sup> To date, this has not occurred in any service.

While ultimately the convening authority, a non-lawyer, refers charges to a court-martial, she does so only after considering both the binding probable cause determination of her SJA (in the case of general courts-martial) and the non-binding disposition guidance in Appendix 2.1 of the Manual for Courts-Martial.<sup>40</sup> The non-binding disposition guidance mirrors the factors the Department of Justice considers in making charging decisions. She also does so, for general courts-martial, after having obtained the advice and analysis of the judge advocate who conducted the preliminary hearing and the SJA.

While the military justice system differs from civilian systems in the United States, just as civilian state systems differ from one another, it maintains the due process considerations inherent in criminal justice—oversight, review of probable cause determinations, and independent analysis of the appropriateness of charges. It operates, essentially, as an inverse to the federal system in which non-lawyers determine probable cause through the grand jury—here, two different lawyers make two independent probable cause determinations, with the SJA's no-probable-cause determination being binding on the convening authority under Article 34, UCMJ.

### **b. Role of Law Enforcement**

Civilian law enforcement are often the gatekeepers of the criminal justice system and hold almost exclusive authority—by way of citations, arrests, and even physical force—to enforce and regulate the law.<sup>41</sup> Civilian law enforcement may independently decide whether to initiate a criminal investigation, decide the course of the investigation, and decide whether to issue a citation, make an arrest, or to refer the investigation to a prosecutor to make a charging decision.

The relationship between law enforcement and the prosecutor is vital to the civilian criminal justice system. The process of investigating, apprehending and prosecuting criminals involves a variety of tasks, the responsibility for which has been divided between police and prosecutors.<sup>42</sup> Even though the prosecutors have an investigative responsibility, the investigative function as a whole remains almost entirely with the

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<sup>39</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980, sec. 1744 (2013).

<sup>40</sup> UCMJ art. 33; MANUAL FOR COURTS-MARTIAL, App. 2.1 (2019) (hereinafter Non-Binding Disposition Guidance). The Non-Binding Disposition Guidance has been included as Appendix C of this report.

<sup>41</sup> See S. Rebecca Neusteter, Ram Subramanian, Jennifer Trone, Mawia Khogali, and Cindy Reed, Vera Institute of Justice, *Gatekeepers: The Role of Police in Ending Mass Incarceration* (August 2019), 2.

<sup>42</sup> U.S. DEP'T OF JUSTICE, NATIONAL INSTITUTE OF JUSTICE, *Police-Prosecutor Relations in the United States*, July 1982, 15.

police.<sup>43</sup> Law enforcement conducts preliminary or early follow-up stages of investigations, while the prosecutors may engage in investigations related to tracking down witnesses or putting last minute touches on cases.<sup>44</sup> For most crimes, the investigation and arrest decisions are initiated and controlled entirely by the police. The prosecutor plays virtually no direct role in the initial stage of the process.<sup>45</sup> Most often, a prosecutor's first involvement with a case is when law enforcement submit their investigation to them for review or following an arrest. However, in determining whether formal criminal charges should be filed, prosecutors should consider whether further investigation should be undertaken.<sup>46</sup>

Before police can issue a citation, make an arrest, or apply for a search or arrest warrant, an officer must have probable cause to believe that a crime has been committed and that a specific person committed the crime. This determination of probable cause by law enforcement is separate and distinct from the charging decision made by the prosecutor. The prosecutor's charging decision, however, most often involves a more rigorous standard than merely determining whether probable cause for the charge exists. As discussed below, a prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.<sup>47</sup>

Civilian law enforcement also plays an important role vis-à-vis victims of crime. As the Office of Justice Programs, Office for Victims of Crime website states:

Whenever a crime is committed, law enforcement officers are typically the first to arrive on the scene and to interact with victims. As a result, police officers have more contact with crime victims in the immediate aftermath of a crime than any other criminal justice professional. This makes their role critical and puts them in a unique position to meet victims' needs immediately after the crime has occurred and encourage and facilitate the victim's participation in the criminal justice system.<sup>48</sup>

In the military, the relationship between a military criminal investigative organization (MCIO)<sup>49</sup> and the commanders who make disposition decisions is similar in some ways, but very different in other ways, to the relationship between civilian law enforcement and the prosecutor. While civilian law enforcement is independent from prosecutors' offices, MCIOs perform their duties under the authority of the Secretaries of their respective

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<sup>43</sup> Id. at 16.

<sup>44</sup> Id. at 17.

<sup>45</sup> Id. at 25.

<sup>46</sup> American Bar Ass'n, *Standards for the Prosecution Function*, Standard 3-4.2(c).

<sup>47</sup> Id. at Standard 3-4.3(b).

<sup>48</sup> Office of Justice Programs, Office for Victims of Crime, (available at <https://ovc.ncjrs.gov/topic.aspx?topicid=87#tabs2>).

<sup>49</sup> The four MCIOs are the Army Criminal Investigation Command, the Naval Criminal Investigative Service, the Air Force Office of Special Investigations, and the Coast Guard Investigative Service (CGIS).

Military Departments.<sup>50</sup> However, each MCIO has the independent authority to initiate investigations in accordance with law and governing regulations and do not require approval from any authority outside the MCIO.<sup>51</sup>

Unlike civilian prosecutors, military commanders at all levels are required to ensure that criminal allegations or suspected criminal allegations involving persons affiliated with the Armed Forces or any property or programs under their control or authority are referred to the appropriate MCIO or law enforcement organization as soon as possible.<sup>52</sup>

To a greater extent than civilian law enforcement, military law enforcement is obligated by regulation to ensure that victims are accorded their rights.<sup>53</sup> Just like civilian law enforcement, military law enforcement is often in first contact with victims of crime. However, military law enforcement's obligations regarding crime victims go beyond their civilian law enforcement counterparts. Military law enforcement is required to provide the victims of crime with a written document that serves as evidence that the officer notified the victim of his or her statutory rights.<sup>54</sup> In addition, by regulation, military law enforcement is part of each installation's victim and witness assistance council. In the military, law enforcement is integral to the multi-disciplinary approach adopted by the military to provide services to victims. These councils, in addition to victim and witness providers, include law enforcement personnel, criminal investigators, chaplains, family advocacy personnel, medical personnel, judge advocates, corrections personnel and unit commanding officers.<sup>55</sup>

Even though civilian prosecutors have crime victim responsibilities, they lack the responsibility and obligation required of commanders of military crime victims. While referring commanders may not be co-located with the accused's or victim's unit (depending on the Service), the hierarchical command structure helps ensure that the unit-level commander carries out the crime victim responsibilities. Not only is the commander required to report crimes to military law enforcement, they may also authorize searches to assist law enforcement investigations. By regulation, the commander is obligated to ensure crime victims receive the entitled services. The commander is a member of the victim and witness assistance council that meets regularly to discuss the services provided to crime victims and the status of law enforcement investigations. Further, unit-level commanders maintain a critical pulse on

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<sup>50</sup> See, e.g., U.S. DEP'T OF NAVY, SEC'Y OF NAVY INSTR. 5340.107A, Missions and Functions of the Naval Criminal Investigative Service, Dec. 28, 2005, ¶ 6.a. The Department of Defense instructions do not apply to CGIS, as the Coast Guard is part of the Department of Homeland Security. CGIS special agents are credentialed to exercise the law enforcement authority contained in 14 U.S.C. § 525. See Coast Guard Investigative Service Roles and Responsibilities, COMDTINST 5520.5 (series).

<sup>51</sup> U.S. DEP'T OF DEF., INSTR. 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations, March 24, 2011, incorporating Change 2, February 13, 2017, ¶ 4.a. See also Coast Guard Investigative Service Roles and Responsibilities, COMDTINST 5520.5 (series).

<sup>52</sup> Id., ¶ 5.c.

<sup>53</sup> U.S. DEP'T OF DEF., Dir. 1030.01, VICTIM AND WITNESS ASSISTANCE, April 13, 2004 (Certified Current as of April 23, 2007), ¶ 4.4.

<sup>54</sup> U.S. DEP'T OF DEF., INSTR. 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES, June 4, 2004, ¶ 6.2.

<sup>55</sup> Id., ¶ 5.2.6.

the unit. They are typically the first to identify victims being ostracized, the first to assist in locating alternative lodging for accused service members or victims in domestic violence cases, and the first to identify the need for military protective orders. The commander has a stake in crime victims' rights and in the outcome of law enforcement investigations. Commanders' dual interests set them apart from a civilian prosecutor who often has no contact with a victim until a law enforcement investigation is complete.

While the independent judge advocate contemplated under Section 540F would have to be mindful of victim rights, they would not have the same obligations as the commander to ensure a victim receives all the entitled services. Moreover, the independent judge advocate would lack the necessary authority to ensure the unit-level commander or the base-level SJA carry out their crime victim responsibilities. To remove commanders from the court-martial process removes their in-depth knowledge of the impact the crime has taken on the victims and the lingering effects on good order and discipline within the unit. Any law relegating the commander's role in military justice would need to ensure that the commander is empowered with the tools necessary to remain proactive rather than reactive in addressing these matters.

### **c. An Analysis of the Exercise of Prosecutorial Discretion**

Though the American court system generally recognizes prosecutorial discretion as belonging solely to the prosecuting attorney, prosecutorial discretion is not related solely to determinations of legal sufficiency of evidence. In the federal system there are statutory limitations upon a federal prosecutor's authority to decline to prosecute. For instance, in cases involving insolvency, prosecutors may not decline to prosecute until they have first reported the facts to the Attorney General, and then to the United States Trustee Program.<sup>56</sup> Similarly, the Department of Justice Criminal Division has policies which impose limitations upon United States Attorneys.

Indeed, the Department of Justice recognizes that “[a] determination to prosecute represents a policy judgment that the fundamental interest of society require the application of federal criminal law to a particular set of circumstances—recognizing both that serious violations of federal law must be prosecuted, and that prosecution entails profound consequences for the accused, crime victims, and their families whether or not a conviction ultimately results.”<sup>57</sup> In determining whether to prosecute a case, federal prosecutors look not only to whether admissible evidence will probably be sufficient to obtain and sustain a conviction, but also to whether prosecution serves a substantial federal interest; whether the person is subject to effective prosecution in another jurisdiction; or if an adequate non-criminal alternative to prosecution exists.<sup>58</sup> In determining whether there is a substantial federal interest, the prosecutor should consider federal law enforcement priorities, the nature and seriousness of the offense, the deterrent effect of prosecution, the subject's culpability, the subject's criminal

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<sup>56</sup> 18 U.S.C. § 2057 (2018).

<sup>57</sup> Justice Manual, *supra* note 20, at § 9-21.001.

<sup>58</sup> Id. at § 9-28.229.

history, the subject's willingness to cooperate with authorities, the subject's personal circumstances, the interests of the victims, the probable sentence, and any other relevant factors.<sup>59</sup> The determination of whether there is a substantial federal interest, then, is primarily predicated upon policy and not any legal determination.

In the military justice system, the policy of determining whether a substantial federal interest is furthered by prosecution is replaced with the policy of determining whether the interests of justice and good order and discipline are met by pursuing a court-martial. Appendix 2.1 to the Manual for Courts-Martial provides non-binding disposition guidance for convening authorities. It provides factors for convening authorities to consider in determining what level of discipline is appropriate to further the interests of justice and good order and discipline.<sup>60</sup> Commanders consider those same policy prerogatives: for example, the nature, seriousness, and circumstances of the offense and the accused's culpability, the views of any victim, input from law enforcement agencies, and the accused's willingness to cooperate in the investigation.<sup>61</sup>

#### **d. Lawyers and Non-Lawyers Work Together in the Charging Process in the American Justice System**

As discussed above, in every civilian justice system in the United States, prosecutorial discretion lies primarily with lawyers. While there are some occasional outliers, they alone are responsible for choosing whether to charge, as well as what to charge. This differs from military justice, where the convening authority makes the ultimate charging decision.

The military is the only criminal justice system in which the prosecutor does not have principal, if not sole, responsibility for charging decisions. However, the executive branch in almost every jurisdiction places limits or prohibitions upon the exercise of those charging decisions.

For instance, the California governor stated a desire to dismantle California's capital punishment system. While the prosecutor is responsible for charging decisions on a case-by case basis, the governor has authority to issue an executive order, which could direct the attorney general to pursue no capital cases.<sup>62</sup> Although a district attorney serves as an elected official within the executive branch, the state constitution vests supervisory authority in the governor. In this way, an elected official, with no requirements of legal expertise, may direct the performance of prosecutors within his state.

Similarly, a governor may shape charging decisions within his state based upon announced policies. In 2014, the governor of Washington issued a moratorium on

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<sup>59</sup> Id. at § 9-28.230.

<sup>60</sup> Non-Binding Disposition Guidance, *supra* note 40.

<sup>61</sup> Id.

<sup>62</sup> Cal Const Art. V § 1; Cal Const Art. V § 13

capital punishment within the state. Following the moratorium, there were no death sentences adjudged in the state.

Perhaps the most famous example of political policy influencing a prosecutor's decision whether to prosecute arose from the Department of Justice and its changing stance on the prosecution of marijuana offenses, particularly in states that had decriminalized the use of either medical or recreational marijuana. In 2013, Deputy Attorney General James Cole issued a memorandum stating that prosecutors should consider that a state's regulatory system, if followed, was likely to be sufficient to allay concerns that the drug operation would be a threat to federal enforcement efforts. While the memorandum explicitly left to prosecutors independent charging decisions, this policy-based memorandum clearly provided strategic guidance that addressed policy and budget concerns, as opposed to legalistic determinations of probable cause or evidence sufficient to obtain a conviction. In 2018, Attorney General Jefferson Sessions rescinded the previous guidance, stating that the Department of Justice should return to its "well-established general principles."<sup>63</sup>

Policy-based directives from the executive branch, whether it be the President or a state governor, are not uncommon in any justice system. These policy directives, while not addressing cases on an individual basis, necessarily impact charging decisions made by independent prosecutors.

Within the military system, there exists no distinction between executive guidance and independent decision-making. Instead, the commander is vested with both the authority to determine as a policy decision what types of crimes merit higher levels of discipline, as well as the authority in each independent case to determine what level of discipline is appropriate. As the President noted when promulgating the Manual for Courts-Martial:

Military law includes jurisdiction exercised by courts-martial and the jurisdiction exercised by commanders with respect to nonjudicial punishment. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.<sup>64</sup>

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<sup>63</sup> Memorandum from Jefferson B. Sessions, U.S. Attorney General, to all United States Attorneys, U.S. Dep't of Justice, Subject: Marijuana Enforcement, Jan. 4, 2018 (available at <https://www.justice.gov/opa/press-release/file/1022196/download>).

<sup>64</sup> MANUAL FOR COURTS-MARTIAL, United States, Pt. I (2019).

## **V. HOW THE COMMANDER'S ROLE IN THE MILITARY JUSTICE SYSTEM FITS IN THE AMERICAN JUSTICE SYSTEM**

### **a. Purpose of Military Justice**

Crucial to the commander's role in military justice is the unique role of the military itself. As the Supreme Court articulated, “[t]he military is, by necessity, a specialized society separate from civilian society.”<sup>65</sup> The basis and purpose for justice within the military is also separate from that of the civilian sector. After all, “an army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in a soldier.”<sup>66</sup>

The commander's role is more than that of a district attorney or a federal prosecutor. She is also the mayor, the head of law enforcement, and the effective employer. She is responsible for policy and implementation, unique to the military. The Supreme Court has long recognized the unique needs of the military, finding that “civil courts are ‘ill equipped’ to establish policies regarding matters of military concern.”<sup>67</sup> As the Supreme Court noted in 2018, this is no different today than it was when the Framers drafted the Constitution.<sup>68</sup>

While the military is the only criminal jurisdiction in the United States in which a lawyer is not responsible for charging, a non-attorney commander making charging decisions does not render commanders unable to achieve both the protection of the rights of its service members and the unique needs of the military to maintain good order and discipline. The commander must maintain good order and discipline within her community just as police chiefs and district attorneys maintain order within their communities. While the commander is responsible for the referral and effective “charging” of cases, her role necessarily pervades more broadly the court-martial process. That is because the commander is responsible for not only enforcing the law, but ensuring the welfare and discipline of each member of her command. Even after having made the charging decision, the convening authority still uses her command authority at additional stages throughout the process.

The simplicity of the phrase “good order and discipline” carries with it the risk of devolving into a mere platitude. Military discipline, simply put, is the respect for authority and absolute obedience to lawful orders.<sup>69</sup> The purpose of discipline stems from the necessity of combat. Against their natural instincts and personal risk, service members must adhere to the orders of their superiors to kill other human beings and risk being killed in harsh and chaotic battlefield conditions. Though modern warfare, in some

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<sup>65</sup> Parker v. Levy, 417 U.S. 733, 743 (1974).

<sup>66</sup> In re Grimley, 137 U.S. 147, 153 (1890).

<sup>67</sup> Solorio v. United States, 483 U.S. 435, 448 (1987).

<sup>68</sup> See Ortiz v. United States, 138 S. Ct. 2165 (2018) (stating “the court-martial is in fact ‘older than the Constitution’ . . . When it came time to draft a new charter, the Framers ‘recognized and sanctioned existing military jurisdiction’”).

<sup>69</sup> Fredric I. Lederer, Civilianization of the Military Justice System, 225 MIL. L. REV. 512, 515 (2017).

aspects, has changed since the pitched battles of Saratoga, Gettysburg, and Iwo Jima, war is not and will never become an abstraction. The nature of warfare will always fundamentally remain a contest of wills, a human endeavor in which command and control, unit cohesiveness, trust, and discipline are required to maintain readiness, effectiveness, and lethality on the battlefield. Along with training, education, counseling, and military custom, military justice is meant to inculcate service members in the necessity of good order and discipline. The UCMJ must be an effective tool for commanders to quickly reinforce the absolute necessity for their unit personnel to follow orders. Reducing commanders of their role under the UCMJ for all or certain classes of offenses would significantly dilute the inherent authority needed to discharge their military responsibilities in preparing for and fighting wars.

Because of the purpose of the UCMJ is to strengthen national security through the promotion of justice and preservation of good order and discipline, referral of charges and court-martial convening decisions are inherently command decisions. As with all military decisions, they are best made by a military commander aided by the advice of a relevant expert, in this case an experienced judge advocate. Command decisions regarding military justice are no different in this regard than operational decisions regarding the employment of service members and ordnance. While the commander may not be an expert in the law, likewise a commander is rarely the expert in logistics, the manner in which weapon systems function, or the intricacies of advanced intelligence platforms. However, commanders are accountable for the results of the people and equipment under their commands. Subordinate commands and members of the staff, just as judge advocates, logisticians, artillerymen, and intelligence specialists, provide recommendations based on their technical expertise, but it is the commander who is responsible for accomplishing the assigned mission and maintaining good order and discipline. Commanders, by being solely accountable for successes and failures, are amply incentivized to reach the correct decision in any of these fields.

Moreover, the military justice system must be able to operate in both peacetime and war, in the United States and abroad. The drafters of the UCMJ recognized this when making commanders responsible for the administration of justice:

We cannot escape the fact that the law which we are now writing will be as applicable and 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.<sup>70</sup>

Centralizing the functions of military justice, even with the delegation of some prosecutorial decisions to local judge advocates, would place undue burden on the ability of commanders to achieve their wartime missions. Without the authority to administer military justice against those whose indiscipline threatens that ability, the fabric of a capable military force is stretched.

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<sup>70</sup> H.R. Rep. No. 81-491, 8 (1949) (Conf. Rep.).

## b. Detailing of Panel Members

In 2019, there were 76,538 felonies which received sentencing through federal district courts.<sup>71</sup> The State of New York, with an estimated 2019 population of 19,453,561 persons,<sup>72</sup> had 16,612 persons convicted of felony offenses.<sup>73</sup>

Unlike federal and state courts, the court-martial is not a standing court, nor could it transform into a standing court. Based solely on the number of cases tried within a jurisdiction or command, creating standing military court systems is impracticable.

In contrast to the federal government and New York, the Army tried 622 general and special courts-martial,<sup>74</sup> the Navy tried 245 general and special courts-martial,<sup>75</sup> the Marines tried 245 general and special courts-martial,<sup>76</sup> and the Air Force tried 415 general and special courts-martial.<sup>77</sup> These 1,527 courts-martial among the entire Department of Defense plus the U.S. Coast Guard, with an Active, Reserve, and National Guard force of nearly 1.4 million, were tried at various locations worldwide. Because of the nature of deployments and permanent changes of station, courts-martial are often a global affair. It is not uncommon, particularly in cases involving a delayed report of a sexual offense, for witnesses to have scattered across the globe in the time between the commission of the offense and the court-martial. Cases are tried not only within the United States, but across the world.

A standing system of courts is not responsive to the ever-changing nature of a globally-deployed military force – nor is a standing court system necessary given the limited number of cases tried within a year.

As discussed above, within the federal system it is the judiciary that is responsible for selection and coordination of prospective jurors. Similarly, state jurisdictions assign courts the responsibility for selecting citizens for jury duty, generally based upon voting records. Without the ability to create, or the necessity of, a standing court, it is the commander who performs this role within the military. It is the convening authority who referred the charges who is also responsible for the selection of prospective panel members.<sup>78</sup> The convening authority not only details members but is also responsible for excusing members before trial. It is not uncommon for service members to request excusal based upon their military duties, whether they are a pending deployment, mission, or a permanent change of station. The commander is best-positioned to

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<sup>71</sup> U.S. Sentencing Comm'n, Annual Report 2019.

<sup>72</sup> U.S. Census Bureau, Quick Facts: New York, available at <https://www.census.gov/quickfacts/NY> (last accessed May 28, 2020).

<sup>73</sup> New York State Div. of Criminal Justice Services, Criminal Justice Processing Report (May 2019).

<sup>74</sup> U.S. DEP'T OF ARMY, U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2019, Dec. 31, 2019.

<sup>75</sup> U.S. DEP'T OF NAVY, NAVY REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2019, Dec. 31, 2019.

<sup>76</sup> U.S. MARINE CORPS, MARINE CORPS REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2019, Dec. 31, 2019.

<sup>77</sup> U.S. DEP'T OF AIR FORCE, AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2019, Dec. 31, 2019.

<sup>78</sup> UCMJ art. 25 (2019).

determine, based upon overall mission efficiency, whether continued service on a panel is a best use of an officer or enlisted member, or whether their presence on a given mission or deployment promotes military effectiveness.

Panel members are drawn from the ranks, and convening authorities select panel members based on the criteria in Article 25, UCMJ: those who “are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” Their sense of duty to the Constitution and obedience to its ideals result in a deliberative body that takes their responsibility seriously and is not influenced by perceived desired outcomes. When empaneled, military members carry out their duty with the same vigor they approach any other mission.

#### **c. Commander's Role in Punishment**

Unlike civilian systems, the unique nature of the military justice system requires a commander to both initiate and conclude the proceedings. In the federal system, at the conclusion of court, the sentence is enforced by the Bureau of Prisons or the Court Supervisory Officer. However, the unique sentencing scheme in courts-martial requires a commander to carry out the sentence. Military sentences often involve unique military punishments such as hard labor without confinement, restriction to base, reduction in rank, forfeiture of pay, and punitive discharge from the service that are enforced by the commander.

While lengthy confinement is overseen principally at five regional military confinement facilities, the accused's commander oversees most other sentences. Similarly, in cases in which a punitive discharge is not adjudicated, the member is returned to the commander upon the conclusion of the court-martial proceedings, and the commander is then responsible for determining whether the accused has been rehabilitated and if their continued service is consistent with, or prejudicial to, good order and discipline. If the commander determines the latter, she may initiate administrative separation procedures.

#### **d. Commander's Role in Clemency**

Finally, the commander, when serving as the convening authority, is responsible for clemency. While the convening authority's clemency authority has been limited, she is still responsible for clemency decisions regarding those punishment decisions which she is charged with enforcing: the reduction of rank, forfeiture of pay, restriction to base limits, and hard labor without confinement. In some cases, the commander may also provide clemency regarding confinement and/or a punitive discharge. The convening authority is also responsible for drafting the language of a military reprimand, if adjudged. Commanders may decide in some instances that clemency is warranted based on the totality of the circumstances and that it actually contributes to good order and discipline.

### e. Oversight of Command Authority

Just as the judicial branch serves as a check on the executive branch in the civilian sector, so too do military judges and appellate processes serve as a check on command authority within the military justice system. As the Supreme Court noted recently, “the independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function.”<sup>79</sup>

Military judges may not be rated by a convening authority.<sup>80</sup> As a practical matter, military judges do not fall under the command authority of any convening authority. Just as civilian defendants may raise motions for selective prosecution, suppression of evidence, or violations of due process, so too may military accused do so before an impartial judge. If a convening authority acts unlawfully in his roles of charging or processing a court-martial, military accused may seek relief from the impartial judge. In addition, service members convicted at a court-martial may seek judicial review: first before a Court of Criminal Appeals,<sup>81</sup> then, before the presidentially appointed, Senate-confirmed civilian judges on the Court of Appeals for the Armed Forces,<sup>82</sup> and ultimately before the United States Supreme Court.<sup>83</sup>

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<sup>79</sup> Ortiz v. United States, 138 S. Ct. 2165, 2176 n.5 (2018).

<sup>80</sup> Manual for Courts-Martial, United States, R.C.M. 105 (2019).

<sup>81</sup> UCMJ art. 66 (2019).

<sup>82</sup> UCMJ art. 67 (2019).

<sup>83</sup> UCMJ art 67a (2019); 28 U.S.C. § 1259.

## **VI. A COMPARATIVE ANALYSIS OF THE MILITARY JUSTICE SYSTEMS OF RELEVANT FOREIGN ALLIES**

### **a. Points of Comparison to U.S. Military**

The JSS-PAS determined that it could not draw a useful comparison between the United States military justice system and other foreign allied services. The United States' military is significantly larger in size and operates on a global scale, and its military justice system handles a significantly higher volume of cases each year. In order to provide adequate context to the studies of allied military justice systems, the JSS-PAS offers the following statistics taken from the Services' annual reports on military justice:

Army.<sup>84</sup>

- Reported 2019 active duty strength: 483,941
- Number of cases where nonjudicial punishment imposed: 24,852
- Number of courts-martial (of any degree) tried or pending during fiscal year 2019: 1,359

Marine Corps.<sup>85</sup>

- Reported 2019 active duty strength: 186,009
- Number of cases where nonjudicial punishment imposed: 6,728
- Number of courts-martial (of any degree) tried or pending during fiscal year 2019: 601

Navy.<sup>86</sup>

- Reported 2019 active duty strength: 337,006
- Number of cases where nonjudicial punishment imposed: 4,323
- Number of courts-martial (of any degree) tried or pending during fiscal year 2019: 427

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<sup>84</sup> U.S. ARMY, REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2019, *supra* note 74.

<sup>85</sup> U.S. MARINE CORPS, MARINE CORPS REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2019, *supra* note 76.

<sup>86</sup> U.S. DEP'T OF NAVY, NAVY REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2019, *supra* note 75.

Air Force.<sup>87</sup>

- Reported 2019 active duty strength: 324,169
- Number of cases where nonjudicial punishment imposed: 4,055
- Number of courts-martial (of any degree) tried or pending during fiscal year 2019: 757

Coast Guard<sup>88</sup>

- Reported 2019 active duty strength: 41,906
- Number of cases where nonjudicial punishment imposed: 523
- Number of courts-martial (of any degree) tried or pending during fiscal year 2019: 75

**b. Canada**

*Size of service.* The Canadian Armed Forces (including the Royal Canadian Navy, the Canadian Army, the Royal Canadian Air Force, and the Canadian Special Operations Forces Command) totals 71,500 Regular Force members and 30,000 Reserve Force members.<sup>89</sup> Between April 1, 2018, and March 31, 2019, the Canadian Armed Forces tried 51 courts-martial for serious offenses and held 533 unit-level summary trials for minor offenses.<sup>90</sup>

*Basis of military law.* The Parliament of Canada has exclusive authority to make laws relating to the “militia, military and naval service and defence.”<sup>91</sup> The National Defence Act (NDA), originally enacted by the Parliament of Canada in 1950, includes the Code of Service Discipline (CSD). The CSD sets out the foundation of the Canadian military justice system including disciplinary jurisdiction, service offences, punishments, powers of arrest, organization and procedures of service tribunals, appeals, and post-trial review.<sup>92</sup> The Queen’s Regulations and Orders (QR&O) implement the NDA.<sup>93</sup> The

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<sup>87</sup> U.S. DEPT OF AIR FORCE, AIR FORCE REPORT ON THE STATE OF MILITARY JUSTICE FOR FISCAL YEAR 2019, *supra* note 77.

<sup>88</sup> U.S. COAST GUARD, U.S. COAST GUARD OFFICE OF MILITARY JUSTICE (on file).

<sup>89</sup> Mandate of National Defence and the Canadian Armed Forces, [www.forces.gc.ca/en/about-us.page](http://www.forces.gc.ca/en/about-us.page) (last accessed Apr. 13, 2020).

<sup>90</sup> National Defence of Canada, Office of the Judge Advocate General, Annual Report 2018-2019 of the Judge Advocate General to the Minister of National Defence on the Administration of Military Justice from 1 April 2018 to 31 March 2019, 14.

<sup>91</sup> Constitution Act, 1867, 30 & 31 Victoria, c. 3, § 91(7), <http://laws-lois.justice.gc.ca/eng/Const/FullText.html>.

<sup>92</sup> Judge Advocate General (hereinafter JAG), Military Justice at the Summary Trial Level 2.2, 3-1, <http://www.forces.gc.ca/jag/publications/training-formation/miljustice-justmil-v2-2/chap3-eng.asp> (last updated Jan. 12, 2011).

<sup>93</sup> Id.

NDA creates a two-tiered military justice system, consisting of the summary trial system and the formal court martial system.<sup>94</sup>

*Jurisdiction over offenses.* Canada's military justice system, regardless of tier, has jurisdiction over most offenses committed by members of the Canadian Armed Forces. However, excepted from this jurisdiction are the offenses of murder, manslaughter, and child abduction when committed in Canada.<sup>95</sup> Sexual offenses are not excluded from service tribunal jurisdiction, as the inability of the military justice system to deal with sexual offenses had "the potential to undermine morale and unit discipline, lessen mutual trust and respect, and ultimately impair military efficiency."<sup>96</sup> Civilian courts have concurrent jurisdiction with military tribunals with respect to any offense for which the civilian court would also have jurisdiction (e.g., the Criminal Code and the Controlled Drugs and Substances Act).<sup>97</sup>

*Summary trial system.* The summary trial is the most predominant form of Canadian military discipline, which allows cases involving service offenses to be tried and disposed of at the unit level. Presiding officers are trained and certified by the Judge Advocate General as qualified to perform those duties. Members facing a summary trial are not entitled to legal representation. The procedures at a summary trial are straightforward and the powers of punishment are limited in scope.<sup>98</sup>

Under NDA section 163(1), "[a] commanding officer<sup>[99]</sup> may try an accused person by summary trial if the following conditions are satisfied: the accused person is either an officer cadet or a non-commissioned member below the rank of warrant officer;<sup>[100]</sup> having regard to the gravity of the offence, the commanding officer considers that his or her powers of punishment are adequate; if the accused person has the right to elect to be tried by court martial, the accused person has not elected to be so tried; the offence is not one that, according to regulations made by the Governor in Council, the commanding officer is precluded from trying; and the commanding officer does not have reasonable grounds to believe that the accused person is unfit to stand trial or was

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<sup>94</sup> *Id.* at 3-2.

<sup>95</sup> National Defence Act (hereinafter NDA), R.S.C., 1985, c. N-5, § 70, <http://laws-lois.justice.gc.ca/eng/acts/n-5/>.

<sup>96</sup> Jerry S.T. Pitzul & John C. Maguire, *A Perspective on Canada's Code of Service Discipline*, 52 AIR FORCE L. REV. 1, 15 (2002), <http://www.afjag.af.mil/shared/media/document/AFD-081204-027.pdf>.

<sup>97</sup> NDA, *supra* note 95, at § 71.

<sup>98</sup> JAG, *supra* note 92, at 3-3. A commanding officer may pass a sentence of up to 30 days' confinement, reduction of one rank, reprimand, a fine not exceeding one month's basic pay, and minor punishments. NDA, *supra* note 95, at § 161(3), <http://laws-lois.justice.gc.ca/eng/acts/n-5/>.

<sup>99</sup> "Commanding officer" is defined as "the commanding officer of the accused person and includes an officer who is empowered by regulations made by the Governor in Council to act as the commanding officer of the accused person." NDA, *supra* note 95, at § 160.

<sup>100</sup> A "superior commander" is "an officer of or above the rank of brigadier-general, or any other officer appointed by the Chief of the Defence Staff as a superior commander." *Id.* at § 162.3. The jurisdiction of a superior commander's summary trial includes officers below the rank of colonel and noncommissioned officers above the rank of sergeant. Otherwise, the conditions precedent to trial by summary court as applied to commanding officers also apply to those presided over by superior commanders. *Id.* at § 164(1).

suffering from a mental disorder at the time of the commission of the alleged offence.”<sup>101</sup>

The commanding officer or superior officer who investigates or lays charges<sup>102</sup> against a member is generally prohibited from presiding at the summary trial.<sup>103</sup> A commanding officer may authorize others within a command to lay charges, which preserves the commanding officer’s ability to preside at a summary trial.<sup>104</sup> The person with authority to lay charges must obtain legal advice prior to laying a charge, except in limited circumstances.<sup>105</sup>

The jurisdiction of summary trials with respect to offenses is limited to offenses of a military nature and a very limited number of offenses under Canada’s *Criminal Code* and *Controlled Drugs and Substances Act*.<sup>106</sup> Members may demand trial by court martial except when the charged offense is for insubordinate behavior, quarrels and disturbances, absence without leave, drunkenness, or conduct prejudicial to good order and discipline as it relates to military training, maintenance of personal equipment, quarters or workspace, dress and deportment, or other sufficiently minor circumstances.<sup>107</sup>

*Court martial system.* A court martial is a formal military court presided over by a military judge. Members facing a court martial are entitled to a free lawyer and the prosecution is conducted by a legally-qualified officer from the Canadian military. There are two types of courts martial: general courts martial and standing courts martial. General courts martial are comprised of a military judge, who makes legal rulings and imposes a sentence, and a five-member panel, which makes a finding on the charges. Standing courts martial are presided by a military judge sitting alone. Both types of courts martial may impose any sentence authorized by the *NDA*, including imprisonment for life.<sup>108</sup>

*General overview.* A case proceeds to court martial under two general scenarios: when a commanding officer or superior commander believes the nature of the offense requires it, or when an accused has elected a court martial over a summary trial.<sup>109</sup>

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<sup>101</sup> Id. at § 163(1).

<sup>102</sup> To “lay a charge” means to reduce the charge to writing on a Record of Disciplinary Proceedings form, signed by the person authorized to lay charges. Queen’s Regulations & Orders (hereinafter QR&O), § 107.015, <https://www.canada.ca/en/department-national-defence/corporate/policies-standards/queens-regulations-orders.html>.

<sup>103</sup> NDA, *supra* note 95, at §§ 163(2), 164(2).

<sup>104</sup> QR&O, *supra* note 102, at § 107.02(b).

<sup>105</sup> Id. at § 107.03. See generally Director of Military Prosecutions Policy Directive 002/00, Pre-Charge Screening, Mar. 1, 2000 (updated Sep. 1, 2018).

<sup>106</sup> QR&O, *supra* note 102, at §§ 108.07(2), 108.07(3).

<sup>107</sup> Id. at § 108.17.

<sup>108</sup> JAG, *supra* note 92, at 3-3 to 3-4.

<sup>109</sup> The Honorable Patrick J. Lesage, C.M., O. Ont., Q.C., Report of the Second Independent Review Authority to the Honourable Peter G. Mackay Minister of National Defence (hereinafter SIRA), 32 (Dec. 2011).

When the commanding officer, superior commander, or in certain circumstances a member of the Canadian Forces National Investigative Services<sup>110</sup> believes the charges should be tried at a court martial, the charges are referred to the referral authority.

The referral authority has two options: forward the case with recommendations as to disposition to the Director of Military Prosecutions (DMP) or return the case back to the commanding officer or superior commander to dispose of the case via summary trial.<sup>111</sup>

The DMP, or his or her delegate, then decides whether the charge is suitable for court martial based on the sufficiency of the evidence and whether prosecution is in the public interest and the interest of the Canadian Forces.<sup>112</sup> If a court martial is warranted, the DMP, or an authorized deputy, prefers the charge by signing the charge sheet and referring it to the Court Martial Administrator, who convenes the court martial.<sup>113</sup>

### *System participants*

*Referral authority.* Referral authorities are “[t]he officers who are authorized to refer a charge to the Director of Military Prosecutions.” By regulation, the following exercise referral authority: “the Chief of the Defence Staff and any officer having the powers of an officer commanding a command.”<sup>114</sup> “The [r]eferral [a]uthority represents the interests of the Canadian Forces in prosecuting the charge. The [r]eferral [a]uthority’s role is to ensure the views of the senior chain of command are taken into account in deciding whether to proceed with the charges. He or she has a broader perspective and a clearer picture of all issues in the units and formations to be considered when determining to continue with the prosecution.”<sup>115</sup> Before the advent of the DMP, the referral authority served as the convening authority.<sup>116</sup>

*Director of Military Prosecutions.* The DMP commands the Court Martial Prosecution Service and is the senior military prosecutor in Canada, appointed by the Minister of Defence for a four-year term.<sup>117</sup> While the DMP acts under the general supervision of the Judge Advocate General (JAG),<sup>118</sup> the DMP “exercises his prosecutorial mandate independent from the JAG and the chain of command.”<sup>119</sup> The DMP retains final disposition authority for relatively few offenses, but under the NDA the DMP is

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<sup>110</sup> See QR&O, *supra* note 102, at § 107.12.

<sup>111</sup> Id. at § 109.05.

<sup>112</sup> See Director of Military Prosecutions Policy Directive 003/00, Post-Charge Review (hereinafter Policy Directive 003/00), Mar. 1, 2000 (updated Sep. 1, 2018).

<sup>113</sup> NDA, *supra* note 95, at §165.12, and QR&O, *supra* note 12, at §110.01.

<sup>114</sup> QR&O, *supra* note 102, at § 109.02.

<sup>115</sup> SIRA, *supra* note 109, at 32.

<sup>116</sup> JAG, *supra* note 92, at Annex N (Guide for Referral Authorities), <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/military-justice-summary-trial-level-2-2/annex-n-referral-authorities-guide.html>.

<sup>117</sup> NDA, *supra* note 95, at § 165.1.

<sup>118</sup> Id. at § 165.17.

<sup>119</sup> Director of Military Prosecutions Annual Report 2018-2019 (hereinafter DMP Annual Report 2018-2019), 1 (June 2019), <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2018-2019.html>.

responsible for the preferral of all charges and the conduct of prosecutions at court martial.<sup>120</sup>

Regional Deputy Director of Military Prosecutions (DDMP). The DDMPs supervise Regional Military Prosecutors (RMP).<sup>121</sup> The DDMPs retain final disposition authority for offenses which may subject an accused to life imprisonment, offenses that require the consent of the Attorney General, offenses that carry a minimum punishment under the Criminal Code, and the offense of torture.<sup>122</sup> The DDMP may also either retain or delegate final disposition authority for cases involving weapons offenses, obstruction of justice offenses, operational offenses, most offenses under the Controlled Drug and Substances Act, and fraud or theft in excess of \$500.<sup>123</sup>

Deputy Director of Military Prosecutions – Sexual Misconduct Action Response Team (DDMP-SMART). The DDMP-SMART retains final disposition approval in all cases involving serious sexual misconduct.<sup>124</sup>

Regional Military Prosecutor. The RMP has the discretion to prefer, not prefer, and withdraw charges in most cases.<sup>125</sup> Prosecutors are to seek the input of the chain of command throughout the entire court martial process.<sup>126</sup>

Court Martial Administrator. Once a charge is preferred, the Court Martial Administrator is responsible for convening general and standing courts martial<sup>127</sup> and acts under the general supervision of the Chief Military Judge.<sup>128</sup> The Court Martial Administrator generates orders convening courts martial identifying the date, time, location, language (French or English, as chosen by the accused), the military judge, and the members.<sup>129</sup> The Court Martial Administrator randomly chooses members and excuses them based on the criteria in the QR&O.<sup>130</sup>

Military Judge. Canadian military judges are statutorily appointed and serve as military judges for the remainder of their military careers or until the age of 60, removable only for cause.<sup>131</sup> The Canadian Forces has five military judges: a Chief Military Judge, a Deputy Chief Military Judge, and three Military Judges (as well as reserve military

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<sup>120</sup> See Policy Directive 003/00, *supra* note 112, at 17-18.

<sup>121</sup> DMP Annual Report 2018-2019, *supra* note 119, at 3.

<sup>122</sup> Policy Directive 003/00, *supra* note 112, at 18.

<sup>123</sup> Id. at 19.

<sup>124</sup> Id.

<sup>125</sup> Id. at 18.

<sup>126</sup> See generally, Director of Military Prosecutions Policy Directive 005/00, Communications with Service Authorities (hereinafter Policy Directive 005/00), Mar. 15, 2000 (updated Sep. 1, 2018).

<sup>127</sup> NDA, *supra* note 95, at § 165.19(3).

<sup>128</sup> Id. at §§ 165.191-193.

<sup>129</sup> QR&O, *supra* note 102, at § 111.02.

<sup>130</sup> See id. at § 111.03.

<sup>131</sup> NDA, *supra* note 95, at § 165.21.

judges). The chief must hold the rank of at least a colonel and assigns military judges to courts martial.<sup>132</sup>

#### *Reason for change to an independent prosecutor*

The adoption of the Canadian Charter of Rights and Freedoms in 1982 forced the Canadian Forces to make changes to its military justice system in order to implement the Charter's constitutional protections. In 1992, the Supreme Court of Canada decided the case of R. v. Généreux, which found commander-centric general courts martial violated the constitutional guarantee of judicial independence.<sup>133</sup> However, the Généreux decision recognized the importance of a system separate from the civil courts operated by personnel who are sensitive to the requirements of the military.<sup>134</sup> Many of these reforms are reflected above and include separating the functions of convening courts martial from the selection of court martial panels, adopting a random methodology for selecting panel members, and securing the tenure and independence of judges.<sup>135</sup> This parallel system of military justice largely mirroring the civilian justice system "designed to meet the unique needs of the military with respect to discipline, efficiency, and morale" was recently upheld again by the Supreme Court of Canada in R. v. Stillman.<sup>136</sup>

#### *Impact of the change on good order and discipline, including sexual misconduct*

Canada's change to a military justice system that separates the ability to convene courts martial from the command does not appear to have had a discernable improvement on good order and discipline, specifically with respect to sexual assault prosecutions.

The vesting of preferral and referral decisions in an independent prosecutor was implemented to comport with the Canadian Charter of Rights and Freedoms, not in an effort to improve prosecutions.<sup>137</sup> In his testimony before the Response Systems to Adult Sexual Assault Crimes Panel, Major General Blaise Cathcart, then-Judge Advocate General of the Canadian Forces, stated there was no discernable trend in data between 2005 and 2010 and he could present no data indicating an effect of independent prosecutors on sex crime reporting.<sup>138</sup>

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<sup>132</sup> *Organizational Structure of the Office of the Chief Military Judge*, Government of Canada, <https://www.canada.ca/en/chief-military-judge/corporate-information/organizational-structure.html> (last accessed Apr. 14, 2020).

<sup>133</sup> R. v. Généreux 1 S.C.R. 259, 261 (S.C.C.) (1992).

<sup>134</sup> Pitzul and Maguire, *supra* note 96, at 9.

<sup>135</sup> Id. at 8.

<sup>136</sup> R. v. Stillman, 2019 SCC 40, ¶ 36 (Jul. 26, 2019).

<sup>137</sup> Response Systems to Adult Sexual Assault Crimes Panel, Transcript of RSP Public Meeting, 181 (Sept. 24, 2013) (available at

[https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/24\\_Sep\\_13\\_Day1\\_Final.pdf](https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/24_Sep_13_Day1_Final.pdf)).

<sup>138</sup> Id. at 163-164.

In 2015, an independent review on sexual misconduct and sexual assault found that “there is an underlying sexualized culture in the [Canadian Armed Forces] that is hostile to women and [lesbian, gay, transgender, bisexual, and queer] members...”<sup>139</sup> The report noted an environment that included instances of sexual jokes, jokes about women’s bodies, unwelcome sexual touching, quid pro quo sexual harassment, date rape, and condonation of such conduct by the chain of command.<sup>140</sup> Of particular importance to the topic of this study, the scope of the review specifically excluded “any matter related to the Judge Advocate General (JAG) in respect of his or her superintendence of the administration of military justice in the Canadian Forces.”<sup>141</sup> As a result, the report did not “review the JAG’s oversight of court martial proceedings and summary trial.”<sup>142</sup>

However, a recent study found that from 2015 to 2018, the Canadian Forces secured only four convictions for sexual assault, a conviction rate of 14 percent for that offense, which is markedly lower than the conviction rate for cases disposed of in the Canadian civilian criminal justice system.<sup>143</sup> As one of the reasons for this low rate, the author cited a 2018 Auditor General report that concluded that because of “frequent rotation, military prosecutors and defence counsel do not develop the expertise and experience to perform their duties.”<sup>144</sup>

### c. United Kingdom (UK)

*Size of service.* In October 2019, the total strength of the full-time United Kingdom Armed Forces (including the Army, the Royal Air Force, and the Royal Navy/Marines) totaled 144,650 Regular Force members and 36,830 Reserve Force members.<sup>145</sup> Approximately 8,220 United Kingdom military personnel are stationed outside Great Britain with the largest number (2,850) stationed in Germany.<sup>146</sup>

*Basis of military law.* English service members have been regulated by a separate system from civilians for centuries. Courts martial have been in place in England since 1521, and in 1666, the office of the Judge Advocate General was created to supervise these courts-martial.<sup>147</sup> Parliament became involved in military justice with the passage of the Mutiny Act in 1689, thus setting the English precedent of legislative control over

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<sup>139</sup> Canada, Department of National Defence, External Review into Sexual Misconduct and Sexual Harassment in the Canadian Armed Forces, Mar. 27, 2015, i.

<sup>140</sup> Id. at ii.

<sup>141</sup> Id. at 66.

<sup>142</sup> Id.

<sup>143</sup> Elaine Craig, An Examination of How the Canadian Military's Legal System Responds to Sexual Assault, 43:1 DAL. L.J. 1, 12-13 (2020).

<sup>144</sup> Id. at 38, (citing Auditor General of Canada, Report 3 – Administration of Justice in the Canadian Armed Forces, (Ottawa, Office of the Auditor General, 2018)).

<sup>145</sup> Ministry of Defence, UK Armed Forces Quarterly Service Personnel Statistics, October 1, 2019 (published November 21, 2019).

<sup>146</sup> Ministry of Defence, Annual Location Statistics (ALS), April 1, 2019.

<sup>147</sup> Military, Judiciary of England and Wales, <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-in-detail/jurisdictions/military-jurisdiction>.

military issues.<sup>148</sup> In the mid-1950s each branch of the United Kingdom armed forces was governed by what were known as the Service Discipline Acts, with separate Acts applying to each branch of the armed forces.<sup>149</sup> Each of these Acts provided for its own system of discipline for its members, including for criminal offenses. Despite the separate Acts, the general structure of each of the systems was similar.<sup>150</sup> In 2006, the Armed Forces Act established the court martial as a permanent, standing court effective October 31, 2009.<sup>151</sup> The 2006 Act established a single system of armed services law.<sup>152</sup> The Armed Forces Act created a two-tiered system, consisting of the commanding officer who can investigate and decide upon less serious offenses summarily, and more serious offenses that are heard by court martial, a standing court that is headed by a civilian Judge Advocate.<sup>153</sup>

*Jurisdiction over offenses.* All active duty armed forces members at any time, reserve forces while in service or performing duty or training, and some civilians working for the armed forces, are subject to service law.<sup>154</sup> Jurisdiction over offenses solely against service law (such as absence without leave) lies with the Service authorities. Concurrent jurisdiction (between the Service and civilian police) may apply to other offenses. Jurisdiction over who investigates offenses depends on where the offense took place, what the offense is, and who was involved. Where issues of jurisdiction are complex, agreements exist between the military and civilian police as to who will lead the investigation.<sup>155</sup> Jurisdiction overseas is regulated by treaty, memorandum of understanding or other agreement, including a Status of Forces Agreement.<sup>156</sup>

### *Summary trial system*

While the UK has a robust system for hearing serious criminal and disciplinary matters by the court martial, it maintains a system that allows a commanding officer to address both minor criminal and disciplinary matters from within the chain of command.<sup>157</sup>

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<sup>148</sup> Origins of Military Justice, <https://law.jrank.org/pages/22766/Military-Issues-Origins-Modern-Military-Justice.html>.

<sup>149</sup> Naval Discipline Act 1957, c. 53, 5 & 6 Eliz. II, <http://www.legislation.gov.uk/ukpga/Eliz2/5-6/53/>; Army Act 1955, c. 18, Regnal 3 & 4 Eliz. II, <http://www.legislation.gov.uk/ukpga/Eliz2/3-4/18/contents>; Air Force Act 1955, c. 19, Regnal. 3 & 4 Eliz. II, <http://www.legislation.gov.uk/ukpga/Eliz2/3-4/19/contents>.

<sup>150</sup> Armed Forces Act 2006, c. 52, Explanatory Notes, ¶¶ 5–6, <http://www.legislation.gov.uk/ukpga/2006/52/notes>.

<sup>151</sup> Judge Advocate General, *Guidance on Sentencing in the Court Martial* (version 3) ¶ 1.2 (2011), <http://www.justice.gov.uk/downloads/courts/judge-advocate-general/guidance-sentencing-court-martial.pdf>.

<sup>152</sup> Judiciary of England and Wales, *supra* note 147.

<sup>153</sup> See, Louisa Brooke-Holland, International Affairs and Defence Section, The Military Justice System: An Introduction, House of Commons Library, SN06823, § 1 (last updated May 7, 2014).

<sup>154</sup> Id. The Director of Service Prosecutions may refer certain civilians working for or accompanying UK armed forces to the Service Civilian Court (SCC).

<sup>155</sup> Id. § 1.4.

<sup>156</sup> Joint Service Publication (JSP) 830 Manual of Service Law (MSL), volume 1, chapter 3 (hereinafter JSP 830).

<sup>157</sup> Armed Forces Act 2006 (hereinafter AFA), c. 52, §§ 52–53 (The offenses that may be tried summarily by a Commanding Officer are listed in Schedule 1 of this Act and include theft offenses, possession of

Specified criminal offenses and disciplinary issues may be dealt with summarily by the accused's commanding officer and, according to the Judiciary of England and Wales, this remains the method through which the majority of minor and disciplinary offenses by members of the armed forces are handled.<sup>158</sup>

For offenses that may be dealt with summarily, the commanding officer retains the majority of authority to hear, amend charges relating to, determine punishment for, or dismiss such cases.<sup>159</sup> The commanding officer also has a duty to either report service offenses to the Service Police or conduct an "appropriate investigation" into them.<sup>160</sup> The commanding officer is under a duty to inform the Service Police of any allegations of actions or circumstances in which he or she believes a "serious offence" (those listed in Schedule 2 of the Armed Forces Act 2006) has been committed.<sup>161</sup>

The commanding officer has authority to impose up to twenty-eight days of detention, extendable to up to 90 days with approval from a higher-ranking authority. The accused may request that his or her case be heard before the court martial and may appeal the matter to a Summary Appeal Court after the conclusion of the hearing before the commanding officer.<sup>162</sup> A Judge Advocate is a civilian who presides over the Summary Appeal Court along with two military officers. The Judge Advocate makes legal rulings but the decision to grant or dismiss an appeal is decided by a majority of the three members of the Court.

A defendant is not entitled to a lawyer at a summary hearing but may seek legal advice prior to the Summary Hearing, including whether to choose a summary hearing or a court martial.<sup>163</sup> At the summary hearing, defendants may have an "assisting officer" who is not a lawyer but someone who can assist the defendant with paperwork.<sup>164</sup>

*Court martial system.*<sup>165</sup> The court martial is a standing, permanent court established by the Armed Forces Act 2006.<sup>166</sup> It replaced the three separate Service courts that existed prior to 2006.<sup>167</sup> The Director of Service Prosecutions (DSP) heads the Service Prosecuting Authority (SPA), which is independent of the military chain of command. The DSP and the SPA act under the general supervision of the Attorney General of

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illegal drugs, criminal damage, assault and battery, and driving a vehicle under the influence of alcohol. If permission is given, additional offenses may be dealt with summarily by the accused's commanding officer including assault occasioning actual bodily harm, possession in public of an offensive weapon, or fraud).

<sup>158</sup> Judiciary of England and Wales, *supra* note 147.

<sup>159</sup> AFA, *supra* note 157, at § 123.

<sup>160</sup> Id. at § 115 (Explanatory Notes).

<sup>161</sup> Id. at § 113 (A list of serious offenses are listed in Schedule 2 of the Act).

<sup>162</sup> Id. at § 129.

<sup>163</sup> Id. at § 154(1).

<sup>164</sup> Brooke-Holland, *supra* note 153, at § 1.10.

<sup>165</sup> Id. at § 1. Civilians, under certain circumstances fall under military jurisdiction may be referred to the SCC in the manner military armed forces members may be referred to court martial.

<sup>166</sup> Id. at § 1.7.

<sup>167</sup> See, Grady, Kate, *Disciplinary Offences at the Court Martial*, CRIMINAL LAW REVIEW, Issue 10, 716.

England and Wales. The DSP is not answerable to the Secretary of State for Defence in respect of the DSP's decision making relating to prosecutions. The SPA determines whether to prosecute an individual by trial at Court Martial and prosecutes that case.<sup>168</sup> The Armed Forces Act of 2011 provided that the DSP may also appoint civilians with the prescribed qualifications to carry out these prosecution functions previously handled only by military personnel.<sup>169</sup>

*General overview.* Only the DSP may refer a case to court martial.<sup>170</sup> Commanders are without jurisdiction to take action on any Schedule 2 offense unless the case has been previously referred to the DSP and the DSP refers the case back to the commander for summary trial.<sup>171</sup>

A commander who is aware of an allegation or circumstance which would indicate to a reasonable person that a serious Schedule 2 offense may have been committed by someone in his or her command must ensure that the Service Police are made aware of the offense as soon as is reasonably practicable.<sup>172</sup>

The DSP has four options: direct the commanding officer to bring a specified charge(s) for court martial,<sup>173</sup> issue a direction barring either all further Service proceedings or all further Service and civilian proceedings against the suspect in relation to an offense,<sup>174</sup> refer the case back to the commanding officer without giving a direction as to which charge or charges should be brought,<sup>175</sup> or take no action.<sup>176</sup>

Once the DSP has directed the commanding officer to bring a charge to court martial, the commanding officer must sign the charge sheet prepared by the DSP, and serve it on the accused.<sup>177</sup>

### *System participants*

*Referral authority.* The decision regarding whether or not to bring an accused before the court martial for serious criminal and disciplinary offenses lies with the prosecuting authority, the Director of Service Prosecutions (DSP). The DSP is independent of the chain of command and is an experienced lawyer appointed by the Queen. The DSP

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<sup>168</sup> Brooke-Holland, *supra* note 153, at § 1.6.

<sup>169</sup> Explanatory Notes for Armed Forces Bill as introduced in the House of Commons on 8 December 2010 [Bill 122].

<sup>170</sup> AFA, *supra* note 157, at § 119(5).

<sup>171</sup> Id. at § 121(4).

<sup>172</sup> JSP 830, *supra* note 156, at volume 1, chapter 6, part 3.

<sup>173</sup> AFA, *supra* note 157, at § 119(5) (The CO must bring the charge(s) specified in the charge sheet as directed).

<sup>174</sup> Id. at §§ 121(5) and 127 and note regulation 15(5) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009, for the direction barring further proceedings.

<sup>175</sup> Id. at § 119(5) (the commander has all initial powers in relation to the case and may take summary action, administrative action, or no action in the case).

<sup>176</sup> JSP 830, *supra* note 156, at volume 1, chapter 6, part 5 (If the DSP considers that the case would be better dealt with by the civilian authorities).

<sup>177</sup> Regulation 11(1) (b) of the Armed Forces (Part 5 of the Armed Forces Act 2006) Regulations 2009.

may be a civilian lawyer.<sup>178</sup> A commanding officer is under a duty to inform the Service Police of any allegations believed to be a serious offense. When the service police conducts an investigation and determines there is sufficient evidence to charge the serious offense, the case must be referred to the DSP. Other than being informed of the referral by the service police, the commanding officer plays no role in the charging decision.<sup>179</sup> The DSP may direct the commanding officer to bring charges or send the case to court martial.<sup>180</sup>

Service Prosecuting Authority. The DSP heads the Service Prosecuting Authority (SPA). The DSP and the SPA act under the general supervision of the Attorney General of England and Wales. The Director of Service Prosecutions is not answerable to the Secretary of State for Defence in respect of the DSP's decision making relating to prosecutions. The SPA determines whether to prosecute an individual by trial at court martial and prosecutes that case.<sup>181</sup>

Defendant's Attorney. A defendant may request the assistance of a legal representative to act on his or her behalf. The representative may be a Service or civilian lawyer. A defendant may also have a Defendant's Assisting Officer (DAO) whose role is primarily administrative, and who has no legal standing in the court martial.<sup>182</sup>

Military Court Service (MCS). The MCS provides a criminal court service for all three Services in the court martial, Summary Appeal Court and Service Civilian Court. The MCS was set up by the Armed Forces Act 2006 to provide a tri-service military court service, merging the three Services' court services. There are five permanently manned MCSs in the UK and one in Germany. Trials can be held outside the manned MCSs when required. Court martial results from the Military Court Centres are published on a Government website.

Military Judge. A court martial is presided over by a civilian judge known as a Judge Advocate, who is appointed from among experienced lawyers.<sup>183</sup> The Judge Advocate decides questions of law, practice and procedure and gives direction to the members but does not decide findings of guilt or innocence.<sup>184</sup>

Members. Every court martial has between three and seven lay or board members who act as the jury. The members decide findings on guilt or innocence.<sup>185</sup> The lay members also help the Judge Advocate to decide on any sentence if the accused is found guilty. Whether lay members are service personnel (commissioned or warrant officers) or

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<sup>178</sup> Id. at § 364.

<sup>179</sup> AFA, *supra* note 157, at § 116.

<sup>180</sup> Id. § 121.

<sup>181</sup> Id.

<sup>182</sup> JSP 830, *supra* note 156, at version 2.0, chapter 28

<sup>183</sup> The Law Library of Congress, Global Research Center, Military Justice: Adjudication of Sexual Offenses, July 2013, 56.

<sup>184</sup> The Court Martial and the Summary Appeal Court Guidance, vol. 2, 8 (version 6 – June 2011) (hereinafter Summary Appeal Court Guidance).

<sup>185</sup> Id.

civilians depends on the status of the defendant.<sup>186</sup> Members must not be lawyers, the commanding officer of the defendant, or in the same unit as the defendant, nor may they have taken part in the investigation or a member of the SPA.<sup>187</sup>

*Reason for change to an independent prosecutor.* Prior to the Armed Forces Act of 2006, in the United Kingdom the commanding officer was responsible for convening the court martial, charging the accused with the appropriate crimes, appointing the panel members from within the command, confirming the verdict, and reducing the sentence if such action was appropriate.<sup>188</sup> The transformation of the United Kingdom system was, in part, brought about by the findings of the European Commission and European Court of Human Rights (ECHR) in *Findlay v. United Kingdom*<sup>189</sup> that the United Kingdom system violated the fair trial guarantee contained in the European Convention of Human Rights and Fundamental Freedoms.<sup>190</sup> Even though *Findlay* was issued a year after the adoption of the Armed Forces Act of 2006, the effective date of the Act was not until October 31, 2009 and the ECHR decided the case based on the UK system in place prior to the Act. The ECHR decided the court-martial system in the United Kingdom violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms that provides that the right to a fair trial includes the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>191</sup>

#### *Impact of the change on good order and discipline, including sexual misconduct*

It is difficult to gauge the impact of the UK's current court-martial system on good order and discipline. When considering sexual assault cases, a UK survey in 2006 found that almost all service women who responded had been in a situation that involved sexualized behaviors, with almost seventy percent responding that they had encountered sexual behavior directed at them that was unwelcome. The length of service was also found to play a role; the longer survey respondents had served, the more likely they were to perceive that there was a problem with sexual harassment in the military. Thirteen percent reported that they had been sexually assaulted, but only five percent of these made a formal written complaint.<sup>192</sup> Despite removing commander involvement in serious sexual assault cases following the implementation in late 2009 of the Armed Forces Act of 2006, the Service Complaints Commissioner, responsible for taking complaints of crimes either directly from an individual's chain of command or

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<sup>186</sup> JSP 830, *supra* note 156, at volume 2, chapter 28.

<sup>187</sup> Summary Appeal Court Guidance, *supra* note 184, at vol.2, 6.

<sup>188</sup> *Id.* at 16.

<sup>189</sup> 24 Eur. Ct. H.R. 221 (1997), available at <http://www.echr.coe.int/eng>.

<sup>190</sup> Darla W. Jackson, The European Convention on Human Rights: A Threat to United States-European Security Relations and the United States Military Justice System? Air Command and Staff College, Maxwell Air Force Base, April 2002, 1.

<sup>191</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ. TS No.5, 213 UNTS 221.

<sup>192</sup> Carrie Hunt et al., *Sexual Harassment in the Workplace: A Literature Review* 13 (Centre for Equality and Diversity at Work, Manchester Business School, Working Paper Series No. 59, 2006), <http://research.mbs.ac.uk/equality-diversity/Portals/0/docs/WPS59Sexualharassment.pdf>.

from the complaining individual directly, was critical of the armed forces complaints system stating, “After 5 years the Armed Forces complaints system is still inefficient and undermines confidence in the chain of command.”<sup>193</sup>

Between 2009 and 2012 there was a total of 135 cases of sexual assault and rape investigated in the UK out of a total of 146 allegations (some investigations involved multiple allegations). Of these cases, 63 cases were either not pursued, were investigated but did not result in a person being referred to a prosecuting authority, or were referred to a prosecuting authority but did not result in court-martial or other disciplinary proceedings. Forty-nine cases were referred to court martial, 24 cases resulted in conviction, 10 resulted in acquittal, and 15 cases resulted in conviction of a lesser offense, with 23 cases still ongoing (at the time of the report).<sup>194</sup> In calendar year 2019, there were 59 cases of sexual assault referred to court martial in the UK resulting in 17 convictions for a conviction rate of just under 28 percent.<sup>195</sup>

#### **d. Australia**

*Size of service.* The Australian Defence Force (ADF) is comprised of the Royal Australian Navy (14,689 members) the Royal Australian Air Force (14,295 members) and the Australian Army (30,810 members) for a total active duty strength of 59,794 personnel.<sup>196</sup> There are an additional 19,850 reservists.<sup>197</sup> Between January 1 and December 31, 2019, the ADF’s Office of Director Military Prosecutions (ODMP) had 178 open cases which include 27 carried over from the previous year. This represented an increase of 40 percent over the previous year’s totals. Of those outstanding cases, 54 cases were not prosecuted due to lack of reasonable prospect of conviction. Forty-two cases were heard before a Defence Force Magistrate, one was tried at a Restricted Court Martial and one was tried at a General Court Martial.<sup>198</sup>

*Basis of military law.* Section 51(vi) of the Australian Constitution, referred to as the “defence power,” authorizes its legislature to enact laws pertaining to the military discipline system.<sup>199</sup> Statutory authority is derived from the Defence Force Discipline Act 1982 (DFDA). The DFDA was implemented in 1985 and it created a standardized military discipline system for all three branches of the ADF. Previously each service

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<sup>193</sup> Defence Committee – Eighth Report: the Work of the Service Complaints Commissioner for the Armed Forces, 2012–13, ¶ 30, <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmdfence/720/72002.htm>.

<sup>194</sup> April 25, 2013, PARL. DEB. H.C. (6th ser.) 1253W, <http://www.publications.parliament.uk/pa/cm201213/cmhansrd/cm130425/text/130425w0009.htm>.

<sup>195</sup> United Kingdom Ministry of Defence, *Sexual Offences in the Service Justice System 2019* (March 26, 2020), 8.

<sup>196</sup> Kuper, Stephen, “How big is too big? Increasing the size of the ADF,” Defence Connect, <https://www.defenceconnect.com.au/key-enablers/4195-how-big-is-too-big-increasing-the-size-of-the-adf>, (last updated June 7, 2019).

<sup>197</sup> Id.

<sup>198</sup> Director of Military Prosecutions, Annual Report 2019 (hereinafter DMP Annual Report 2019), ¶ 75.

<sup>199</sup> Australian Constitution, Part V, Section 51(vi), Legislative Powers of Parliament.

maintained its own military discipline system.<sup>200</sup> The DFDA removed the commander from the role of imposing punishment and reviewing trials.<sup>201</sup>

### *Jurisdiction over offenses*

There are three different types of offenses under the DFDA: disciplinary, equivalent, and territory offenses. Disciplinary offenses are those “purely disciplinary in nature and for which there is no civilian equivalent (e.g., mutiny, prejudicial conduct, absence without leave or disobeying a lawful command).”<sup>202</sup> Equivalent offenses are those “with elements that are the same or similar to a civilian offence” (e.g., theft or driving while intoxicated).<sup>203</sup> Territory offenses are those “applicable by virtue of the incorporation of the criminal law of the Australian Capital Territory and certain Commonwealth criminal laws into the DFDA through section 61.”<sup>204</sup> As such, the ADF military discipline system is extra-territorial applying to offenses committed overseas as well as in Australia.<sup>205</sup>

The ADF military justice system de-conflicts with civilian prosecutors before laying charges. A 2011 Inspector General report summarized the roles and responsibilities of the civilian and military justice systems as follows: “[c]ivilian criminal jurisdiction should be exercised when it can conveniently and appropriately be invoked. The jurisdiction of Service tribunals should not be invoked except for the purpose of maintaining and enforcing service discipline.”<sup>206</sup> During peacetime DFDA jurisdiction may only be exercised for offenses reasonably regarded as “substantially serving the purpose of maintaining Service discipline.”<sup>207</sup> Stated differently, while the United States military justice system focuses on the military status of the member, the ADF focuses on the connection the offense has with the service.<sup>208</sup>

If there is insufficient service connection, the ADF member’s criminal conduct is referred to civilian authorities for investigation and prosecution.<sup>209</sup> Offenses that must be referred to the civilian prosecutors for consideration include: treason, murder, manslaughter,

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<sup>200</sup> Response Systems to Adult Sexual Assault Crime Panel, “Overview of the Australian Military Discipline System,” (September 24, 2013) (hereinafter RSP).

[https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/australian-mj-sys/02\\_Overview\\_of\\_the\\_Australian\\_Military\\_Discipline\\_System.pdf](https://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/australian-mj-sys/02_Overview_of_the_Australian_Military_Discipline_System.pdf), paragraph 4.

<sup>201</sup> Id. at ¶ 4.

<sup>202</sup> Senate Foreign Affairs, Defence and Trade References Committee, The Effectiveness of Australia’s Military Justice System (June 2005), [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=fadt\\_ctte/miljustice/report/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=fadt_ctte/miljustice/report/index.htm), ¶ 2.13 (hereinafter Senate Report).

<sup>203</sup> RSP, *supra* note 200, at ¶ 5.b.

<sup>204</sup> Id. at ¶ 5.c.

<sup>205</sup> Id. at ¶ 1.

<sup>206</sup> Inspector General Australian Defence Force, Review of the Management of Incidents and Complaints in Defence including Civil and Military Jurisdiction ¶ 147 (2011), [http://www.defence.gov.au/pathwaytochange/docs/incidentscomplaints/Review%20of%20the%20Management%20of%20Incidents%20and%20Complaints%20in%20Defence\\_complete%20report.pdf](http://www.defence.gov.au/pathwaytochange/docs/incidentscomplaints/Review%20of%20the%20Management%20of%20Incidents%20and%20Complaints%20in%20Defence_complete%20report.pdf).

<sup>207</sup> Senate Report, *supra* note 202, at ¶ 3.7.

<sup>208</sup> RSP, *supra* note 200, at ¶ 2.

<sup>209</sup> Senate Report, *supra* note 202, at ¶ 2.15.

bigamy, and sexual assault offenses.<sup>210</sup> The Australian Directors of Public Prosecutions and the Director of Military Prosecutions (DMP) established a memorandum of understanding in May 2007 that outlines consultation and cooperation requirements between the military and civilian prosecutorial authorities.<sup>211</sup>

*Disciplinary System.* The ADF military discipline system employs a Discipline Officer Scheme. The scheme is designed to address offenses at the lowest possible level as judiciously as possible. At the lowest level is the Discipline Officers. Discipline Officers are limited to imposing minor punishments (limited to a fine of one day's pay) and only where the offender has admitted to the offence.<sup>212</sup> Summary authorities (discussed below) is the next level of severity and punishment is limited to 28 days' detention. After summary authorities are restricted courts martial and Defence Force Magistrates (discussed below). They may not impose punishment greater than six months' imprisonment. Finally, general courts martial may impose up to life imprisonment.<sup>213</sup>

### *Summary Trial System*

The summary trial system is the most widely used in the ADF. It is an amalgamation of a Summary Court Martial and an Article 32 preliminary hearing in the United States military justice system. Summaries are designed to deal with matters expeditiously and without the formalities of courts martial or Defence Force magistrates. The summary authority, a commander, must afford the accused the option to have the charge tried by a court martial or Defence Force magistrate.<sup>214</sup> Within the summary trial system, there are three types of summary authorities: superior summary authorities, commanding officers, and subordinate summary authorities.<sup>215</sup> The primary differences in the three summary authorities are the rank of summary authority and the authority he or she is vested to properly dispose of an offense.<sup>216</sup>

The summary trial is a lay-tribunal exercising a quasi-judicial function. The summary authorities presiding over the disciplinary matters are commanders and generally do not have legal qualifications.<sup>217</sup> These summary authorities have the responsibility to "deal" with charges that fall within their jurisdiction (certain offenses such as sexual assault are withheld from the summary trial system). Dealing with a charge is tantamount to disposing of a charge by determining what course of action to take.<sup>218</sup> A summary authority has a greater ability to "deal" with a charge than to try a charge.<sup>219</sup> A summary authority may generally deal with charges by taking one of the following actions:

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<sup>210</sup> Buchanan, Kelly, "Military Justice: Adjudication of Sexual Offences," Library of Congress, July 2013, 6-7.

<sup>211</sup> RSP, *supra* note 200, ¶ 2.

<sup>212</sup> Id. at ¶ 17.

<sup>213</sup> Id.

<sup>214</sup> Defence Force Discipline Act, 1982, para 111B(A) (hereinafter DFDA 1982).

<sup>215</sup> Id. at Part VII, Division 2, Summary Authorities.

<sup>216</sup> RSP, *supra* note 200, at ¶ 10.

<sup>217</sup> Id. at ¶ 7.

<sup>218</sup> DFDA 1982, *supra* note 214, at ¶ 110.

<sup>219</sup> RSP, *supra* note 200, at ¶ 8.

referring the charge to the Director of Military Prosecutions, referring the charge to another summary authority (i.e., one with greater authority), trying the charge, or directing that the charge be dismissed.<sup>220</sup> To determine a proper disposition, a summary authority may receive evidence and be presented with an “outline” of the charge(s).<sup>221</sup>

Jurisdiction is dictated upon the level of the summary trial. Superior summary authorities possess the greatest authority – limited only by certain restrictions based upon the rank of the member charged in relation to the rank of the summary authority. Subordinate summary authorities possess the least jurisdiction.<sup>222</sup>

*Defense Force Magistrate and Courts Martial.* The Director of Military Prosecutions selects the forum, whether Defence Force Magistrate, Restricted Court Martial, or General Court Martial.<sup>223</sup> The DMP notes that the cost of convening courts martial is expensive, therefore courts martial are selectively chosen when necessary to ensure good order and discipline.<sup>224</sup>

Defence Force Magistrate (DFM) Process. DFM s are appointed by the Judge Advocate General in writing from the panel of judge advocates.<sup>225</sup> DFM trials are constituted by a legal officer sitting without a jury.<sup>226</sup> The DFM has the same powers of punishment as a Restricted Court Martial (RCM).<sup>227</sup> Upon commencement of a case, the DFM will ask the accused how he or she pleads.<sup>228</sup> If the member pleads guilty and the DFM finds the plea provident, the DFM will convict the individual and impose an appropriate punishment.<sup>229</sup> If the member pleads not guilty, the DFM is charged with receiving relevant evidence and applying rules of evidence.<sup>230</sup> The accused is entitled to a qualified defense counsel throughout the process.<sup>231</sup>

Court Martial. The ADF court martial system is comprised of two types of courts martial: general and restricted. As with the DFM process, the accused is entitled to a qualified defense counsel.<sup>232</sup> Restricted Courts Martial are comprised of a panel of not less than three officers. The President of the panel is at least a Lieutenant Colonel (or equivalent). As noted above, RCMs may impose up to six months of imprisonment.<sup>233</sup> General Courts Martial (GCMs) are comprised of a panel of five or more officers. The panel

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<sup>220</sup> DFDA 1982 *supra* note 214, at ¶¶ 110 and 111.

<sup>221</sup> Id. at ¶ 111A(2).

<sup>222</sup> Id. at ¶¶ 106-108.

<sup>223</sup> Director of Military Prosecutions, Annual Report 2017, ¶ 67 (hereinafter DMP Annual Report 2017).

<sup>224</sup> Id.

<sup>225</sup> DFDA 1982, *supra* note 214, at ¶ 127.

<sup>226</sup> RSP, *supra* note 200, at ¶ 15.

<sup>227</sup> DFDA 1982, *supra* note 214, ¶ 127.

<sup>228</sup> Id. at ¶ 135.

<sup>229</sup> Id.

<sup>230</sup> Id. at ¶¶ 129 & 135.

<sup>231</sup> Id. at ¶ 136.

<sup>232</sup> Id.

<sup>233</sup> RSP, *supra* note 200, at ¶ 14.

includes a President in the rank of Colonel (or equivalent). GCMs may impose a sentence up to life imprisonment.<sup>234</sup>

### *Military Justice Participants*

The Office of Director Military Prosecutions. The ODMP was established on an interim basis in July 2003 and acted in an advisory capacity to commanders who served as convening authorities.<sup>235</sup> In June 2006, Section 188G of the DFDA took effect. At that time, the DMP became the sole source for laying charges against accused and commanders were divested of their convening authority.<sup>236</sup> The DMP is charged with providing legal advice on serious allegations under the DFDA where the jurisdictional authority is withheld from the summary trial level and includes the possibility of a maximum punishment of more than two years' imprisonment.<sup>237</sup> These matters are referred to the ODMP from commanders of the ADF member.<sup>238</sup> It is the responsibility of the ODMP to determine when charges should be preferred against ADF members and then prosecute those cases according to law.<sup>239</sup>

The DMP must be 1) a legal practitioner with at least five years' experience, 2) a member of the Permanent Navy, Regular Army or Air Force, or a member of the Reserves rendering full-time service, and 3) at least in the rank of Commodore, Brigadier or Air Commodore.<sup>240</sup> The DMP is independent but acts on behalf of the Service Chiefs.<sup>241</sup>

There is one deputy DMP authorized to act when the DMP is unavailable.<sup>242</sup> There are two Senior Prosecutors that supervise teams of four to five junior prosecutors.<sup>243</sup> Military prosecutors are authorized to appear in DFM, RCM, and GCM cases and appeals.<sup>244</sup> The junior prosecutors assigned to ODMP generally have no prior advocacy experience. The expectation is that once admitted to practice, any lawyer can become an advocate but the DMP has routinely identified the lack of experience as a setback in prosecuting cases.<sup>245</sup> To counter this, ODMP has advocated for a "career track" for military justice within each Service, but there is little interest in a career track by the Services.<sup>246</sup> The DMP further notes, that until a military track is created, prosecutors "will continue to be placed at a significant disadvantage when they appear in trials by

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<sup>234</sup> Id. at ¶ 15.

<sup>235</sup> Buchanan, *supra* note 210, 4.

<sup>236</sup> Id. See also DFDA 1982, *supra* note 214, at ¶ 188G.

<sup>237</sup> Department of Defence, Military Justice, <https://www.defence.gov.au/mjs/organisations.asp>, (last visited April 20, 2020).

<sup>238</sup> Id.

<sup>239</sup> DMP Annual Report 2017, *supra* note 223, at ¶ 4.

<sup>240</sup> DFDA 1982, *supra* note 214, at ¶ 188G.

<sup>241</sup> DMP Annual Report 2017, *supra* note 223, at ¶ 30.

<sup>242</sup> Id. at ¶ 18.

<sup>243</sup> Id.

<sup>244</sup> Id. at ¶ 62.

<sup>245</sup> Id. at ¶ 5.

<sup>246</sup> Id. at ¶ 6.

court martial or before a Defence Force magistrate.<sup>247</sup> Additionally, there are five Assistants, one Police Liaison, and one Business Manager.<sup>248</sup> Reservists are used for cases of greater complexity or length and can serve as mentors.<sup>249</sup>

Director of Defense Counsel Services (DDCS). The DDCS was created on May 15, 2006 and was designed to manage defense counsel services to ADF members facing charges before the Australian Military Court.<sup>250</sup> The mission of the DDCS is to advise members prior to trial and provide representation at trial, provide representation to members on appeal, and trial and appeal from residual service tribunals when used.<sup>251</sup> The DDCS is not subordinate to any military command or to the DFDA.<sup>252</sup> An ADF member who appears before a court martial or a DFM is afforded free legal counsel by a legal officer. An ADF member is not required to have his defense counsel be an ADF legal officer, but is generally required to pay for the representation if it is not an ADF legal officer.<sup>253</sup>

Investigators. The ODMP routinely works with the ADF Investigative Services. The primary goal is to reduce the timelines in relation to briefs of evidence and the requests for further information in relation to briefs of evidence.<sup>254</sup> This allows the two offices to identify matters where charges may be laid early which provides the accused the benefit of an early plea of guilty.<sup>255</sup>

Commanders.

The authority for the accused's commander to take action in disciplinary matters exists only at the summary court level.<sup>256</sup> The importance of military justice is stressed to commanders during a pre-command training course, a requirement within each Service before an officer takes command. Each pre-command course has a military justice component delivered by staff from the Military Law Centre.<sup>257</sup> Those commanders generally do not have legal qualifications.

The commander of an accused does not have the authority to determine which charges may be laid at a Defence Force Magistrate hearing or at a court-martial. The laying of charges is determined by the ODMP. The ODMP, while independent from command,

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<sup>247</sup> Id. at ¶ 8.

<sup>248</sup> Id. at ¶ 16.

<sup>249</sup> Id. at ¶ 22.

<sup>250</sup> RSP, *supra* note 200, at ¶ 50.

<sup>251</sup> Id. at ¶ 51.

<sup>252</sup> Id. at ¶ 52.

<sup>253</sup> Id. at ¶ 19.

<sup>254</sup> DMP Annual Report 2017, *supra* note 223, at ¶ 50.

<sup>255</sup> Id. at ¶ 51.

<sup>256</sup> RSP, *supra* note 200, at ¶ 7.

<sup>257</sup> DMP Annual Report 2017, *supra* note 223, at ¶ 56.

routinely works informally with the command to maintain good order and discipline but the charging decision rests with the ODMP.<sup>258</sup>

Commanders may be appointed by the Chief of the Defence Force or a service chief to serve as a reviewing authority post-court-martial conviction.<sup>259</sup> However, commanders serving as reviewing authorities cannot act on any proceedings in which they performed any of the functions of a superior authority in relation to the charge.<sup>260</sup> This means a commander of a member convicted at a proceeding cannot take reviewing action on that case. A reviewing authority is vested with the power to make a final determination in courts-martial that resulted in conviction pursuant to the Defence Force Discipline Act 1982. A reviewing authority may quash the conviction if the conviction “is unreasonable, or cannot be supported” by the evidence or the accused lacked mental responsibility.<sup>261</sup> The reviewing authority may quash a conviction and order a new trial in the interests of justice.<sup>262</sup> Finally, a reviewing authority may substitute an original offense conviction for an alternative service offense in certain situations.<sup>263</sup>

### *General Overview of the ADF Military Justice Process*

The military justice process is to maintain good order and discipline through a fair and impartial justice process. For this reason ADF courts are predominantly open to the public.<sup>264</sup> Additionally, the purpose of the ODMP under the DFDA is not to obtain a conviction but to present before the tribunal credible and relevant evidence to support the charged offences.<sup>265</sup> The ODMP’s overarching question is “whether or not the public interest requires that a particular matter be prosecuted.”<sup>266</sup> Public interest is defined as “the requirement to maintain a high standard of discipline in the ADF.”<sup>267</sup> There are three sets of criteria the ODMP will examine to determine whether to prosecute a case. One set focuses on 11 factors that weigh the strength of the evidence available.<sup>268</sup> The ODMP will also solicit input from “superior authorities,” officers that represent the interests of the service, regarding their opinion on prosecuting a case to enforce good order and discipline within the service. While not binding, the ODMP may consider these eight factors in its decision to prosecute a case.<sup>269</sup> Superior authorities do not opine whether charges should be laid.<sup>270</sup> Finally, the ODMP will consider the following list of non-exhaustive factors when determining whether to lay charges: consistency and

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<sup>258</sup> Id. at ¶ 54.

<sup>259</sup> DFDA 1982, *supra* note 214, at 150.¶

<sup>260</sup> Id. at ¶150A.

<sup>261</sup> Id. at ¶158.

<sup>262</sup> Id. at ¶160.

<sup>263</sup> Id. at ¶161.

<sup>264</sup> Id. at ¶ 63.

<sup>265</sup> Director of Military Prosecutions Prosecution Policy, Oct. 16, 2015, 4 (hereinafter DMP Prosecution Policy).

<sup>266</sup> Id. at 5.

<sup>267</sup> Id.

<sup>268</sup> Id. at 5-7.

<sup>269</sup> Id. at, 8-9.

<sup>270</sup> Id. at 9.

fairness, deterrence, seriousness of the offense, interest of the complainant, nature of the offender, degree of culpability, delay in dealing with matters, and the member's discharge from the ADF.<sup>271</sup>

The ADF has witnessed a steady decline in cases over the last five years.<sup>272</sup> Of the 1,000 cases in FY18-19, 970 were summary trials, leaving only 30 cases to be disposed of at the RCM or court martial forum.<sup>273</sup> Based upon available reports, between 2013 and 2019 the ADF has averaged one GCM a year with zero in 2016<sup>274</sup> and a high of four in 2013.<sup>275</sup> However, in a 2019 Inspector General Report, a survey of ADF members indicated that 73 percent believed the disciplinary process was fair and consistent. Seventy-eight percent believed if they were an accused, they would be treated fairly. Ninety-three percent believed appropriate action would be taken in a sexual assault allegation.<sup>276</sup>

### *Changes to the System*

There were two efforts to change the ADF military justice system to achieve greater impartiality within the military judicial process. One effort was establishing the DMP and the other effort was establishing the Australian Military Court (AMC).

The basis for establishing the DMP arose from two cases occurring overseas – R v Genereux [1992] 1 SCR 259, (Supreme Court of Canada) and Findlay v United Kingdom (1997) 24 EHRR 221, (European Court of Human Rights).<sup>277</sup> These cases focused on the independence and impartiality of military courts, specifically, finding the system lacked impartiality as the convening authorities determined whether to prosecute, the type of tribunal, selected the judge, court members, and prosecutor, and reviewed the proceedings.<sup>278</sup> In 1997 and 1998, recommendations were made to ensure the impartiality and the appearance of fairness were maintained in the ADF military justice system, however, the Chiefs of Staff Committee members held firmly that "commanders, as Convening Authorities, must retain the power to decide on prosecution."<sup>279</sup> The Committee noted, at the heart of the question of the independence and impartiality of the ADF military justice system was the International Covenant on Civil and Political Rights (ICCPR) (Australia became a signatory in 1980). Article 14(1) states:

All persons shall be equal before the Courts and tribunals. In the determination of any Criminal charges against him, or of his rights and obligations in a suit of law,

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<sup>271</sup> Id. at 12-13.

<sup>272</sup> Inspector-General of the Australian Defence Force, Annual Report, June 30, 2019, 23.

<sup>273</sup> Id. at 24.

<sup>274</sup> Director of Military Prosecutions, Annual Report 2016, ¶ 83.

<sup>275</sup> Director of Military Prosecutions, Annual Report 2013, ¶ 1.6. Data is unavailable for 2018 and 2015.

<sup>276</sup> Id. at 15.

<sup>277</sup> James Burchett, Report of an Inquiry Into Military Justice in the Australian Defence Force, 127 (2001), <http://www.defence.gov.au/media/DeptTpl.cfm?CurrentID=893>.

<sup>278</sup> Id.

<sup>279</sup> Id. at 129.

everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>280</sup>

To meet the intent of Article 14(1) of the ICCPR, the Committee approved the implementation of the DMP.<sup>281</sup> In issuing his 2001 report on the Inquiry Into Military Justice in the Australian Defence Force, the Honorable James Burchett, found:

I have reached the view that, on balance, there is more to be gained from the early introduction of an independent DMP than from postponing the decision any further. In my opinion it would not only enhance the perception and reality of fairness in the system but, as the Judge Advocate General has observed, would also provide a more professional, unified and consistent approach to prosecution decisions.<sup>282</sup>

To better understand the reasoning for establishing the AMC, it helps to briefly examine the tribunal system prior to the AMC. The ADF's military justice system, prior to the AMC, was based upon tribunals of varying severity. These tribunals operated outside the constructs of courts established under Chapter III of the Australian Constitution. Rather, the tribunals were established under the DFDA 1982 and consisted of courts martial (most serious), Defence Force magistrates (intermediate tribunal), and summary courts (least serious, where the commander was authorized to determine culpability and impose punishment). The tribunal system was designed to support the unique nature and mission of the ADF which prevented the use of a civilian court system.<sup>283</sup>

Then in 2005, the Senate issued a report on the effectiveness of Australia's military justice system. The report recognized that the "control and exercise of discipline, through the military justice system, is an essential element of the chain of command."<sup>284</sup> But the report also recommended the ADF justice system automatically refer all alleged crimes, regardless of where the crimes were committed, to civilian authorities for investigation and prosecution. The Australian government and ADF rejected this outright, stating that such a paradigm would impugn the ability to be combat-ready and ensure good order and discipline within the ADF.<sup>285</sup>

In response to the Senate Report, the Australian government established the Australian Military Court (AMC) in 2007. This was done in part to address concerns regarding lack of independence, impartiality, and transparency within the non-Chapter III tribunal system. The AMC was comprised of a Chief Military Judge, two full-time Military Judges, and up to eight part-time Military Judges. Judges were required to be a legal

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<sup>280</sup> Id. at 130.

<sup>281</sup> Id. at 130.

<sup>282</sup> Id. at 137.

<sup>283</sup> Burmester H, *The Rise and Fall of the Military Court* (Speech delivered at the Defence Legal Conference, December 1, 2009).

<sup>284</sup> Senate Report, *supra* note 202, at ¶ 2.8.

<sup>285</sup> Department of Defence, Government Response to the Senate Foreign Affairs, Defence and Trade References Committee: Report on the Effectiveness of Australia's Military Justice System (Government Response) pg 14 (Oct. 2005), [http://www.defence.gov.au/mjs/docs/mji\\_government\\_response\\_4oct05.pdf](http://www.defence.gov.au/mjs/docs/mji_government_response_4oct05.pdf).

practitioner, a member of the ADF, possess certain rank requirements, and meet service deployment requirements.<sup>286</sup> All judges operated outside the chain of command. The AMC replaced the court martial and Defence Force magistrate forum and could try charges in the first instance, meaning that the charges did not need to be vetted through the summary authority trial first, thus taking the commander out of the decision-making process.<sup>287</sup> The AMC could try cases judge-alone or with a military jury (comprised of either six or 12 members).<sup>288</sup> These changes were based upon the 2005 Senate Report. The one recommended change from the Report not adopted was to establish the AMC as a Chapter III court pursuant to the Australian Constitution. This proved critical in the ultimate demise of the AMC.

In August 2009, the High Court of Australia (a Chapter III, civilian constituted court) held in *Lane v. Morrison* that the provisions in the DFDA creating the AMC were invalid.<sup>289</sup> The High Court unanimously held the provisions of the DFDA that established the AMC were invalid because the AMC was exercising the judicial power of the Commonwealth (Chapter III powers) without being a Chapter III constituted court. The High Court looked at the final decision authority under the tribunal system and the final decision authority under the AMC system and drew a contrast between the two. The High Court noted that under the tribunal system:

The decisions of courts-martial were not "definitive" of guilt; the punishments awarded by courts-martial were subject to confirmation or review. Dispositive decisions about guilt and punishment were made on confirmation or review within the chain of command. It was, therefore, right to describe courts-martial as directed to the maintenance of discipline of the forces.<sup>290</sup>

While the tribunal system acted "judicially," it was not exercising judicial power of the Commonwealth under Chapter III.<sup>291</sup> ADF courts-martial were not independent of the chain of command. They were convened by orders from within the chain of command and the court-martial outcomes were reviewed within the chain of command.<sup>292</sup> Additionally, the High Court pointed out that the court-martial system was, therefore, not the authoritative decision on a determination of guilt or of the sentence and could not enforce its decisions.<sup>293</sup> That authority was held by commanders.

This stood in contrast to the AMC system. The AMC was designed to be independent of the ADF chain of command. The decisions regarding the findings and sentence were binding and not subject to review by individuals within the chain of command.<sup>294</sup> The

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<sup>286</sup> RSP, *supra* note 200, at ¶ 23.

<sup>287</sup> Id. at ¶ 24.

<sup>288</sup> Id. at ¶ 28.

<sup>289</sup> *Lane v Morrison* (2009) 239 CLR 230 (Hayne, Heydon, Crennan, Keifel and Bell JJ).

<sup>290</sup> Id. at 86.

<sup>291</sup> Id. at 96.

<sup>292</sup> Id. at 97.

<sup>293</sup> Id.

<sup>294</sup> Id. at 95 and 98.

decisions were only subject to appellate review by the Defence Force Discipline Appeal Tribunal and the Federal Court – both of which were outside the chain of command.<sup>295</sup> Moreover, the AMC would enforce its own decisions.<sup>296</sup> In other words, the AMC was established by parliament to exist outside the ADF chain of command as an independent judicial body. This, however, was problematic because the parliament's authority under Section 51(vi) only permits it to make laws with respect to "the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth."<sup>297</sup> It "does not extend to the creation of a 'legislative court,' [...] which operates outside the previous system of military justice."<sup>298</sup>

By creating the AMC with autonomy and final authority, the legislative branch usurped the judiciary's authority under Chapter III of the Constitution without creating a Chapter III court. The historical conception of military justice was "directed to the maintenance of the defining characteristic of armed forces as disciplined forces organized hierarchically"<sup>299</sup> and courts-martial previously operated within that hierarchical chain of command. The AMC was designed to operate outside this historical construct and "break from the past" to become an independent and impartial court. This broke from the military justice's traditional foundation in the defence power, which cannot create a "legislative court" such as the AMC.<sup>300</sup>

The effect of this ruling was to revert back to the prior system of courts martial and DFM's. The summary trial system was unaffected.<sup>301</sup> The post-Lane v. Morrison ADF military justice system was enacted through the Military Justice (Interim Measures) Bill (No 1) 2009 (Cth) and the Military Justice (Interim Measures) Bill (No 2) 2009 (Cth).<sup>302</sup> While attempts have been made to establish a Military Court of Australia under Chapter III of the Australian Constitution (Judiciary) the measures have lapsed in Parliament.<sup>303</sup>

### *Impact on Sexual Assault Matters*

The changes in the ADF military justice system were premised upon fairness and impartiality of convening courts martial and not driven by a real or perceived unfairness to victims of sexual assault. That said, the ADF has taken steps to ensure victims of

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<sup>295</sup> Id. at 95.

<sup>296</sup> Id. at 97.

<sup>297</sup> Australian Constitution, s 51(vi).

<sup>298</sup> *Lane v Morrison* (2009) 239 CLR 230 at 62 (French CJ and Gummow JJ).

<sup>299</sup> Id. at 12, quoting *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 52 (Gummow, Hayne and Crennan JJ).

<sup>300</sup> Id. at 62.

<sup>301</sup> RSP, *supra* note 200, at ¶ 32.

<sup>302</sup> See [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s727](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s727) and [http://www.aph.gov.au/Parliamentary\\_Business/Bills\\_Legislation/Bills\\_Search\\_Results/Result?bld=s728](http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s728).

<sup>303</sup> 16 <http://parlinfo>.

<sup>303</sup> RSP, *supra* note 200, at ¶ 33.

alleged sexual assault are treated with dignity and fairness. These efforts are not levied upon the ODMP but there are overlapping coordination efforts that the ODMP recognizes and embraces to ensure alleged victims are treated with fairness.

In 2011, the Chief of the ADF issued an instruction on handling sexual offense complaints.<sup>304</sup> The general principles included: 1) commanders taking responsibility to prevent sexual assaults and manage complaints, 2) reporting allegations to the Australian Defence Force Investigative Service (ADFIS) is mandatory, 3) maintaining appropriate confidentiality, 4) ensuring the ability for individuals to seek advice from legal counsellors without initiating a complaint, and 5) administrative inquiries are not to be used to investigate sexual offences.<sup>305</sup> Sexual assault allegations must be immediately reported to the ADFIS and they will determine the appropriate jurisdiction. Even if the ADF member cannot be prosecuted under the DFDA the alleged offence must still be reported to ADFIS and it will be referred to the proper state or territory for prosecution.<sup>306</sup> If ADFIS has jurisdiction, then the commander over the individual should obtain legal advice from the DMP.<sup>307</sup> Additionally, on July 23, 2013, the Sexual Misconduct Prevention and Response Office (SemPRO) was established to provide support to members affected by sexual assault. While there is no formal operational link between ODMP and SemPRO, ODMP embraces the goals of SeMPRO.<sup>308</sup>

#### e. New Zealand

*Size of service.* New Zealand spends about 1.16 percent of its GDP on its voluntary military, which consists of an Army, Navy, and Air Force.<sup>309</sup> New Zealand's military is composed of 2,304 Navy personnel, 4,712 Army personnel, and 2,540 Air Force personnel,<sup>310</sup> totaling 9,556 active duty personnel.<sup>311</sup> In addition, New Zealand's military has 2,792 reserve personnel.<sup>312</sup>

*Basis of military law.* The basis of military law in New Zealand is the Armed Forces Disciplinary Act (AFDA) of 1971.<sup>313</sup> The act underwent substantial modification via the New Zealand Court Martial Act (CMA) of 2007, and became recently adjusted to address victim rights through the Military Justice Legislative Amendments Act (MJLAA).

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<sup>304</sup> DI(G) PERS 35-4 AMDT 1, Management and Reporting of Sexual Offences (Nov. 22, 2011), [http://www.defence.gov.au/fr/Policy/GP35\\_04.pdf](http://www.defence.gov.au/fr/Policy/GP35_04.pdf).

<sup>305</sup> Id. at ¶ 10.

<sup>306</sup> Id. at ¶ 2.

<sup>307</sup> Id. at ¶ 79.

<sup>308</sup> DMP Prosecution Policy, *supra* note 265, at 20.

<sup>309</sup> New Zealand, CIA World Fact Book (last accessed April 16, 2020), <https://www.cia.gov/library/publications/the-world-factbook/geos/nz.html>.

<sup>310</sup> Personnel Summary, New Zealand Defense Force (last accessed April 16, 2020), <http://www.nzdf.mil.nz/personnel-records/personnel-branch/>.

<sup>311</sup> Id.

<sup>312</sup> Id.

<sup>313</sup> Armed Forces Disciplinary Act of 1971, as amended 2007, <http://legislation.govt.nz/act/public/1971/0053/latest/whole.html> (hereinafter AFDA).

of 2018.<sup>314</sup> The AFDA governs the legal conduct of service members from all three branches of the New Zealand military.<sup>315</sup> The drafters created the CMA as a forum-specific statute containing information pertaining to the specific roles of personnel in the court martial system, and it also serves as an administrative guide for conducting courts martial.<sup>316</sup> The AFDA contains general provisions applicable to both summary trials and the courts martial of more serious offenses.<sup>317</sup> The AFDA bifurcates appellate law review, which contains rules related to the Summary Appeal Court,<sup>318</sup> and the Court Martial Appeals Act (CMAA) of 1953, which established the Court Martial Appeals Court.<sup>319</sup> A service member punished at summary proceeding may only appeal to the Summary Appeals Court, while a member convicted at court martial may appeal to either of these appellate bodies.<sup>320</sup>

*Jurisdiction over offenses.* In New Zealand, the AFDA subjects all service members to its jurisdiction.<sup>321</sup> Military justice subject matter jurisdiction in New Zealand extends to specific offenses listed within the AFDA and violations of civil law committed by service members.<sup>322</sup> The AFDA applies extraterritorially; therefore, a New Zealand service member may be prosecuted for committing a crime in any geographical location.<sup>323</sup> Commanders use the summary trial as the primary means of maintaining discipline within the armed services in New Zealand.<sup>324</sup> Theoretically, all service member crimes could be referred for court martial in New Zealand. However, the summary trial tends to be used where informal disciplinary measures prove sufficient and the misconduct does not merit the possibility of imprisonment. New Zealand's military reserves courts martial for serious offenses.<sup>325</sup> Pursuant to the adoption of the MJLAA in 2018, the authorities must consider placing charges before a court martial in "specified cases" involving a victim.<sup>326</sup> The New Zealand Victim Rights Act of 2002 defines such specified cases, which include sexual offenses, serious assaults of a non-sexual nature, and other

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<sup>314</sup> Court Martial Act of 2007, <http://www.legislation.govt.nz/act/public/2007/0101/latest/DLM1001890.html> [hereinafter CMA] and Military Justice Legislative Amendments Act of 2018, <http://www.legislation.govt.nz/act/public/2018/0036/latest/whole.html> (hereinafter MJLAA).

<sup>315</sup> AFDA, *supra* note 313, at Part I (Jurisdiction).

<sup>316</sup> CMA, *supra* note 314.

<sup>317</sup> AFDA, *supra* note 313, at Part 3 (Jurisdiction of Court Martial and Punishment of Offenders) and Part 5 (Investigation and Summary Trial of Charges).

<sup>318</sup> Id. at Part 5A (Summary Appeal Court of New Zealand).

<sup>319</sup> Court Martial Appeal Act 1953, <http://www.legislation.govt.nz/act/public/1953/0100/latest/whole.html> (hereinafter CMAA).

<sup>320</sup> AFDA, *supra* note 313, at Part 5A, Sect. 124; CMA, *supra* note 314, at Part 2, Sect. 50; CMAA, *supra* note 319, at Sect. 7-9.

<sup>321</sup> AFDA, *supra* note 313, at Part I (Jurisdiction).

<sup>322</sup> Id. Part 2 (Offences).

<sup>323</sup> Id. Part I, Sect. 4 (Extraterritorial Operation of this Act).

<sup>324</sup> Summary Report on Military Justice 2019, TŪ AROMATAWAI (Independent Review), New Zealand Ministry of Defence, June 2019, 5 (hereinafter Summary Report on Military Justice).

<sup>325</sup> AFDA, *supra* note 313, at 117V.

<sup>326</sup> MJLAA, *supra* note 314, at Sect. 7-8 (incorporated into AFDA, *supra* note 313, at Part 5, Sects. 102A and 117ZIA).

offenses that resulted in serious injury or death.<sup>327</sup> Further, authorities prefer the use of a civilian court over a court martial in cases involving the most serious misconduct (e.g. treason, murder, and sexual offenses) when that misconduct occurs within New Zealand's borders.<sup>328</sup>

### *Summary trial system*

In New Zealand, authorities resolve most offenses via summary trial instead of a court martial, because authorities reserve the latter for more serious offenses which justify imprisonment.<sup>329</sup> Summary trial under the AFDA exists as an ad hoc, chain of command controlled, tribunal based disciplinary process that utilizes "disciplinary officers" to determine guilt and assess punishment upon service personnel.<sup>330</sup> Practitioners and legal authorities in New Zealand do not consider summary trials to be courts. Commanders conduct the summary proceeding without the formality of a court and lawyers do not represent parties.<sup>331</sup> Depending on the rank and authority of the presiding officer, a summary trial can reduce personnel in rank, fine offenders, and even order detention.<sup>332</sup>

Pursuant to section 102 of the AFDA, the commanding officer of an accused service member holds an obligation to investigate all well founded allegations brought to their attention.<sup>333</sup> The commanding officer possesses the option of using military personnel to investigate or refer the allegation to the appropriate civilian authority for investigation.<sup>334</sup> If the initial investigation discovers sufficient evidence, a commanding officer may refer a matter to summary trial provided the evidence does not indicate the case to be a "specified case" requiring referral to the Director of Military Prosecutions.<sup>335</sup>

A summary trial consists of a disciplinary officer, legal advisor, presenting officer, and a defending officer.<sup>336</sup> The disciplinary officer will be an officer in the chain of command of the accused party, and must be at least two ranks higher than the accused.<sup>337</sup> The AFDA permits four categories of officers to serve as disciplinary officers: superior commanders, commanding officers, detachment commanders, and subordinate commanders.<sup>338</sup> An officer failing to hold sufficient rank or authority to serve as the disciplinary officer in the particular case in question must refer the case to a higher

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<sup>327</sup> Victim Rights Act 2002, Part 3, Sect. 29

<http://www.legislation.govt.nz/act/public/2002/0039/latest/DLM157813.html>, (hereinafter VRA).

<sup>328</sup> AFDA, *supra* note 313, at Part 2, Sect. 74(4) (Offences Against the Civil Law of New Zealand).

<sup>329</sup> AFDA, *supra* note 313, at Schedules 2 – 5; Summary Report on Military Justice, *supra* note 324, at 5.

<sup>330</sup> AFDA, *supra* note 313, at Part 5.

<sup>331</sup> Summary Report on Military Justice, *supra* note 324, at 10-11.

<sup>332</sup> AFDA, *supra* note 313, at Part 5, Sect. 117R.

<sup>333</sup> Id. at Part 5, Sect. 102.

<sup>334</sup> Id.

<sup>335</sup> Id. at Part 5, Sect. 102A.

<sup>336</sup> Summary Report on Military Justice, *supra* note 324, at 10-11.

<sup>337</sup> AFDA, *supra* note 313, at Part 5, Sect. 108.

<sup>338</sup> Id., and Summary Report on Military Justice, *supra* note 324, at 11.

ranking commander.<sup>339</sup> The AFDA disqualifies a commander holding a personal interest in a case from serving as the disciplinary officer.<sup>340</sup> Once authorities identify the correct disciplinary officer to conduct proceedings, and they determine the case can be tried summarily, that disciplinary officer becomes responsible for making findings and ordering appropriate punishment.<sup>341</sup> A disciplinary officer must obtain a certificate of competency from the military justice training program prior to conducting proceedings.<sup>342</sup>

The presenting officer aides the disciplinary officer in rendering a decision, and they become responsible for presenting the evidence in support of the charge.<sup>343</sup> A non-lawyer defending officer holds responsibility for assisting the accused in the preparation and presentation of their case.<sup>344</sup> However, the defending officer does not act on the behalf of the accused.<sup>345</sup> Both of these parties must maintain the appropriate certification and attend the military justice training program.<sup>346</sup> Because none of the principal parties to the summary trial possess a legal background, authorities assign a legal advisor to ensure the trial is conducted in a legally sufficient manner. The legal advisor represents the overall interests of the New Zealand Defense Forces and is responsible for addressing conflicts of interest and issues too complex for the disciplinary officer.<sup>347</sup>

A summary trial begins with arraignment.<sup>348</sup> Depending on the pleas of the accused service member, the proceeding may continue with either a brief summary of the evidence or as a semi-adversarial process involving evidence presentation, witness testimony, and cross-examination.<sup>349</sup> Assuming the presiding officer makes a *prima facie* case for the misconduct, the accused has not exercised the right to demand court martial, and the absence of evidence requiring referral to court martial, the summary trial will proceed with the presentation of the defense case.<sup>350</sup> The disciplinary officer announces findings after the presentation of the defense case. The disciplinary officer possesses the discretion to dismiss the case when appropriate.<sup>351</sup> If the disciplinary officer finds the accused guilty, the disciplinary officer will impose an appropriate

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<sup>339</sup> AFDA, *supra* note 313, at Part 5, Sect. 108.

<sup>340</sup> Id.

<sup>341</sup> Id. at Part 5, Sect. 116, 117, 117A *et al.*

<sup>342</sup> Summary Report on Military Justice, *supra* note 324, at 11-12, and 15.

<sup>343</sup> AFDA, *supra* note 313, at Part 5, Sect. 115.

<sup>344</sup> Id. at Part 5, Sect. 114 (Assistance to Accused).

<sup>345</sup> Id.

<sup>346</sup> Id. at Part 5, Sects 114-115, and Summary Report on Military Justice, *supra* note 215, at 11.

<sup>347</sup> Summary Report on Military Justice, *supra* note 215, at 12.

<sup>348</sup> AFDA, *supra* note 313, at Part 5, Sect. 116; *see also* Summary Report on Military Justice, *supra* note 324, at 11.

<sup>349</sup> AFDA, *supra* note 313, at Part 5, Sect 117, 117I, 117J, *et al.*

<sup>350</sup> Id.

<sup>351</sup> Id. at Part 5, Sect 117R, 117S, 117W, *et al.*

punishment given the rank of the accused and the seriousness of the offense (this includes the possibility of no punishment).<sup>352</sup>

A person found guilty possesses the right to appeal to the Summary Appeal Court.<sup>353</sup> Additionally, any person may petition the Judge Advocate General regarding a guilty finding issued from a disciplinary officer.<sup>354</sup>

Finally, victims have the right to be kept informed of charges made against an accused, the right to read a statement during any punishment phase, and the right to be kept informed of the accused's punishment (this includes detention or imprisonment status).<sup>355</sup>

#### *Court martial system*

Since 2008, New Zealand's commanders hold a limited role in military justice and almost no decision making responsibility. The CMA of 2007 limited the role of commanders allowing them only to refer serious criminal charges which would justify imprisonment to court martial via the Director of Military Prosecutions (DMP).<sup>356</sup> This already limited role became further restricted beginning in 2018, with the passage of the MJLAA requiring commanders to refer "specified cases" to the DMP.<sup>357</sup> The DMP holds the ultimate discretion over whether charges are prosecuted.<sup>358</sup>

The position of DMP is a Governor-General appointed position requiring, at a minimum, an officer who possesses at least seven years of legal experience as either a solicitor or a barrister.<sup>359</sup> The DMP operates under the general supervision of the New Zealand Solicitor-General.<sup>360</sup> In order to ensure independence, the CMA does not subject the DMP to the control of the Ministers or the command of any officer.<sup>361</sup> However, the DMP will submit an annual report to the Judge Advocate General concerning the DMP's performance and exercise of powers.<sup>362</sup> The CMA made the DMP responsible for appointing subordinate counsel for the prosecution, certifying all charge sheets, directing the court martial investigation and prosecution of service members charged with violations of the AFDA, filing government objections to members selected for court martial, and independently issuing stays of proceedings when appropriate.<sup>363</sup>

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<sup>352</sup> Summary Report on Military Justice, *supra* note 324, at 12.

<sup>353</sup> AFDA, *supra* note 313, at Part 5A, Sect. 124.

<sup>354</sup> Id. at Part 5A, Sect 129; see also Summary Report on Military Justice, *supra* note 324, at 12.

<sup>355</sup> MJLAA, *supra* note 314, at Sect. 7-8, et al. (incorporated into the AFDA, *supra* note 313, at Parts 5, 5A, et al.).

<sup>356</sup> AFDA, *supra* note 313, at Part 4 (Accessed 16 April 2020).

<sup>357</sup> MJLLA, *supra* note 314, at Section 102A.

<sup>358</sup> AFDA, *supra* note 313, at Part 4A, Sect. 101F.

<sup>359</sup> Id. at Part 4A, Sect. 101E.

<sup>360</sup> Id. at Part 4A, Sect 101K.

<sup>361</sup> Id. at Part 4A, Sect 101I

<sup>362</sup> Id. at Part 4A, Sect 101J

<sup>363</sup> Id. at Part 4A, Sect 101F, et seq.; and CMA, *supra* note 314, at Part 1, Sect 27.

The CMA created a separate Registrar of the Court Martial to complete all of the administrative tasks required for the formation of the court. The Chief Judge will appoint the Registrar, who becomes responsible for all duties that the Chief Judge delegates.<sup>364</sup> Typically, the duties of the Registrar include selecting a date and time for the trial; assigning the defense counsel for the accused; identifying the military judge that will preside over the trial; arranging for a clerk; identifying a person to create a transcript; identifying any translators; and selecting eligible members to serve on the panel deciding the accused's guilt or innocence.<sup>365</sup> During the member selection process, the Registrar will review objections from both parties concerning the appropriateness of the members selected and maintains the authority to rule on challenges to the panel's composition.<sup>366</sup>

The judiciary for military justice consists of at least the Chief Judge and six additional judges.<sup>367</sup> The Governor-General appoints the Chief Judge, who will typically also serve as the Judge Advocate General.<sup>368</sup> The Governor-General will appoint no less than six additional judges, each of whom will either have practiced for at least seven years or be a district judge at the time of their appointment.<sup>369</sup> As needed, the Chief Judge is eligible to elevate members of the judiciary to the position of "Deputy Chief Judge."<sup>370</sup> Once appointed, the CMA provides that court martial judges become subject to removal only upon order of the Governor-General, on proof of misconduct or incapacity, or upon reaching the mandatory retirement age of 70.<sup>371</sup>

While a court martial can be used to try any offense occurring under the AFDA, high crimes such as treason, murder, manslaughter, sexual violations and bigamy that occur within the territory of New Zealand will not be tried through court martial without the consent of the Attorney-General.<sup>372</sup>

As with the civilian district courts of New Zealand, courts martial comply with the standard hallmarks of common law criminal systems. For example, the right to select between trial before a judge alone and a members tribunal resides entirely with the defense. The prosecution alone bears the burden of proving all charges beyond a reasonable doubt with the only exception being affirmative defenses claimed on the part of the accused.<sup>373</sup> Additionally, courts martial comply with the principle of double

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<sup>364</sup> CMA, *supra* note 314, at Part 3, Sect. 78, *et seq.*; and AFDA, *supra* note 313, at Part 8, Sect. 159.

<sup>365</sup> CMA, *supra* note 314, at Part 3, Sect 79; and New Zealand Defense Force Manual for Armed Forces Law, Amendment 3, DM 69 (2 ed) Volume 1, 493 (last accessed April 15, 2020), <http://www.nzdf.mil.nz/downloads/pdf/public-docs/dm-69-2ed-vol-1-al3-complete-bk-online.pdf> (hereinafter DM 69).

<sup>366</sup> CMA, *supra* note 314, at Part 1, Sect 27.

<sup>367</sup> Id. at Part 1, Sect. 10.

<sup>368</sup> Id. at Part 1, Sect. 12.

<sup>369</sup> Id. at Part 1, Sects. 11-12.

<sup>370</sup> Id. at Part 1, Sect. 13.

<sup>371</sup> Id. at Part 1, Sects. 14, 16, & 19.

<sup>372</sup> AFDA, *supra* note 313, at Part 2, Sect. 74(4) (Offences Against the Civil Law of New Zealand); see also DM 69, *supra* note 365, at 2-4.

<sup>373</sup> DM 69, *supra* note 365, at Ch. 5, Sect. 3, 5-7.

jeopardy.<sup>374</sup> Under the AFDA, double jeopardy extends to bar the prosecution of an accused at a court martial or summary trial for misconduct already the subject of an acquittal, conviction, or other proper disposal through a court martial or civilian court.<sup>375</sup>

*Reason for change to an independent prosecutor.* Concern for human rights and compliance with New Zealand's international treaty obligations became the primary reasons for New Zealand's adoption of an independent DMP.<sup>376</sup> Like several other nations that adopted independent prosecutors, New Zealand holds membership in the International Covenant on Civil and Political Rights.<sup>377</sup> The ratification of this treaty led the New Zealand parliament to pass the New Zealand Bill of Rights Act of 1990 (NZBORA).<sup>378</sup> While New Zealand did not experience direct legal challenges to its military justice system based on human rights, the NZBORA had increasingly become viewed as applicable in court martial.<sup>379</sup> Additionally, the experiences of Canada and the U.K. in R. v. Généreux and Findlay v. United Kingdom led New Zealand to take preemptive action to modifying the summary and court martial processes before a successful human rights challenge to the existing system could take place.<sup>380</sup>

#### *Effectiveness of New Zealand's AFDA on good order and discipline, including sexual misconduct*

A recent review of the Summary Trial system conducted by New Zealand's Ministry of Defense found inconsistency in its application across the services.<sup>381</sup> Specifically, the New Zealand Army viewed summary trial as critical while the New Zealand Air Force used the system the least often of the services.<sup>382</sup> Training commands appear to use the summary trial system more frequently than operational ones, usually viewing summary trial as an effective way to instill discipline in new recruits.<sup>383</sup> Since 2007, commanders polled about the Summary Trial system often describe it to be too complicated for minor misconduct; in that it requires significant manpower to operate, and often results in delays.<sup>384</sup>

To date, no studies focused on the effectiveness of the CMA of 2007. This lack of study should not be surprising given the primary reason for adopting the new system: to

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<sup>374</sup> AFDA, *supra* note 313, at, Part 1, Sects. 21-22.

<sup>375</sup> Id.; see also DM 69, *supra* note 365, at 2-13.

<sup>376</sup> See Chris Griggs, *A New Military Justice System for New Zealand*, 6 N.Z. ARMED F. L. REV. 62, at 94] (2006).

<sup>377</sup> U.N. Commission on Human Rights, Office of the High Commissioner, Treaty Body Database, Profile: New Zealand (last accessed April 20, 2020),

[https://tbinternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=124&Lang=EN](https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=124&Lang=EN).

<sup>378</sup> Griggs, *supra*, note 376, at 63.

<sup>379</sup> Id.; see also Drew v. Attorney General, 1 NZLR 58 (CA) (2002) (indicating the NZ defense forces should examine its process to ensure they comply with modern requirements).

<sup>380</sup> Griggs, *supra*, note 376, at 88.

<sup>381</sup> Summary Report on Military Justice, *supra* note 324, at 25 and 27.

<sup>382</sup> Id.

<sup>383</sup> Id.

<sup>384</sup> Id. at 17, 21, and 27.

avoid claims of unfairness to the accused and preventing human rights litigation.<sup>385</sup> There is no study showing authorities believed the old court martial system to be generally ineffective or incapable of ensuring discipline.

Similarly, there is no study focusing on the effects of the MJLAA of 2018 and its implementation of victim rights into the New Zealand military justice system. While the effects of the MJLAA cannot be accurately measured because of how recently it was adopted, it must be noted that sexual violence was cited as a persistent problem in the New Zealand Defence Forces Annual Report for 2019 despite the recent changes favoring court martial in cases involving victims.<sup>386</sup>

The only available data concerning courts martial in New Zealand is found in sporadically produced law reviews and news articles. The available anecdotal evidence suggests the CMA of 2007 caused no dramatic effect on the number of courts martial in New Zealand. Just before the passage of the CMA in 2007, New Zealand's Deputy Director for Legal Services – Personnel Law stated that New Zealand handled an average of 10 courts martial each year.<sup>387</sup> Subsequently, an independently produced news article discussing the financial cost of courts martial reported that New Zealand held just under 100 courts martial between the years 2000 and 2017.<sup>388</sup> The fact that the New Zealand Defence Forces do not regularly report court martial data, and the apparently small sample size of cases, make meaningful evaluation of the New Zealand model difficult to achieve.

#### f. Israel

*Size of service.* The Israeli Defense Force (IDF), including air, naval, and ground forces, totals 445,000 regular and reserve members.<sup>389</sup>

*Basis of military law.* In 1955, Israel enacted the Military Justice Law (MJL), which established a system to adjudicate both military and civilian criminal offenses by active and reserve service members, as well as contractors who commit military or civilian criminal offenses while in service.<sup>390</sup> The MJL established two mechanisms for the adjudication of offenses, trial by a military court or disciplinary adjudication by commanders or adjudication officers.<sup>391</sup> The MJL authorized military courts to hear all

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<sup>385</sup> Griggs, *supra*, note 376, at 65, 67, and 94.

<sup>386</sup> New Zealand Defence Forces, Annual Report for 2019, p. 55 (June 2019), available at <http://www.nzdf.mil.nz/downloads/pdf/public-docs/2019/nzdf-annual-report-2019-web.pdf>.

<sup>387</sup> Griggs, *supra*, note 376, at 6.

<sup>388</sup> Kristy Lawrence, *Taxpayers Have Forked Out for 99 Courts Martial to be Held in the Past 17 years*, STUFF, November 5, 2017, available at <https://www.stuff.co.nz/national/98556531/taxpayers-have-forked-out-for-99-courts-martial-to-be-held-in-the-past-17-years>.

<sup>389</sup> Lisa M. Schenck, *Fact Sheet on Israeli Military Justice* 1, GEO. WASH. UNIV. L. SCH., 2013, (<https://perma.cc/6FLA-J98H>, last accessed Apr. 29, 2020).

<sup>390</sup> Ruth Levush, Library of Congress, *Military Justice – Adjudication of Sexual Offenses (UK, Can, Aus, Ger, Isr)*, (<https://www.loc.gov/law/help/militaryjustice/israel.php>, last accessed Apr. 29, 2020).

<sup>391</sup> Id.

cases relating to any military or civilian criminal offense.<sup>392</sup> The MJL also established the military criminal code, code for investigation and examination proceedings, and the establishment of prosecution and defense systems.<sup>393</sup>

*Jurisdiction over offenses.* Israel's military justice system has jurisdiction over any offense which violates the laws of Israel committed by active or reserve service members, no matter where the offense is committed.<sup>394</sup> Civilian courts also have jurisdiction over any member who commits a civilian criminal offense.<sup>395</sup>

### *Disciplinary Adjudication System*

The disciplinary adjudication process by commanders or adjudication officers is intended to provide commanders a speedy avenue to dispose of offenses in the field. The disciplinary adjudication system may try any member below the rank of Lieutenant General, no matter where the offense occurred, for a military offense for which the potential confinement does not exceed three years.<sup>396</sup> Examples of military offenses include violations of military uniform requirements, violations of the proper handling of weapons, traffic violations, and violations of military discipline regulations.<sup>397</sup> Sexual harassment is considered a military offense and such allegations can be heard in the disciplinary adjudication system.<sup>398</sup>

An adjudication is conducted by an Adjudication Officer (AO) in the same unit as the accused. While an AO is not required to be a lawyer, the AO must have attended the Israeli Defense Force (IDF) military justice training course.<sup>399</sup> The AO must be the commander of the accused's unit or be designated by the commander as an AO. An AO must be at least one rank higher than the accused member. The MJL provides the accused the right to request adjudication by a higher ranking AO or by a military court. However, the accused is not entitled to an attorney if his case is disposed of in the adjudication disciplinary system.<sup>400</sup>

A complaint leading to an adjudication may be filed by the unit commander if the commander has a "reasonable basis to assume one of his subordinates committed an offense."<sup>401</sup> A commander may also file a complaint based on a report issued by the military police documenting reasonable suspicion an accused committed an offense. An

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<sup>392</sup> Id.

<sup>393</sup> Menachem Finkelstein, Yifat Tomer, The Israeli Military Legal System-Overview of the Current Situation and A Glimpse into the Future, 52 A.F.L. REV. 137, 138–39 (2002).

<sup>394</sup> Levush, *supra* note 390, at 45.

<sup>395</sup> Id.

<sup>396</sup> Id.

<sup>397</sup> Id.

<sup>398</sup> Id.

<sup>399</sup> Id.

<sup>400</sup> Id.

<sup>401</sup> Id.

adjudication officer may also file a complaint against a member based on the same standards.<sup>402</sup>

The Military Advocate General (MAG) supervises the disciplinary adjudication system. The MAG and his subordinates review disciplinary adjudication documentation. If an illegality is discovered, the MAG may amend a judgment, quash it, or return it to the disciplinary officer.<sup>403</sup> Additionally, the MAG may quash the judgment of the adjudication officer if he was not authorized to hear the matter, where the allegation did not constitute an offense, or where there was a procedural violation at the hearing.<sup>404</sup> The Supreme Court of Israel has extended judicial review of adjudication proceedings, even though not expressly authorized by the MJL.<sup>405</sup>

Over the past decade, the IDF has instituted reforms of how the adjudication process addresses sexual harassment, or any other sexual offense with a maximum confinement of three years or less. Post-reform, unlike the adjudication of other violations of military law, the decision whether to send a sexual offense to disciplinary proceedings is made by the MAG and not a commander.<sup>406</sup> The adjudication officer must be at least a Lieutenant Colonel or higher, and must have special training in handling sexual harassment cases provided by the IDF School of Military Justice.<sup>407</sup>

### *Court-Martial System*

In the IDF, the MJL establishes the military courts as an independent unit of both the IDF chain of command and the MAG.<sup>408</sup> The military courts consist of a system of regional trial courts, as well as a military court of appeals. The professional military judges of each court are appointed by an independent commission.<sup>409</sup> Each trial court has three judges, one of which must be a professional military judge.<sup>410</sup> The other two judges generally do not have a legal background, and serve in units located in that court's region.<sup>411</sup> Court decisions, including verdicts, are passed by a majority and subject to appeal.<sup>412</sup> The court of appeals sits in three judge panels, and two of the three judges must be military attorneys.<sup>413</sup> The MJL also authorizes the decisions of the military appeals court to be appealed to the Israeli Supreme Court if the appeal is authorized by the President of the Supreme Court or his deputy.<sup>414</sup> The MJL states the

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<sup>402</sup> Id.

<sup>403</sup> Schenck, *supra* note 389, at 2.

<sup>404</sup> Menachem Finkelstein, Yifat Tomer, *supra* note 393, at 141.

<sup>405</sup> Levush, *supra* note 390, at 53.

<sup>406</sup> Id. at 43.

<sup>407</sup> Id.

<sup>408</sup> The Israeli Defense Force Military Justice System, <https://www.idf.il/en/minisites/military-advocate-generals-corps/the-idf-military-justice-system/> (Last accessed April 27. 2020),

<sup>409</sup> Id.

<sup>410</sup> Levush, *supra* note 390, at 45.

<sup>411</sup> Id.

<sup>412</sup> Id.

<sup>413</sup> Id.

<sup>414</sup> Id.

authorization will only be granted when there arises “[a] legal question [that presents an] important, difficult or novel [legal issue].”<sup>415</sup>

The MAG is the highest ranking attorney in the IDF. The functions of the office are set out in the MJL. Under the statute, “the MAG supervises the rule of law in the military, acts as legal advisor to the Chief of Staff and to other military authorities in respect of law and justice, provides legal supervision of disciplinary law in the military, and fulfills any other role imposed upon him by law or military edict.”<sup>416</sup> The MAG has the sole authority in the IDF to file a charge sheet, order a preliminary hearing, or arraign soldiers for both military and civilian criminal offenses. In practice, the filing of charges and the arraignment of soldiers is delegated to the military attorneys, called military advocates, assigned to the MAG and spread throughout the IDF.<sup>417</sup> However, the commander of a military jurisdictional district may “(1) order the Chief Military Prosecutor to file an appeal against a court-martial judgment, (2) with the consent of a military advocate, order the quashing of a charge sheet, and (3) confirm or mitigate any court-martial imposed sentence.”<sup>418</sup>

The MAG is appointed by the Minister of Defense at the recommendation of the Chief of Staff of the IDF.<sup>419</sup> No other military officer is appointed in this manner. While technically the MAG is subordinate to the Chief of Staff in the chain of command, a previous MAG has stated, “[t]he MAG is not subordinate to the Chief of Staff in respect of the exercise of his powers and is not under any command whatsoever – de jure or de facto.”<sup>420</sup> Members of the Military Advocate are not in the chain of the command of the units they serve.<sup>421</sup>

The MAG also supervises the office of Military Defense Counsel. Any accused arraigned before a court-martial may request he be appointed a military defense counsel.<sup>422</sup> While the office of the Military Defense Counsel is subordinate in terms of command to the MAG, during the performance of defense duties a military defense counsel is not subject to the orders of his or her commanders and must only act with the “good of the accused in mind.”<sup>423</sup> Past proposals to separate the Military Defense Counsel from the MAG have been raised, but not put into practice.<sup>424</sup>

#### *IDF Military Justice Statistics*

The only statistics publicly available regarding IDF military justice relate to sexual offenses. From 2007-2011 an average of 442 reports were made alleging verbal abuse,

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<sup>415</sup> Id.

<sup>416</sup> Menachem Finkelstein, Yifat Tomar, *supra* note 393, at 141.

<sup>417</sup> Id. at 142.

<sup>418</sup> Schenck, *supra* note 389, at 2-3.

<sup>419</sup> Menachem Finkelstein, Yifat Tomar, *supra* note 393, at 139.

<sup>420</sup> Id. at 140-1.

<sup>421</sup> Id.

<sup>422</sup> Id. at 147.

<sup>423</sup> Id. at 147-8.

<sup>424</sup> Id.

and physical harassment, resulting in 123 investigations and 23 indictments.<sup>425</sup> In 2011, there was a five-year high of sexual harassment with 583 reports and only 14 indictments. The rate of indictment for serious sex crimes also stayed flat from 2008 to 2011, with 28 in 2007 and 27 in 2012.<sup>426</sup> There is no publicly available data on conviction rates for sex offenses, or any offenses, in the IDF.<sup>427</sup>

However, one commentator noted that even if it is assumed all IDF indictments in 2012 were convictions, the conviction rate per thousand personnel in the Department of Defense would still be higher than the IDF.<sup>428</sup> Recent news reports indicate the rate of reported sexual assault has increased since 2012. Between July 2017 and July 2018, there were 40 reports of rape and a 43 percent increase in the reporting of any type of sexual offense.<sup>429</sup>

#### **g. Allied Legal Systems: Conclusion**

The above review of allied legal systems exposes several commonalities among U.S. allies who have eliminated commander referral authority. Importantly, these are commonalities which the U.S. does not share.

The chief motivation for change among the allied nations considered above was the desire to protect the rights of defendants, rather than to address a deficiency in prosecutions. In the case of the U.K., Australia, and New Zealand, the change was a direct result of an increased willingness on the part of their courts to view commander-driven courts-martial as inconsistent with their obligations under international human rights treaties. While the motivation for Section 540F is not necessarily clear, ensuring the military justice system complies with human rights obligations is undoubtedly not a U.S. concern. Congress should be wary of attempting to adopt changes these nations made for human rights purposes as doing so creates a risk of imprecise legislative adaptation which may yield unintended consequences.

Assuming the goal of removing commanders under Section 540F is either to improve prosecution and referral rates, increase victim trust in the process, increase conviction rates, or decrease incidents of sexual assault, there is nothing about the allied nations' experiences which suggests that removing commanders will achieve those outcomes. None of the allied services evaluated above reported an increase in criminal prosecutions at court-martial following their shift to a model in which judge advocates make referral decisions. In fact, most allied nations reported a decrease in the number of courts-martial. Summary punishment remained the most often used method of addressing misconduct in all the allied services, even as the increase complexity of the

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<sup>425</sup> Schenck, *supra* note 389, at 6-7.

<sup>426</sup> Id.

<sup>427</sup> Id.

<sup>428</sup> Id.

<sup>429</sup> Anna Ahronheim, *40 cases of rape reported in the IDF, signifying rise in complaints*, Jerusalem Post, (<https://www.jpost.com/israel-news/40-cases-of-rape-reported-in-the-idf-signifying-rise-in-complaints-561765>, last accessed Apr. 29, 2020).

summary system decreased the speed of summary discipline.<sup>430</sup> No ally reported an increased conviction rate or decrease in sexual assault reports due to their eliminating commanders' referral decision power. To the contrary, several allies continued to report increased numbers of sexual assaults while their prosecution rates fell.

Finally, the allied militaries that no longer retain commander driven courts-martial are significantly smaller in size and reach than that of the U.S. Armed Forces. The U.S. conducts hundreds more courts-martial than its allies each year. U.S. troops are spread across a greater distance and a larger number of commands. Additionally, the U.S. military is more expeditionary than those allied forces. Because the removal of commanders from courts-martial has yielded no discernable positive change in allied military justice systems, it is unreasonable to expect that removing commanders will have a positive effect in the larger, more complex, U.S. military justice system.

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<sup>430</sup> See Summary Report on Military Justice, *supra* note 324.

## VII. PAST STUDIES OF COMMAND AUTHORITY TO CONVENE COURTS-MARTIAL

### a. Response Systems to Adult Sexual Assault Crimes Panel – June 2014

On June 27, 2014, the Response Systems to Adult Sexual Assault Crimes Panel (RSP), comprised of civilians with a vast array of expertise in civilian and military criminal law, victim advocacy, and law enforcement, released its report fulfilling the requirements of Section 576 of the National Defense Authorization Act for Fiscal Year 2013, after 12 months of review and assessment of the systems used to adjudicate allegations of sexual assault.<sup>431</sup> Among its several topics for review and recommendation was the role of the commander in the military justice process. The RSP determined that there was no evidence that replacing commanders as court-martial convening authorities with independent prosecutors would improve the military justice system.<sup>432</sup> The RSP recommended against any statutory changes that would replace commanders serving as court-martial convening authorities with independent prosecutors.<sup>433</sup>

In coming to this conclusion, the RSP considered the testimony of active and retired military officers, judge advocates, legislators, academics, victims, victim advocacy organizations, and allied military judge advocates.<sup>434</sup> The RSP studied several aspects of the arguments for and against removing commanders from the prosecutorial decision making process and took into account testimony provided by advocates for both sides of the issue.

#### *Alternative allied and civilian justice systems*

After an extensive review of several allied military justice systems, the RSP found no increase in sexual assault reporting or convictions upon transitioning to systems in which attorneys exercised prosecutorial discretion and determined that allied militaries face many of the same challenges as the U.S. military with respect to the prevention and response to sexual assaults.<sup>435</sup> The testimonies of judge advocates from Israel, Canada, the United Kingdom, and Australia, as well as from the Legal Counsel to the Chairman of the Joint Chiefs of Staff who surveyed legal advisors from allied nations, indicated no correlation between increased or decreased sexual assault reporting and removing commanders from prosecutorial decision making.<sup>436</sup>

Similarly, the RSP report found that civilian jurisdictions face sexual assault underreporting challenges and that it is unclear whether a criminal justice system

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<sup>431</sup> RSP, *supra* note 12 at 1.

<sup>432</sup> Id. at 168.

<sup>433</sup> Id. at 22-23.

<sup>434</sup> Id. at 167. See generally U.S. DEP'T OF DEFENSE, REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL Annex B (Report of the Role of the Commander Subcommittee), June 2014, 91-114 (hereinafter RoC Subcommittee Report).

<sup>435</sup> RSP Report, *supra* note 431, at 167.

<sup>436</sup> RoC Subcommittee Report, *supra* note 434, at 109-110.

administered by elected or appointed prosecutors is more effective than the military at encouraging the reporting of sexual assaults, investigating, or prosecuting reported sexual assault.<sup>437</sup> One presenter to the RSP stated that it “assumes too much, that somehow a prosecutor is always going to be better at [making disposition decisions] than commanders.”<sup>438</sup>

*Convening authority fairness and objectivity.* The RSP found that the current U.S. military justice system does not create a conflict of interest for commanders with general court-martial convening authority and that there are systemic checks in place to ensure unbiased disposition decisions.<sup>439</sup> The RSP pointed out that “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.”<sup>440</sup> In short, the RSP determined that commanders with general court-martial convening authority are capable of exercising judgment and discretion without regard to inappropriate considerations.

*Convening authority legal training and advice.* The RSP determined that senior officers serving as convening authorities receive military justice training during pre-command courses along with specific legal training from judge advocates.<sup>441</sup> Additionally, the RSP noted that convening authorities do not make disposition decisions in a vacuum; they are required by law to receive the advice of a judge advocate in making disposition decisions.<sup>442</sup>

Anticipated consequences of removing and replacing the convening authority with independent prosecutors in the grade of O-6. Finally, the RSP recommended against the passage of legislation that replaces senior commanders as convening authorities in favor of O-6 judge advocates who meet specific prerequisite qualifications. The RSP noted that the demand for O-6 judge advocates needed to fill this role would result in understaffing of other important senior legal advisor positions.<sup>443</sup>

**b. Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) – March 2019**

*Background*

On March 26, 2019, the DAC-IPAD, comprised of civilian prosecutors, defense counsel, judges, law professors, and private attorneys experienced in the investigation, prosecution, and defense of allegations of sexual assault offenses, submitted its third annual report in accordance with Section 546 of the National Defense Authorization Act

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<sup>437</sup> Id. at 167-168.

<sup>438</sup> RoC Subcommittee Report, *supra* note 434, at 112 (citing Transcript of RSP Public Meeting 91, (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law)).

<sup>439</sup> RSP Report, *supra* note 431, at 168.

<sup>440</sup> Id (citing RoC Subcommittee Report, *supra* note 434, 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)).

<sup>441</sup> RSP Report, *supra* note 431, at 168.

<sup>442</sup> Id.

<sup>443</sup> Id. at 171.

for 2015.<sup>444</sup> Recognizing that past proposed legislation had sought to remove court-martial disposition authority from commanders and replace such authority with military prosecutors, the DAC-IPAD undertook a first-of-its-kind effort to systematically analyze individual sexual assault cases to determine whether commanders are making appropriate disposition decisions or if there is a problem in the manner in which commanders exercise disposition discretion.<sup>445</sup>

The DAC-IPAD “focus[ed] its case review on the period from the initial report of a penetrative sexual assault to military law enforcement through the decision of the commander whether to prefer charges for a penetrative sexual assault, thereby initiating a criminal justice proceeding.”<sup>446</sup>

Evaluating a random sample of 164 penetrative sexual offense investigations closed in fiscal year 2017, the DAC-IPAD determined that military commanders’ disposition decisions were “reasonable in the overwhelming majority (95%) of cases reviewed.”<sup>447</sup>

#### *Methodology*

To select the 164 cases reviewed as part of its assessment, the DAC-IPAD’s Case Review Working Group started with fiscal year 2017’s 2,055 penetrative sexual offense investigations in which the victims were over the age of 16, the subject was an active duty service member in the same service as the investigating military criminal investigative organization, and the case had not been prosecuted by civilian authorities.<sup>448</sup> Using the random number function in Microsoft Excel, the Case Review Working Group selected 184 cases from the pool of 2,055 cases for review. After excluding cases disposed of by nonjudicial punishment or administrative action (leaving only referral or no action), 152 cases remained. The random sample number increased to 164 to account for cases involving multiple victims.<sup>449</sup>

The committee then reviewed the investigative files of those 164 cases. The typical documents in these files were reports of results of investigations; verbatim statements from key witnesses; summaries of statements made by the complainant, the subject, and other witnesses; crime scene descriptions; photographs; digital evidence; forensic lab test results; video recordings; agent notes; documentation of the initial disposition decision by commanders; and the final outcome of proceedings. Some also included

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<sup>444</sup> U.S. DEPT OF DEFENSE, DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES, THIRD ANNUAL REPORT, March 26, 2019, iii (hereinafter DAC-IPAD Third Annual Report).

<sup>445</sup> Id. at 28.

<sup>446</sup> Id. at 21.

<sup>447</sup> Id. at iv. On August 21, 2020, the DAC-IPAD voted to approve the FINAL REPORT ON INVESTIGATIVE CASE FILE REVIEWS FOR MILITARY PENETRATIVE SEXUAL OFFENSE CASES CLOSED IN FISCAL YEAR 2017 at its eighteenth public meeting. As of the completion of this study and report, the DAC-IPAD’s report and its results had not yet been released.

<sup>448</sup> Id. at 23. Of note, approximately 80% of the 2,055 cases of the initial set of penetrative sexual offenses did not result in charges being preferred. Id. at 24.

<sup>449</sup> Id. at 24.

probable cause determinations and legal memoranda by judge advocates.<sup>450</sup> If charges were preferred in the case, the file also included documents such as the charge sheet, the report of the Article 32 preliminary hearing officer, and the report of result of trial.<sup>451</sup>

In conducting their reviews, the committee members leveraged their “expertise in sexual assault case investigation and adjudication to assess whether, from an investigatory and legal standpoint, commanders are systemically exercising their authority to dispose of sexual assault offenses under the UCMJ appropriately, particularly when the commander declines to prefer charges for a penetrative sexual assault complaint.”<sup>452</sup> While not re-litigating or second-guessing prior decisions in any single case or decision based on nothing more than an investigative file, the committee used this study to “develop a sense of whether commanders charged with making preferral decisions in sexual assault cases are doing so in a manner consistent with the Committee members’ own experience and judgment.”<sup>453</sup>

To develop this sense, each of the cases was reviewed by one member of the DAC-IPAD and one of the DAC-IPAD’s professional staff members. The reviewer would make an independent assessment, recording comments and opinions. In the event a reviewer determined that a commander’s disposition decision was not supported by the evidence, a third reviewer would review the file. The reviewers did not assess whether they would have reached a different conclusion, but rather whether the commander’s disposition decision was reasonable.<sup>454</sup>

While the DAC-IPAD did not specifically express an opinion on whether commanders should retain disposition authority over penetrative sexual assault offenses – which was the stated reason for having conducted the study – the Committee found the “review of the 164 cases from the random sample reveals no sign of systemic problems with the reasonableness of commanders’ decisions on whether to prefer charges in cases involving a penetrative sexual assault.”<sup>455</sup> This finding implies that the DAC-IPAD does not believe replacing commanders with judge advocates as the disposition authority for penetrative sexual assault offenses would result in more reasonable disposition decision making.

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<sup>450</sup> Id. at 25-26.

<sup>451</sup> Id. at 26.

<sup>452</sup> Id. at 28.

<sup>453</sup> Id. at 28-29.

<sup>454</sup> Id. at 29.

<sup>455</sup> Id. at 30.

## **VIII. RELEVANT PROCEDURAL, LEGAL, AND POLICY IMPLICATIONS AND CONSIDERATIONS OF THE ALTERNATIVE MILITARY JUSTICE SYSTEM**

### **a. Referral to the Military Justice Review Panel**

It would be infeasible and inadvisable to conduct a sweeping change of the military justice system without first referring the proposed changes to the Military Justice Review Panel (MJRP). Removing commanders from the military justice system would be the most sweeping change to military justice since the UCMJ was enacted in 1950. The system's constitutionality and viability have withstood the crucible of judicial review by the Supreme Court. The commander's authority under this system is its foundation; removing commanders' prerogative would not be a mere incremental change.<sup>456</sup> Significant structural changes to the UCMJ such as the one identified by Section 540F should first be referred to the MJRP established by Congress in Article 146, UCMJ, as amended by the Military Justice Act of 2016, before consideration.

Congress replaced the former Code Committee under Article 146, UCMJ, for the purpose of creating a body to "conduct independent periodic reviews and assessments of the operation of this chapter." The MJRP review process, as proposed by the Military Justice Review Group, was "based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice."<sup>457</sup> The MJRP is formed "from among private United States citizens with expertise in criminal law, as well as appropriate and diverse experience in investigation, prosecution, defense, victim representation, or adjudication with respect to courts-martial, Federal civilian courts, or State courts."<sup>458</sup> The MJRP is empowered to hold hearings in order to take testimony and study proposed changes to the UCMJ. Congress created this important resource to ensure the orderly operation of the military justice system. Any proposal to radically alter the underpinnings of the commander's authority and responsibility under the UCMJ should be referred to the MJRP for extensive study before consideration.

### **b. Scope of Offenses**

Under the convening authority scheme identified by Section 540F, a judge advocate's responsibility would be well beyond the capabilities of a single authority to give each case a fair and comprehensive review. The scope of offenses and offenders is too

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<sup>456</sup> Michel Paradis, Is a Major Change to Military Justice in the Works?, Lawfare, May 4, 2020, available at <https://www.lawfareblog.com/major-change-military-justice-works> (last accessed September 1, 2020).

<sup>457</sup> Report of the Military Justice Review Group, Part I, 1024 (December 22, 2015) (available at [https://ogc.osd.mil/images/report\\_part1.pdf](https://ogc.osd.mil/images/report_part1.pdf)).

<sup>458</sup> UCMJ, art. 146(b)(3)(c) (2019).

great for a single, centralized convening authority. The maximum punishment for at least 152 offenses under the Manual for Courts-Martial (not including inchoate offenses such as attempts and conspiracies) exceeds one year of confinement.<sup>459</sup> Many of these offenses, particularly drug offenses under Article 112a, UCMJ, absence offenses under Articles 85 and 86, UCMJ, and disobedience and disrespect offenses under Articles 89, 90, 91, and 92, UCMJ, carry maximum penalties of over one year confinement but are often dealt with in proceedings other than a court-martial, such as nonjudicial punishment and administrative separations.

For example, in Fiscal Year 2019 (FY19), the Army reported an active duty strength of 483,941 personnel. During FY19, the Army held 1,359 courts-martial (of any degree tried or pending), along with more than 24,000 nonjudicial punishments imposed.<sup>460</sup> In this same fiscal year, there were 13,501 offenses that carried a maximum penalty of confinement for more than one year that were either tried by court-martial or disposed of via nonjudicial punishment, not including offenses investigated but disposed of through other means. The sheer scope and variety of offenses and alleged offenders should dispel belief that consolidating adjudication for all felony-level offenses by a single convening authority will make the military justice system more efficient. Instead, it will result in slower justice and discipline, degrading the commander's ability to maintain the good order and discipline of her unit and the warfighting capability of the fighting force.

Currently, the Army has 88 GCMCAs, of which 55 have convened a court-martial in the past five fiscal years. Each of these GCMCAs is advised by a legal advisor experienced in military justice to aid in this decision-making.<sup>461</sup> By pushing down decision-making to commanders, the system is more effective in meeting the unique priorities of individual commands. It also fosters more efficiency than centralizing decision making and duplicating the evaluation of cases using the nonbinding disposition guidance in Appendix 2.1 of the Manual for Courts-Martial by both a commander and the judge advocate in the system identified by Section 540F. The potential delay of having to seek independent judge advocate review of so many offenses, even when a court-martial is unlikely, is troubling. Even if delays are relatively minimal, the impact will be palpable at the small unit level. A delay as short as one week could detrimentally affect unit cohesion, good order and discipline, and mission effectiveness.

### **c. Good Order and Discipline**

Good order and discipline will be the biggest casualty of removing commanders from or further limiting their role in the military justice system. Unlike civilian justice systems, the military justice system's purpose is to strengthen the national security of the United States by both doing justice and assisting in the maintenance of good order and discipline.<sup>462</sup> The commander's role in this system is most effective when it is swift and

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<sup>459</sup> MCM, *supra* note 2, App. 12.

<sup>460</sup> U.S. ARMY REPORT ON MILITARY JUSTICE FOR FISCAL YEAR 2019, *supra* note 74.

<sup>461</sup> See, e.g., U.S. DEP'T OF ARMY, REPORT TO CONGRESS - THE DEP'T OF THE ARMY REPORT ON THE MILITARY JUSTICE EXPERIENCE OF GENERAL COURT-MARTIAL CONVENING AUTHORITY LEVEL STAFF JUDGE ADVOCATES, November 14, 2019, 3.

<sup>462</sup> MCM, *supra* note 2, Pt. 1.

visible; the court-martial is not the only tool available to commanders but is one in a series of possible actions with increasing severity and complexity. Removing initial disposition authority from commanders for the vast majority of offenses for which commanders generally use other disciplinary actions threatens to undermine the effectiveness of these other tools. For instance, a service member who violates a commander's order to remain within certain geographical limits during a pandemic as a force protection measure could face a maximum of five years' confinement when charged under Article 90, UCMJ. While each case is evaluated on a case-by-case basis, very rarely will this offense alone result in the preferral of court-martial charges. Instead, commanders would consider other options for a variety of purposes, namely to quickly correct the behavior of the service member and send a message to other service members that the command expects all orders to be followed. If a judge advocate not associated with the command prior to the commander taking corrective action must first review the most severe option, the ability to have a timely effect on unit behavior is irretrievably diminished, which could encourage other service members to take their chances with their own misconduct.

Among the defining characteristics and purposes of the military justice system is its ability to instill discipline through the administration of justice in an efficient manner, even during times of conflict. Efficient justice strengthens the national security interests of the United States.<sup>463</sup> Creating a military justice bureaucracy would dangerously risk national security by undermining a commander's ability to enforce discipline to orders. The identified alternative military justice system would create such a bureaucracy without promoting the efficiency of the system.<sup>464</sup>

The necessity for speed is even more apparent during contingency operations. A commander operating in a combat zone must have the ability to swiftly address misconduct affecting the discipline and the safety of a unit. In the conflicts in Iraq and Afghanistan, many commanders operated independently on small forward operating bases. The dispersed command-driven system allowed commanders the flexibility to enforce discipline tailored to their locations and circumstances. Pockets of misconduct in a combat environment can affect the safety of the entire unit. For example, sleeping on guard duty can create a serious tactical weakness at a combat outpost. A commander must have the ability to quickly respond to this type of misconduct. If service members sense a lack of punishment or a tepid response to misconduct, they will not alter their behavior. Another common example arising in the modern combat arena is the possession of cell phones in guard towers. Most commanders order the removal of cell phones from guard towers to eliminate distractions. When service members are caught with cell phones in guard towers, the command must have the means to back up their orders and issue punishments. While these offenses seem relatively minor, they each carry a maximum sentence of greater than one year confinement under Articles 90-92, UCMJ.

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<sup>463</sup> Non-Binding Disposition Guidance, *supra* note 40.

<sup>464</sup> Paradis, *supra* note 456.

Just as offenses that may appear minor have grave consequences in a military context, a commander must have the means to dispose of felony-level offenses in a swift and efficient manner outside the context of a court-martial. For instance, the possession of less than 30 grams or the use of marijuana carries a maximum penalty including two years' confinement. Often, commanders choose to expedite the disposition of these offenses to remove the offending service member from the unit as quickly as possible with nonjudicial punishment under Article 15, UCMJ, and a subsequent administrative separation. However, in units with particularly sensitive missions such as aircraft maintenance or parachute rigging, or in units where the commander identifies a severe drug problem, cases are often handled differently. The external judge advocate conducting review risks minimizing or losing the unit's important perspective. A judge advocate, knowing that marijuana use offenses are typically dealt with below court-martial, may refer the case back to the command for action instead of taking the case to court-martial as the commander's specific context demands. In this scenario, a judge advocate, likely with no experience in command, has made a decision that negatively impacts the manner in which the commander leads her unit. The authority of that commander is abdicated to the judge advocate. If an accident occurs as a result of a drug problem in a unit, (e.g., a parachute fails, a helicopter or aircraft crashes, or an explosive prematurely detonates) that commander may no longer be the officer who can take meaningful action to address the misconduct. Such life and death situations occur daily across the military services in both peace and wartime. In military deaths and accidents, often the root cause relates to a failure of discipline. If the commander is removed from the disciplinary decision process, they cannot take full responsibility for the safety of their command.

#### **d. Friction in a Bifurcated System**

Service member misconduct rarely falls along the felony and non-felony lines contemplated by the alternative military system. A criminal course of conduct that includes offenses on both sides of this divide invites unwanted creativity when investigating and disposing of offenses. A bifurcated system is likely to cause friction as commanders and reviewing judge advocates debate the proper disposition of each type of offense and whether a commander can act on the non-felony offense in a way that could negatively impact the prosecution of the felony-level offense or offenses. Similarly, without control over the court-martial process, commanders could be put in a precarious position when dealing with repeat offenders whose misconduct is frequent but only chargeable under articles with confinement under one year. Unless commanders are given a recourse to punish and remove such individuals from their units, the tools a commander retains would have less effect in maintaining good order and discipline.

The potential for friction between the role of the commander and the role of an independent prosecutor is not an issue of first impression. Major General Kenneth J. Hodson, the Judge Advocate General of the Army from 1967 to 1971, pointed out this concern when a similar proposal was put forth in the early 1970s:

Another flaw in the Bayh proposal is that it would split the responsibility for the administrative management of soldiers, including their reassignment or their administrative discharge, from the responsibility of deciding whether they should be prosecuted. When a soldier is alleged to have committed an offense, the basic question presented is what is the best disposition to be made of him, considering his prior record, his ability and training, the nature of the offense and its impact on discipline, and the nature of the unit's mission. The responsibility for providing an answer to this question should not be divided between two people, one who has an overall responsibility for creating and maintaining discipline, and the other who has no responsibility except to consider the nature of the offense and to determine whether the evidence will support a trial by court-martial. The proposed split of responsibility means that neither the commander nor the prosecutor will be able to consider all of the alternatives that should be available in determining the best disposition of the matter. An inherent conflict between these two decision-makers is bound to result, not necessarily because they disagree, but because neither person has access to sufficient data to make an informed disposition. Law enforcement is a difficult job under the most favorable circumstances, that is, when all its aspects, from police selection and training through the judicial process to correction and rehabilitation, are carefully coordinated. To split deliberately, the responsibility for law enforcement in the military is to plan for failure.<sup>465</sup>

While vesting court-martial referral authority with judge advocates would be a novel concept, the Services have sometimes vested referral authority outside the chain of command of service members suspected of misconduct. One such example is the U.S. Navy's use of consolidated disposition authorities (CDAs).<sup>466</sup> Navy CDAs have been used typically in cases involving large numbers of individuals assigned to different commands, most recently demonstrated in the Glenn Defense Marine Asia and Western Pacific ship collision investigations.<sup>467</sup> The recent Comprehensive Review of the Department of the Navy's Uniformed Legal Communities found that "[w]hile necessary in certain cases, [the use of CDAs] contrasts with the general principle that commanders are responsible for the conduct of their units and ensuring accountability."<sup>468</sup> Nonetheless, it is an experienced commander who makes prosecutorial decisions understanding the perspective of the service members' commanders in CDA situations.

One of the criticisms of the military justice system is that commanders' decision making is clouded by the inherent conflict of interest between wanting to appear as though they have the discipline of their units under control and referring cases to court-martial. In other words, commanders are allegedly pressured to appear as though their unit does not have a discipline problem so there is decreased incentive to investigate and refer

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<sup>465</sup> Kenneth J. Hodson, *Military Justice: Abolish or Change*, 22 U. KAN. L. REV. 31, 44-45 (1973).

<sup>466</sup> Similarly, U.S. Army Europe uses an area jurisdiction model, which to some extent consolidates UCMJ authority through designated commanders.

<sup>467</sup> U.S. DEPT OF NAVY, *Comprehensive Review of the Department of the Navy's Uniformed Legal Communities*, Dec. 9, 2019, 78.

<sup>468</sup> *Id.*

cases. Critics argue that transferring prosecutorial decision authority from commanders to prosecutors decreases the risk of improper influence and that the system at least will appear to be fairer. Not only is there no empirical evidence to support the assertion that commanders' decision making is hampered by inappropriate considerations under the non-binding disposition guidance issued under the authority of Article 33, UCMJ,<sup>469</sup> there is also no evidence that lawyers, if given this authority, would not also be susceptible to the same or other inappropriate considerations. For instance, in the civilian context, an elected prosecuting attorney is likely to have a conflict between what is objectively "right" and the desire to win the next election campaign.

As Lieutenant General Charles Pede, The Judge Advocate General of the Army, stated in his testimony to the House Armed Services Committee Subcommittee on Military Personnel on the matter of racial and ethnic disparities in the military justice system, "there's no monopoly on bias or unbias. There's no monopoly on wisdom in your legal branches."<sup>470</sup> Lieutenant General Pede then cited two studies to show that in the state and federal lawyer-centric systems the racial and ethnic disparities in investigation, conviction, and sentencing are well in excess of what is found in the military's command-centric system.<sup>471</sup> Lieutenant General Pede's poignant testimony illustrates how the belief that somehow a lawyer-centric system will be free from inappropriate biases, considerations, and pressures and will therefore create a "more fair" military justice system is greatly flawed.

Commanders remain responsible and accountable for the disciplinary issues in their units. Removing disciplinary decisions from the commander and giving them to an unchecked lawyer would seriously compromise the commander's inherent responsibility and authority. Across the various criminal justice systems in the United States, prosecutors are accountable, whether directly to an electorate or as a political appointee of an elected official. Both those elected and appointed can be removed from office. These prosecutors are ultimately accountable to the people whom they serve. Commanders can also be relieved when they fail to enforce standards and discipline or when they exercise poor judgment. A centralized military justice office would diffuse responsibility and accountability by consolidating oversight into a small pool of military lawyers separated from the chain of command. While this may centralize accountability to Congress, it will decouple accountability where it needs to be most visible – at the unit level. Questions about the division of authority are not limited to what adjudicative tools the decision maker should use. In addition to determining where on the

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<sup>469</sup> Id., at ¶ 2.7.

<sup>470</sup> Subcommittee on Military Personnel Hearing: Racial Disparity in the Military Justice System – How to Fix the Culture, 116th Cong. (June 16, 2020) (testimony of Lieutenant General Charles Pede) available at <https://armedservices.house.gov/hearings?ID=A4D378D4-906F-4D61-B504-CAED54EAE38E> (last accessed June 19, 2020).

<sup>471</sup> See The Sentencing Project, Report of The Sentencing Project to the United Nations Human Rights Committee, August 2013, 1 (finding that African-American males were six times more likely to be incarcerated than white males, and 2.5 times more likely than Hispanic males), and U.S. DEP'T JUSTICE OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, Prisoners in 2018, April 2020, 1 (finding that "[i]n 2018, the imprisonment of black males was 5.8 times that of white males [in state and federal prisons].").

adjudication spectrum offenses should fall, additional friction would arise over administrative decisions for a case that the judge advocate has referred to court-martial.

#### **e. Supervision of Subordinate Prosecutors**

Additionally, as noted earlier, implementing an alternative military justice system may lead to significant impacts on the geographic distribution of judge advocates in each service. Such changes to the force structure could decrease the quality of military justice mentorship junior judge advocates currently receive. As a result, there is a serious risk that changes to the judge advocate force structure may lead to a shortage of junior judge advocates with military justice experience. If the proposed changes were implemented, an SJA would have very few military justice responsibilities. While an SJA may have previously had military justice experience, any junior judge advocates assigned to the office of an SJA would receive little-to-no exposure to the military justice system.

#### **f. Pretrial Confinement**

The scheme identified by Section 540F does not address who should retain authority over the decision of whether to put a service member into pretrial confinement. Article 10, UCMJ, permits the pretrial arrest or confinement of persons subject to the UCMJ and gives the authority to the President to prescribe regulations to govern its administration. Rule for Courts-Martial 305 governs pretrial confinement and places the responsibility of determining whether an accused should be placed into pretrial confinement upon commanders. If commanders lose disposition authority over the offenses which give rise to a court-martial, it is unclear whether they should also lose the authority to place a service member that may flee or continue to engage in serious misconduct into pretrial confinement. In the typical civilian justice system, the issue of pretrial restraint is a judicial decision made early in the process, something that could potentially be mirrored under the authority of Article 30a, UCMJ. However, a commander's access to the military judge would be through the prosecutor. Even if in most cases the prosecutor and the command agree that a service member should go into pretrial confinement, in cases where they disagree the disagreement would cause significant damage to the commander's ability to maintain good order and discipline. Additionally, removing disposition authority from commanders could incentivize commanders' use of pretrial confinement because the consequences of failing to move a case expeditiously would fall on the prosecutor, not the command. Inversely, a prosecutor may be hesitant to support a command's good faith request for pretrial confinement because of caseload concerns or due to an uninformed belief that the command is not sincere in its belief that pretrial confinement is necessary. Again, this would take crucial considerations of good order and discipline away from a commander and place them in the hands of a prosecutor not associated with the unit.

#### **g. Funding**

Courts-martial cost money. Currently, units fund courts-martial expenses through their Services' Operations and Maintenance funds. This includes funding for witness travel

and the employment of experts for both the prosecution and the defense. A determination would be required regarding how best to fund courts-martial. Will the commander maintain the budget for funding courts-martial? This presents a potential dilemma should the commander refuse to fund witness travel or an expert request for the independent prosecutor, thereby jeopardizing the case. Will commanders be stripped of the funds earmarked for courts-martial and have it directed to the independent prosecutor? Managing the entire budget for all felony-level courts-martial presents its own challenges and would likely require additional personnel support to effectively manage the budget. Either scenario creates risk to the ability of the government to meet its responsibility under Article 46, UCMJ, to provide the defense equal access to witnesses and evidence and may even necessitate providing the Services' defense bars their own court-martial budgets. Moreover, tying the cost of trying of a court-martial to a unit's operation and maintenance cost allows commanders to consider the value in accepting a guilty plea to a lesser offense or in exchange for lesser jail time, which is one of the non-binding disposition factors.<sup>472</sup>

#### **h. Panel Selection**

Also unclear in Section 540F's alternative military justice system is whether the commander would continue to select panels or whether this duty would fall to another entity, such as a "court-martial administrator" like in some allied systems. Either way would be problematic; if the status quo were to remain the commander could be forced to convene panels for prosecutions that frequently take the panel members away from their military duties, or a centralized administrator could assign personnel to panels without any regard to the military duties and requirements of those personnel or the orders of their commanders. As convening authorities, commanders have inherent authority and control over the leave, temporary duty, deployments and other mission-related responsibilities of members within their command. Many times commanders will prevent panel members from engaging in these tangential activities if they would interfere with the court-martial. It is unclear what authority, if any, the independent judge advocate prosecutor would have to direct panel member participation in a court-martial. To be effective, the court-martial administrator would need appropriate authority to ensure that panel members are directed to participate in courts-martial.

#### **i. Matters Retained by the Command and Staffing Considerations**

Section 540F describes a bifurcated system where the command retains jurisdiction over minor offenses, while a senior judge advocate exercises prosecutorial discretion over alleged felony-level offenses. This division calls into question who provides advice to the command for minor offenses. If commanders retain some but not all military justice responsibilities, commanders should be appropriately staffed with judge advocates and paralegals who facilitate this function of command. Bifurcating the two types of cases could double the Services' need for legal personnel performing military justice duties: one set of personnel would provide advice to the command, and another set, under the supervision of the senior judge advocate, would exercise prosecutorial

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<sup>472</sup> Non-Binding Disposition Guidance, supra note 40, at ¶ 3.2k.

authority for felonies. This necessity becomes particularly clear when considering that service members may demand trial by court-martial, even for minor offenses, when offered proceedings under Article 15, UCMJ. If a service member were to make such a demand under the alternative system, either the commander that currently has court-martial convening authority would have the authority to convene a court martial under the “old” rules, or the commander would have to rely on the senior judge advocate to prioritize a case for what might be a minor offense but a major issue of good order and discipline for the command. The former scenario creates an unwieldy and frustrating duplication of effort; the latter creates a frightening proposition for the future ability of commanders to maintain good order and discipline.

Even if the awkwardness of a bifurcated system could be overcome when a case arises in the United States, the Section 540F proposal seems to avoid the question of whether this system could function in an armed force that is more expeditionary, both in terms of numbers of personnel and forward locations, than any allied nation. Currently, the military justice system allows courts-martial to be conducted even in the most austere of environments, something that anecdotal evidence indicates our allies do not do. Commanders are able to marshal all of the resources necessary to conduct a court-martial in a deployed environment and do so safely while considering the effects on the mission. If commanders are no longer in control of military justice, not only are the considerations such as panel selection and funding exacerbated, but the decision of whether it is possible to hold a court-martial in a deployed theater is abdicated to a judge advocate, potentially one not deployed to support the command. Also, as discussed earlier, the negative effect of delay on commanders’ ability to dispose of offenses not appropriate for court-martial is exacerbated when it affects a deployed unit.

#### **j. Command Responsibility under International Law**

This stripping of authority could even affect the commander’s responsibility under international law for the conduct of their service members. The United States has long adhered to international law and standards concerning command responsibility. Removing commanders from their role in the military justice system could jeopardize the ability to hold commanders accountable through vicarious liability for war crimes committed by their subordinates. If commanders lack the authority to discipline those under their command, commanders cannot be held accountable for the actions of their subordinates. This issue was addressed in the 2012 case of Prosecutor v. Ante Gotovina & Mladan Markac.

Gotovina and Markac were tried and convicted by the International Criminal Tribunal for the Former Yugoslavia (ITCY) for the actions of their soldiers in a 1995 military action in the Krajina region of Croatia. In overturning their convictions, the Appeals Chamber of the ITCY considered whether Markac, serving as the Commander of the Special Police during Operation Storm in the 1990s, could be held liable for crimes committed by his subordinates. The court opined:

Turning first to superior responsibility, the Appeals Chamber notes that the Trial Chamber did not explicitly find that Markac possessed effective control over the

Special Police. The Trial Chamber noted evidence indicative of a superior-subordinate relationship and found that commanders of relevant Special Police units were subordinated to Markac. However, the Trial Chamber was unclear about the parameters of Markac's power to discipline Special Police members, noting that he could make requests and referrals, but that crimes committed by members of the Special Police fell under the jurisdiction of State Prosecutors.<sup>473</sup>

While command responsibility was not the central reason for the reversal of the convictions, its mention in this context serves to signal that removing commanders' ability to hold their service members accountable for their wartime misconduct could negatively impact the U.S. ability to uphold its responsibilities under international law.

#### **k. Clemency**

In cases referred by the judge advocate convening authority, a commander will not have knowledge of the history of how the cases developed or what happened during the court-martial process. This will be detrimental to the commander's responsibility to take action on a request for clemency. There will also be friction between the commander and judge advocate convening authority if the commander is considering clemency, which includes no punishment. It is unclear who will be responsible, and therefore held accountable, for granting or denying clemency.

### **I. Judicial Treatment of the Current Military Justice System**

Finally, the current, command driven, UCMJ has been continually tested through the crucible of judicial review. Congress should weigh the loss of this firm legal authority against the unproven and untested purported benefits of removing commanders' authority from the UCMJ. The experience of the Australian Defense Forces in dealing with the fallout of the High Court of Australia's decision in Lane v. Morrison provides one such example of the consequences of invalidation. Prior to Lane, the Australian Parliament created a court it believed would be more independent, and provided it with authority similar to civilian courts. On an appeal challenging the military court system, the Australian High Court determined that military courts in Australia were unlawfully acting with the same judicial authority as civilian courts (see discussion of the Ortiz decision of the U.S. Supreme Court, below). The Lane decision went on to invalidate the entire Australian military justice system and multiple court-martial convictions were subject to reversal. The U.S. should be wary of changes so fundamental to the military system of justice, as they create a risk of a similar outcome.

For all of the reasons articulated above, there is no reliable indication that an alternative military justice system in which felony-level offenses are disposed of by judge advocates will actually achieve the probable aims of such a system. Therefore, the JSS-PAS concludes that an alternative military justice system is neither feasible nor advisable.

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<sup>473</sup> Prosecutor v. Ante Gotovina & Mladen Markak, Case No. IT-06-90-A, Judgement of the Appeals Chamber, ¶ 148 (Nov. 16, 2012), [https://www.icty.org/x/cases/gotovina/acjug/en/121116\\_judgement.pdf](https://www.icty.org/x/cases/gotovina/acjug/en/121116_judgement.pdf).

## **IX. IMPLEMENTATION AND MAINTENANCE ANALYSIS**

### **a. Legal Personnel Requirements**

Because the JSS-PAS finds that the alternative military justice system under evaluation in this study and report is neither feasible nor advisable, the JSS-PAS did not determine legal personnel requirements to implement the proposed alternative military justice system. But as suggested above, it is clear the alternative system would require a significant increase in manning.

### **b. Changes in Force Structure**

Because the JSS-PAS finds that the alternative military justice system under evaluation in this study and report is neither feasible nor advisable, the JSS-PAS did not determine necessary changes in force structure to implement the proposed alternative military justice system.

### **c. Amendments to Law**

**Overview.** As it currently stands, it is not feasible to implement the alternative military system without completely overhauling of the UCMJ. Many of the statutes comprising the UCMJ specifically reference the extensive duties of convening authorities in the system. Any modification would require corresponding modification of the Manual for Courts-Martial (MCM) via an Executive Order. Within the MCM, each of the statutes' implementing Rules for Courts-Martial would require revision to ensure a coherent and consistent application of the Rules for Courts-Martial. Thus, implementation would take a considerable amount of time and a lengthy transition period would be necessary. Additionally, the Services are still implementing changes mandated by the Military Justice Act of 2016, one of the most significant and far-reaching evolutions of the UCMJ since its inception.

The drafting of statutory changes required to implement the alternative military justice system addressed by Section 540F is beyond the scope of this report.<sup>474</sup> However, UCMJ changes may be grouped generally into four categories.<sup>475</sup> The first group contains statutes and corresponding rules that would unquestionably require revision to support the establishment of a judge advocate-based system. The second group contains statutes and rules that would likely require revision. A final determination on whether revision to these statutes is necessary would depend on how legislators decide court-martial authorities will be assigned in the proposed system. The third group contains statutes and rules related to military justice processes falling below the level of special court-martial that would likely require revision to ensure low level misconduct can adequately be addressed. Finally, a fourth group of new statutes will likely be required to effectively implement the proposed system. The breadth and depth of the

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<sup>474</sup> See OFFICE OF MANAGEMENT AND BUDGET, Circular A-19, and U.S. DEP'T OF DEFENSE, DIR 5500.01, PREPARING, PROCESSING, AND COORDINATING LEGISLATION, EXECUTIVE ORDERS, PROCLAMATIONS, VIEWS LETTERS, AND TESTIMONY, June 15, 2007.

<sup>475</sup> The Articles of the UCMJ which comprise each category are listed in Appendix D.

required changes should underscore the sweeping nature of such a change to the UCMJ. Shifting prosecutorial authority from commanders to judge advocates is a fundamental change to the Code; it is not simply a “tweak” or an incremental change.

In addition to changes within the UCMJ, other parts of Title 10, United States Code, addressing command authority would require revision. In particular, 10 U.S.C. § 164 would require removal of any reference to the authority to convene courts-martial unless commanders would retain the authority to convene courts-martial for minor offenses.

*Group 1: Court-martial statutes and rules that would require revision.*

Group 1 involves 27 separate UCMJ articles that would require revision in order for a judge advocate to assume the role as a convening authority. Many of the statutes and rules in this group provide commanders with authority they would not possess under a judge advocate operated system. Other statutes and rules in this group establish procedures that would be unnecessary in a judge advocate convening authority based system.

Six of these articles encompass jurisdiction and composition of courts-martial. Courts-martial are not standing courts like Article III courts. The convening authority, as a commander over the court-martial participants, orders personnel under his or her command to stand up a court-martial for the limited purpose of trying a service member for violations of the UCMJ. These articles would require modification if the alternative military justice system were to empower the senior judge advocate prosecutor to establish a court-martial for the purposes of adjudicating the charges brought against a member.

Nineteen articles address pretrial procedures, findings and sentencing, and post-trial procedures. These articles address requirements to inform a service member of the charges being brought against him or her and how to dispose of the charges against the member. The articles would require modification to address how charges would be referred to a particular type of forum (general, special, or summary) and who would be authorized to negotiate plea agreements. Currently, the convening authority executes sentences adjudged at a court-martial as a function of command. Removing the commander as the convening authority for courts-martial for qualifying offenses would require modification of the entire sentencing process. This includes the selective authority a convening authority currently has to set aside findings of guilty to certain offenses, reduce the sentence imposed on the service member, or dismiss charges if the court-martial requires a rehearing. If the alternative military justice system were to be adopted, these new statutes would have to address whether this senior judge advocate prosecutor, some other entity, or no one will be vested with these clemency authorities currently given to commanders. Moreover, these articles would require modification to adapt unlawful command influence and summary courts-martial to the new paradigm.

Finally, two articles address complaints of wrong and redress of injuries to property. Greater examination of these articles will be required to address their application to the

senior judge advocate prosecutor or whether these authorities would remain with commanders.

*Group 2: Court-martial statutes and rules which would likely require revision.*

Group 2 involves 15 UCMJ articles. The exact nature of any revision to this second group is dependent on how the proposed system would be implemented. More particularly, the controlling factor would be the degree and nature of any decision making authority commanders retain. It is conceivable that some practices and procedures created through the statutes in this group could be left unmodified, but any decision to not modify these statutes should be based on a thorough analysis of the military justice system as a whole.

Nine of these articles encompass general provisions and administrative matters, restraint and apprehension, and composition of courts-martial. General provisions defining the roles, responsibilities, and authorities of court-martial participants, in particular the senior judge advocate prosecutor, may require revision based upon any proposed legislation. Provisions regarding apprehension and restraint, such as pretrial confinement, would likely require revision under the alternative military justice system. Most notably, the process for selecting, assembling, and impaneling court members would likely require revision.

Six articles address pretrial procedures through the imposition of a sentence and post-trial procedures. Most notable is the preliminary hearing process. As the senior judge advocate prosecutor would not be a commander, she could not order a preliminary hearing pursuant to Article 32. Appropriate revisions would be required to ensure the central prosecutor's office has authority to direct the Article 32 preliminary hearing rather than rely on a commander to carry out the decision of the senior judge advocate prosecutor.

*Group 3: Lower forum statutes and rules which would likely require revision.*

Group 3 involves three separate UCMJ articles. Revision of these authorities must be considered with any modification to court-martial convening authority to prevent the system from becoming cumbersome or unbalanced. The exact revision to non-judicial disciplinary forums might range from minor adjustments aimed at administrative processes to broader jurisdictional modifications. Ultimately, legislators must ensure any revisions are focused on ensuring commanders are empowered to address misconduct falling below court-martial level.

*Group 4: Potential new laws.*

Forming and implementing a judge advocate court-martial convening authority could not be accomplished effectively merely through amendments to existing UCMJ articles. Legislators would also need to draft several new UCMJ articles to create the necessary positions, clarify the qualifications requirements, and address relationships between parties. The form the new system takes once the judge advocate authority is incorporated would ultimately dictate the scope of the new articles.

The following are a few examples of new UCMJ articles should a senior judge advocate prosecutor be appointed to make disposition decisions for qualifying offenses. An article would be required to outline the qualifications, authorities, and responsibilities of the senior judge advocate prosecutor. Similar to military judges, a statute would need to describe any conditions or circumstances that may justify removal of the judge advocate court-martial authority and who would have the authority to do so. In conjunction with the senior judge advocate prosecutor, a court-martial administrator might be required if the alternative military justice system would also remove the ability of commanders to select panel members. Another statute would need to explain the nature of the relationship and independence between the Judge Advocate General of each Military Department and the senior judge advocate prosecutor.

**d. Impacts on the Timeliness and Efficiency of Legal Processes and Court-Martial Adjudications**

If the commander's authority to dispose of cases were removed and given to a judge advocate, it is unlikely average prosecution time would decrease and would likely increase. Moving from a commander-centric system to a judge advocate-centric system would not improve portions of the military justice process which take the most time between allegation and disposition, namely the investigation by an MCIO and the case analysis by judge advocates and SJAs prior to preferral. If a judge advocate had the authority to dispose of cases, the time spent on investigation and case analysis would not decrease. Under the current system, commanders working with their local legal offices may elect to accelerate the military justice case processing by making a disposition decision prior to the completion of an investigative report. This is possible because the commander and the legal office, along with law enforcement, work together on the status of the investigation to keep the commander informed. However, under the proposed system, the senior judge advocate prosecutor would likely require a completed investigative report prior to making any charging decision. Serial processing of cases would likely be the norm. The judge advocate prosecutor would require a completed report of investigation (ROI) prior to decision, where currently a commander—who is involved throughout the investigation—may make a disposition prior to completion of an ROI.

Instead of decreasing prosecution time, providing authority to a judge advocate instead of a commander may increase the length of time it takes to dispose of certain cases. It is likely that in many instances a commander of a service member who is alleged to have committed an offense with a maximum confinement of over one year will elect to offer nonjudicial punishment to the service member. Presumably, that commander would have to provide justification to the judge advocate in control of disposition of that offense. The commander is in the best position to judge whether referring the member's case to court-martial would impact mission related responsibilities, the effect on morale and good order and discipline, and the appropriateness of alternative disposition. Indeed, the judge advocate with disposition authority should, and likely would, seek input from the member's command for the express purpose of understanding the impact of a court-martial on the member's unit. This input already occurs as part of the advice and counsel commanders' SJAs provide in the current military justice system when

obtaining disposition recommendations and decisions. Thus, no time is saved by transitioning the decision authority to a judge advocate; rather, such a system would likely increase processing time.

Timely processing of plea agreements would also be affected. Currently, the commander not only possesses authority to ensure prosecution of a case in a court-martial, but also exercises various nonjudicial authorities, which may be implicated under the terms of a plea agreements. An accused may agree to accept nonjudicial punishment and a discharge in exchange for dismissing the court-martial charge. An accused may agree to plead guilty in exchange for waiving an administrative discharge board and accepting an under other than honorable conditions discharge in the event a punitive discharge is not adjudged. An accused may submit a request for retirement in lieu of court-martial or a separation in lieu of court-martial—both require the convening authority to exercise her nonjudicial authorities should she accept the request. These are but a few examples where the senior judge advocate could not enter into the plea agreement because the judge advocate would not possess the applicable nonjudicial authority. The judge advocate would need to brief the commander who possesses the authority and that commander would need to agree to be bound by the terms. Many times requests for separations in lieu of court-martial and plea agreements with these conditions are offered on the eve of trial. Under the proposed system, last-minute requests such as these requiring the additional coordination with the commander will undoubtedly jeopardize the trial dates.

Other changes to the military prosecution system resulting from modifying the disposition authority could also increase the length of prosecutions. As previously detailed, consolidating the disposition authority to a single judge advocate could significantly impact the force structure and speed of case disposition. The current military justice caseload is distributed over hundreds of commands all across the globe. If one judge advocate were designated as the disposition authority, she would need a substantial staff of subordinate judge advocates to evaluate cases and make disposition recommendations. These judge advocates would necessarily need to have significant military justice experience, and would then be taken from prosecution and defense offices, further slowing the rate of prosecutions.

Further, depending on how many judge advocates were to be dedicated to the new disposition authority, it is possible that disposition decisions would also slow. As noted in Part I, the United States armed forces are significantly larger than allied services that have implemented a program similar to that identified by Section 540F. It would be untenable to vest all disposition decisions for felony-level offenses in one judge advocate without resulting in a bottleneck. Even if it were legally permissible for disposition authority to be delegated down to the senior judge advocate's subordinate prosecutors (which would not be authorized under the system as described by Section 540F unless the subordinate was at least an O-6 with significant criminal litigation experience), those judge advocates would necessarily be junior in rank relative to the senior judge advocate and have presumably less military justice experience, without the benefit of local leadership to assist with advice and decision-making. This practice

would conflict with the express purpose of the new system, that a senior, experienced judge advocate be the disposition authority.

#### e. Potential Legal Challenges to the Alternative Military Justice System

Removing the military commander from the military justice decision-making process risks invalidating the currently accepted jurisdictional basis for an independent military justice system within the executive branch. Military justice has long served as the vehicle for discipline in the armed forces imposed by and through the commander. The British military used a court-martial system long before the founding of the United States.<sup>476</sup> The first Congress adopted the British system as the best method for allowing commanders to dispense discipline on a fighting force.<sup>477</sup> The Supreme Court has often recognized the unique nature of the military justice system as a commander's tool to instill discipline in the armed forces.<sup>478</sup> This is true throughout the expansion and contraction of military justice jurisdiction occurring since the adoption of the UCMJ in 1950.

Taking the responsibility of discipline from commanders acting as convening authorities challenges the historical and customary deference to military justice by the Supreme Court. The greater the separation between those who command and those who enforce discipline, the less the military justice system provides value as an institution outside of civil courts.

This risk is rooted in the unique position of the military justice courts as Article I "inferior tribunals," rather than an Article III, "inferior court."<sup>479</sup> The Constitution provides for the establishment of the judicial branch in Article III. Article III vests the judicial power of the United States in, "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."<sup>480</sup> Article III also dictates that judges of those courts are appointed for life, and shall not have their salary diminished.<sup>481</sup>

As an Article I creation, the military justice system falls outside the provisions of Article III.<sup>482</sup> Military judges do not have Article III protections. At the trial and military appellate

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<sup>476</sup> James E. Pfander, *Article I Tribunals, Article III Courts and the Judicial Power of the United States*, 118 HARV. L. REV. 643 715-716; *Ortiz v. United States*, 138 S. Ct. 2165, 2199 (2018) (Alito, J., dissenting).

<sup>477</sup> Pfander, *supra* note 476, at 715-716.

<sup>478</sup> *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Reid v. Covert*, 354 U.S. 1 (1957) (plurality opinion); (The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function); *Chappell v. Wallace*, 462 U.S. 296, 300, (In the civilian life of a democracy many command few; in the military, however, this is reversed, for military necessity makes demands on its personnel "without counterpart in civilian life.") *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975); ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty...."); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion); (The military constitutes a specialized community governed by a separate discipline from that of the civilian); *Orloff v. Willoughby*, 345 U.S. 83, 84 (1953).

<sup>479</sup> U.S. CONST. art. III, § 1; U.S. CONST. art. I § 8 cl. 9.

<sup>480</sup> U.S. CONST. art. III, § 1.

<sup>481</sup> U.S. CONST. art. III, § 1.

<sup>482</sup> U.S. CONST. art. I § 8 cl. 9.

court level, judges are assigned by the respective Judge Advocate General or service Chief Trial Judge. In the case of the all-civilian Court of Appeals for the Armed Forces, the judges are appointed by the President with the advice and consent of the Senate for fifteen year terms.<sup>483</sup> No judge in the military justice system is given a lifetime appointment or guaranteed salary protection by the Constitution.

The court-martial has a unique historical precedent that predates the revolution.<sup>484</sup> George Washington and other American soldiers of the Revolution were exposed to the British system during the Seven Years War.<sup>485</sup> The experience of the British system carried over to the Continental Army and established the precursor to the UCMJ.<sup>486</sup> The British system was adopted nearly in whole by the first Congress under the U.S. Constitution and was understood to establish an independent military justice system outside of the Article III realm.<sup>487</sup> The founders believed the British court-martial system was ideal for military commanders at war and fit easily within the executive branch of the tripartite government.

The founders recognized that discipline through military justice was best exercised through the use of the executive power. This executive power is further distilled through the chain of command to the battlefield. Such a view is repeatedly recognized by the Supreme Court and military scholars.<sup>488</sup> In 1950, Congress passed the UCMJ and established the modern system of commander-led discipline.<sup>489</sup> The new system provided significant due process and procedural improvements over the previous Articles of War while retaining the commander-centered system of discipline.

Altering the command-controlled military justice system also risks the status of the current case law allowing jurisdiction over all service member misconduct regardless of its connection to military service. Currently, the military prosecutes crimes committed on civilian victims and off military installations. Between 1969 and 1987 the Supreme Court jurisprudence required a “service connection” for the prosecution of crimes in military court.<sup>490</sup> This rule announced by the Supreme Court in O'Callahan v. Parker attempted to balance the need for discipline with due process protections for service members.<sup>491</sup> The service connected rule effectively eliminated military jurisdiction for most traditional offenses committed against civilians off a military installation including sexual assault,

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<sup>483</sup> UCMJ art. 142(b)(2) (2019).

<sup>484</sup> Frederick Bernays Wiener, American Military Law in the Light of the First Mutiny Act's Tricentennial, 126 MIL. L. REV. 1, 1-5; Pfander, *supra* note 476, at 715-716.

<sup>485</sup> Wiener, *supra* note 484, at 1-5; Pfander, *supra* note 476, at 715-716.

<sup>486</sup> Ortiz v. United States, 138 S. Ct. 2165.

<sup>487</sup> Id.

<sup>488</sup> (“Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.”) Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866); Ortiz v. United States, 138 S. Ct. 2165, 2200, (2018) (Alito, J., dissenting); Reid v. Covert, 354 U.S. 1, 34,(1957) (plurality opinion); United States ex rel. Toth v. Quarles, 350 U.S. 11, 22, (1955).

<sup>489</sup> 10 U.S.C. Chapter 47.

<sup>490</sup> O'Callahan v. Parker, 395 U.S. 258, 302-303 (1969); Solorio v. United States, 483 U.S. 435. 450-451 (1987).

<sup>491</sup> O'Callahan v. Parker, 395 U.S. 258, 302-303 (1969).

larceny, fraud, and murder. The Supreme Court found that those offenses, lacking a sufficient military connection exceeded the need to enforce discipline among Service members.<sup>492</sup> Under O'Callahan, the rape of a civilian at an off-post location would not fall within military jurisdiction.<sup>493</sup> In 1987, the Supreme Court revisited O'Callahan and overruled their prior decision in Solorio v. United States.<sup>494</sup> Solorio held that only a service member's active duty status was required to establish jurisdiction.<sup>495</sup> The Solorio Court specifically dispensed with the "service connected" test in O'Callahan.<sup>496</sup> The Supreme Court reasoned in Solorio that the need to enforce discipline among service members extended to their behavior off duty and in the community and was based on a question of status versus a military nexus.<sup>497</sup>

The most recent Supreme Court case to address issues of military jurisdiction was Ortiz v. United States, decided in 2018.<sup>498</sup> Ortiz involved the status of an appellate court judge sitting on the Air Force Court of Criminal Appeals. The judge was simultaneously serving as an appellate judge on the Court of Military Commission Review (CMCR). Ortiz claimed that the dual appointment of the judge to both the Air Force Court of Appeals and the CMCR violated the Constitution.<sup>499</sup> The Supreme Court voted 7-2 in rejecting that argument in an opinion authored by Justice Kagan.<sup>500</sup> The primary point of contention between the majority opinion and the dissent concerned the jurisdictional authority of the Supreme Court to act on a military justice case.<sup>501</sup>

Justice Kagan quickly dismissed the jurisdictional challenge raised by Justice Alito's dissent: "[t]he constitutional foundation of courts-martial – as judicial bodies responsible for 'the trial and punishment' of service members – is not in the least insecure."<sup>502</sup> The opinion goes on to describe courts-martial as "instruments of military justice, not (as the dissent would have it) mere 'military command.'"<sup>503</sup>

One expert warns of the potential implications of removing the military commander from the system:

Abolishing the command-centric structure of the military justice system may be desirable. But no one should underestimate what a fundamental rethinking of nearly every aspect of the military justice system such a change would entail. The

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<sup>492</sup> O'Callahan v. Parker, 395 U.S. 258, 302-303 (1969).

<sup>493</sup> See generally, O'Callahan v. Parker, 395 U.S. 258, 302-303 (1969).

<sup>494</sup> Solorio v. United States, 483 U.S. 435, 450-451 (1987).

<sup>495</sup> Id.

<sup>496</sup> Id.

<sup>497</sup> See id.

<sup>498</sup> Ortiz v. United States, 138 S. Ct. 2165 (2018).

<sup>499</sup> Ortiz v. United States, 138 S. Ct. 2165, 2170 (2018).

<sup>500</sup> Justices Kennedy, Thomas, Ginsburg, Breyer, Sotomayor and the Chief Justice joined Justice Kagan writing for the majority, Justice Thomas authored a concurring opinion, Justice Alito wrote the dissenting opinion joined by Justice Gorsuch. Ortiz v. United States, 138 S. Ct. 2165 (2018).

<sup>501</sup> Ortiz v. United States, 138 S. Ct. 2165, 2199 (2018) (Alito, J., dissenting).

<sup>502</sup> Ortiz v. United States, 138 S. Ct. 2165, 2175 (2018).

<sup>503</sup> Ortiz v. United States, 138 S. Ct. 2165, 2175 (2018) (parenthetical in original).

change reopens everything from these more prosaic practicalities to the fundamental question of whether the United States should have a military justice system at all...<sup>504</sup>

Removing the commander from decision-making pushes the military justice system further away from its original purpose and historical basis. Congress could attempt to remedy this by trying to tie the decisions of military lawyers serving as convening authorities to the need to enforce discipline. Such an attempt may be textually possible, as is seen in allied military justice systems, but it is difficult to reconcile how a distant lawyer with no connection with a certain chain of command is able to assess and impact the good order and discipline of a distinct unit.

The failure of similar efforts to remove the commander from the military justice system in the Australian Defence Force should serve as a warning. Australia experimented with taking prosecutorial decisions from commanders and giving them to independent lawyers. Like the U.S. military justice system, the Australian military justice system is established under a separate constitutional authority from their judicial system. This authority is akin to the U.S. Congress's authority to "raise and support Armies," and "constitute tribunals inferior to the Supreme Court."<sup>505</sup> Shortly after the commander's role in the Australian system was sharply curtailed, the High Court of Australia (a Chapter III, civilian constituted court similar to the U.S. Supreme Court) held in Lane v. Morrison that the newly created system was invalid.<sup>506</sup> The military court system at issue in that case was independent from command and the trial court's decision was conclusive as to the finding and sentence (subject to judicial appeal), but not subject to any post-trial action by a commander. The resulting military justice system created under Chapter I of the Australian Constitution exercised judicial power of the Commonwealth under Chapter III. By exercising judicial power, the Australian Military Court violated the Australian Constitution. The Australian High Court found the transition of the military justice system from one of discipline-focus where the commander had the final decision in a court-martial to one of justice-focus where the commander no longer had authority to act in the post-trial action invalidated and exceeded the scope of Parliament. A comparable fundamental restructuring of the military justice system would inevitably be subject to constitutional challenges.

Removing commanders from military justice for a large class of offenses would compromise the historical and legal foundation supporting the current system. The system has continued because courts recognize the necessity for a commander to have the ability to control discipline in a unit. If that power is significantly curtailed, the justification for an independent system starts to unravel.

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<sup>504</sup> Paradis, *supra* note 456 ("If the lodestar of a decision to punish someone is not a consideration of discipline and of maintaining obedience and order, but instead is a military lawyer's abstract evaluation of the interests of justice, why should service members – who already sacrifice so much in the service of the country – lose their rights to presentment before a grand jury, trial before an impartial Article III judge and judgment by a jury of their peers?").

<sup>505</sup> U.S. CONST. art. I § 8 cl. 9; U.S. CONST. art. I § 8 cl. 12.

<sup>506</sup> Lane v. Morrison (2009) 239 CLR 230 (Hayne, Heydon, Crennan, Keifel and Bell JJ).

*Potential effect on Articles 133 and 134, UCMJ.* An additional concern is the validity of Articles 133 and 134 of the UCMJ. Article 133 prohibits “conduct unbecoming an officer and a gentleman,” and Article 134 prohibits “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces....”<sup>507</sup> The two articles authorize punishment of a broad variety of offenses designed to uphold discipline and order among the armed forces. The articles were upheld by the Supreme Court after a challenge for being overbroad, vague, and offending the protections of the First Amendment.<sup>508</sup> The Supreme Court explicitly recognized the need for such broad and vague prohibitions to protect the command structure and the enforcement of discipline:

In the armed forces, some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.<sup>509</sup>

If the commander is no longer responsible for the imposition of Articles 133 and 134, the articles’ justifications and purposes are questionable. If Articles 133 and 134 are no longer the purview of the commander, it becomes more difficult to justify the broad disciplinary powers permitted by such language. The requirements of discipline can vary significantly between units, circumstances, and conflicts. The commander remains in the best position to weigh and utilize the tools of Articles 133 and 134 to maintain that discipline. Removing the commander from the equation diminishes the justification of such broad language and potentially risks the holding of Parker v. Levy.

#### **f. Potential Changes in Prosecution and Conviction Rates**

Necessarily, any analysis regarding the feasibility and advisability of implementing a military justice system outlined by Section 540F must be considered in light of the goals such a revision seeks to achieve. Consequently, the question of feasibility and advisability is difficult to assess without an understanding of the problems that such a modification is intended to solve. As identified earlier in this report, the purpose of an alternative military justice system outlined by Section 540F is not so clear. Nevertheless, to adequately address the feasibility and advisability of implementation, the committee presumes that Section 540F is likely designed to accomplish one or more of the following desired end states: (1) an increase in the number of felony-level

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<sup>507</sup> UCMJ art. 133 (2019); UCMJ art. 134 (2019).

<sup>508</sup> Parker v. Levy, 417 U.S. 733, 760-761 (1974).

<sup>509</sup> Parker v. Levy, 417 U.S. 733, 758-59, (1974) *citing* Brandenburg v. Ohio, 395 U.S. 444 (1969).

offenses reported; (2) an increase in the number of felony-level cases referred to courts-martial; (3) an increase level of victims' trust of the military justice system; or (4) an increase in the rate of conviction of felony-level offenses. However, as explained below, there is no evidence to support the contention that a military justice system in which felony-level offenses are disposed of by judge advocates will actually achieve any of these aims.

Addressing the first two of these aims—reporting and referral—it is valuable to draw upon the experiences of some of the allied nations who have already removed commanders from the military justice process and placed prosecution decisions in the hands of its attorneys. Specifically, as identified earlier, the nations of Israel, the United Kingdom, Canada, and Australia all reported no increase in crime reporting and prosecution following the removal of their commanders from military justice.<sup>510</sup> In the U.S. military justice system, judge advocates are already involved in every step of the process and commanders rely upon the advice of their SJAs when making disposition decisions. With respect to penetrative sex-related offenses, this assertion is supported by the data associated with the congressionally-imposed elevated review process. Specifically, pursuant to Section 1744 of the National Defense Authorization Act for Fiscal Year 2014, in any case where a GCMCA decides not to refer a sex-related offense to trial by court-martial after receiving the SJA's Article 34 pretrial advice recommending that a sex-related offense be referred to trial by court-martial, the GCMCA must forward the case to the Secretary of the Military Department concerned.<sup>511</sup> To date, this has never occurred in any Service. This serves as strong evidence that commanders rely heavily upon the advice of their SJAs. Consequently, there is no reason to believe that removing the commander from the U.S. military justice system will increase the number of felony-level UCMJ offenses referred to courts-martial.

Next, when considering the level of trust held by victims, one must first accept that it is difficult to measure the effectiveness of any legislation designed to achieve such a goal, and therefore the feasibility and advisability of such legislation. Every criminal justice system is inherently adversarial. Invariably, there will always be parties—victims, the accused, and the government alike—who possess dissatisfaction with the manner in which a case is handled. This is not to suggest that the military justice system should not continue to prioritize maintaining a victim's trust and satisfaction of the military justice process. However, no data exists to support the belief that eliminating a commanders' authority to refer a felony-level offense to court-martial will increase victims' level of trust throughout the military. Nevertheless, there is data which supports the contention that commanders' military justice dispositions are indeed reasonable throughout the DoD. Specifically, in its 2019 report, the DAC-IPAD conducted a review of 164 randomly-selected investigations of penetrative sexual assault allegations closed

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<sup>510</sup> RSP, *supra* note 12 at 1; RoC Subcommittee Report, *supra* note 434, at 109-110.

<sup>511</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 980, sec. 1744 (2013). Notably, Section 1744 of the NDAA for Fiscal Year 2014 does not apply to the Coast Guard. However, the Coast Guard has implemented a mirroring provision under its regulations. See U.S. COAST GUARD, MILITARY JUSTICE MANUAL, COMDTINST M5810 (series).

in fiscal year 2017 from across the services to determine whether the command made a reasonable decision in their disposition of the case.<sup>512</sup> In 122 of the investigations, charges were not preferred, leaving 42 where charges were preferred.<sup>513</sup> Of the 164 investigations, the DAC-IPAD found 95 percent of the command disposition decisions were reasonable.<sup>514</sup> More specifically, the DAC-IPAD found “[t]he percentage of command disposition decisions determined to be reasonable was similar whether the commander preferred charges for the penetrative sexual assault (95%) or did not prefer charges for the penetrative sexual assault (94%).”<sup>515</sup> The DAC-IPAD did not deem the remaining case dispositions incorrect, but stated more information was needed than present in the documents available to the DAC-IPAD to make a proper assessment of the disposition decision.<sup>516</sup>

The DAC-IPAD is composed of experienced current and former civilian and military prosecutors, defense attorneys, sexual assault forensic investigators, sitting federal judges, military commanders, crime victim rights advocates, and law professors.<sup>517</sup> Given the DAC-IPAD’s blue-ribbon membership, its assessment of commanders’ disposition decisions should be given substantial weight when considering whether the military justice system is one which victims of felony-level offenses should continue to trust.

Lastly, putting aside the issue of whether rates of conviction serve to provide a meaningful assessment of the success or reliability of any criminal justice system, there is no evidence to suggest that a system contemplated by Section 540F would result in an increase in conviction rates. This conclusion is supported by the experience of other countries which have moved from a commander-centric military justice system to an attorney-centric military justice system. For example, after the passage of the Canadian Charter of Rights and Freedoms, and because of a decision by its Supreme Court, Canada removed prosecutorial decision making authority from commanders and gave that authority to military attorneys.<sup>518</sup> Despite that change, the conviction rate for allegations of sexual misconduct in the Canadian Armed Forces has not increased. As noted, a study found the conviction rate for sexual assault allegations between 2015 and 2018 was only 14 percent, notably lower than for the same offenses in the Canadian civilian criminal justice system.<sup>519</sup>

An examination of other allies shows similar results. The United Kingdom amended its military justice system in 2006 by giving a prosecutor sole authority to refer a case to a court-martial.<sup>520</sup> Prior to 2006, the commander was responsible for all charging

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<sup>512</sup> DAC-IPAD Third Annual Report, *supra* note 444, at 29.

<sup>513</sup> *Id.* at 30.

<sup>514</sup> *Id.* at 29.

<sup>515</sup> *Id.*

<sup>516</sup> *Id.* at 30.

<sup>517</sup> See *id.* at appx. C.

<sup>518</sup> R. v. Généreux 1 S.C.R. 259, 261 (S.C.C.) (1992); QR&O, *supra* note 102, at § 109.05.

<sup>519</sup> Craig, *supra* note 143, at 1, 12-13.

<sup>520</sup> AFA, *supra* note 157, at c. 52 § 119(5).

decisions, as well as confirming the verdict and reducing the sentence post-trial. Between 2009 and 2012, 52 percent of allegations of rape and sexual assault prosecuted at a court-martial resulted in a conviction,<sup>521</sup> and in calendar year 2019 the conviction rate was only 28 percent.<sup>522</sup> Australia also amended its military justice system in 2006 to require that a military attorney lay charges against a service member.<sup>523</sup> While conviction statistics are not available for Australia to compare conviction rates before and after 2006, a move to an attorney as a disposition authority has not increased the number of cases referred to court-martial. The number of courts-martial in the Australian Defence Force had declined over the past five years, reaching a low of 32 Defence Force Magistrate cases and one General Court Martial in calendar year 2017.<sup>524</sup> However there was a jump in calendar year 2019 with 42 Defence Force Magistrate cases, one restricted court martial and one general court martial which was continued until 2020 after a pretrial hearing.<sup>525</sup> Based on the rates of sexual assault prosecutions in Canada, the United Kingdom, Australia, and New Zealand and the significantly smaller size of their militaries as compared to the U.S., the statistics do not support removing commanders from the U.S. military justice system because there is no evidence of improved reporting, investigation, or prosecution of sexual assault.

It is also useful to compare the military justice system to those of U.S. civilian jurisdictions. The Rape, Abuse & Incest National Network (RAINN) found that only 23 percent of sexual assault cases are reported to civilian authorities, and of those cases only 20 percent result in an arrest. Of the remaining 20 percent, only 19.6 percent are referred to prosecutors. In other words, of all cases where an arrest was made, only 3.9 percent were referred to prosecutors. Finally, of that remaining 19.6 percent, 55.6 percent result in a felony conviction.<sup>526</sup> These statistics paint a far worse picture of civilian prosecutor-centric systems' ability to prosecute sexual assault than is seen in the military's commander-centric one, as reported by the Department of Defense Office of Sexual Assault Prevention and Response.<sup>527</sup> There is no evidence that changing the military justice system to mirror civilian practice will result in improvement with respect to the prosecution of sexual assault cases.

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<sup>521</sup> 105 April 25, 2013, PARL. DEB. H.C. (6th ser.) 1253W, <http://www.publications.parliament.uk/pa/cm201213/cmhsnd/cm130425/text/130425w0009.htm>.

<sup>522</sup> *Sexual Offences in the Service Justice System 2019*, *supra* note 195, at 8.

<sup>523</sup> DMP Annual Report 2019, *supra* note 198, at ¶ 14.

<sup>524</sup> DMP Annual Report 2017, *supra* note 223, at ¶ 64.

<sup>525</sup> DMP Annual Report 2019, *supra* note 198, at ¶ 75.

<sup>526</sup> Rape, Abuse & Incest National Network, The Criminal Justice System: Statistics, available at <https://rainn.org/statistics/criminal-justice-system> (last accessed June 26, 2020).

<sup>527</sup> See DEP'T OF DEFENSE, DEP'T OF DEFENSE SEXUAL ASSAULT RESPONSE AND PREVENTION OFFICE, Fiscal Year 2019 Annual Report on Sexual Assault in the Military, Appendix B, April 2020.

**g. Potential Impacts on the Preservation of Good Order and Discipline,  
Including the Ability of a Commander to Carry Out Nonjudicial Punishment  
and Other Administrative Actions**

Commanders have a statutory duty to maintain the good order and discipline of their units in order to achieve mission accomplishment.<sup>528</sup> As true today as it was when Major General Kenneth Hodson addressed command responsibility in 1973, “[a]llowing a commander to decide whom to try by court-martial is consistent with the concept that a commander cannot be held responsible for mission accomplishment unless he is given the necessary resources and authority.”<sup>529</sup> To make his point, Major General Hodson compared the responsibility of commanders to whether electorates should hold mayors and governors responsible for breakdowns in governmental functions caused by breakdowns in law and order when the leaders are given inadequate resources and authority to influence the police and prosecutors to properly perform their duties.<sup>530</sup> Commanders’ authority under the UCMJ to enforce the law is a necessary component of commanders’ ability to fulfill their statutory duty.

The experience of allies suggests that removing the authority for commanders to convene courts-martial has not achieved an improvement in the good order and discipline of their armed forces. On the contrary, it may have caused harm. “[M]ilitary discipline is fundamentally intertwined with the greater question of the commander’s responsibility for operational readiness.”<sup>531</sup> Lieutenant General (retired) Michael Linnington testified before the Response Systems to Adult Sexual Assault Crimes Panel Role of the Commander Subcommittee that he observed the lack of allies’ military justice authority resulted in tentative decision making and actions on the battlefield.<sup>532</sup> Divorcing command authority in military justice from that of operational command would degrade the trust that service members have in their commanders to look out for “the morale, physical well-being, and the general welfare of the officers and enlisted persons under their command or charge.”<sup>533</sup>

In addition to the effect on operational readiness, removing commanders’ authority to convene courts-martial would either negatively impact the effectiveness of nonjudicial punishment or require a parallel elimination of the right for service members to demand trial by court-martial when offered proceedings under Article 15, UCMJ. Under most circumstances, service members have the right to demand trial by court-martial in lieu of nonjudicial punishment.<sup>534</sup> If the judge advocate contemplated by Section 540F elects not to prosecute an offense and returns the offense to the command for disposition, nonjudicial punishment would not be an option available to commanders so long as the

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<sup>528</sup> See, 10 U.S.C. § 7233 (2018). See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. 1 (2019).

<sup>529</sup> Kenneth J. Hodson, Military Justice: Abolish or Change, 22 U. KAN. L. REV. 31, 43 (1973).

<sup>530</sup> Id. at 44.

<sup>531</sup> RoC Subcommittee Report, *supra* note 434, at 104 (testimony of Brigadier General Richard C. Gross, U.S. Army).

<sup>532</sup> Id.

<sup>533</sup> 10 U.S.C. § 7233 (2018).

<sup>534</sup> UCMJ art. 15(a) (2019). The exception to the right to demand trial by court-martial is when the service member is attached to or embarked in a vessel.

service member has the right to demand trial by court-martial because the service member could make the demand knowing that the commander is powerless to convene the court-martial. Choosing not to prosecute a service member by court-martial after such a demand can have severe consequences on a commander's ability to lead those under her charge.

Though typically the decision to refer a case to court-martial is held by a commander senior to the one who initially offered the nonjudicial punishment, senior commanders understand this dynamic and the importance of the subordinate commanders' decisions regarding discipline. Removing commanders from this process incentivizes the use of administrative remedies in order to retain control over the service member's discipline. Severing the decision to refer courts-martial from the decision to offer nonjudicial punishment proceedings degrades the ability of commanders to maintain good order and discipline because the enforcement mechanism behind commanders' disciplinary decisions would fall to an officer who has likely never commanded service members.

Having not felt the weight of command, this judge advocate will not likely grasp the full magnitude of prosecutorial decisions that could undermine command authority, even when the judge advocate's decisions are reasonable or justified. In short, when a service member demands trial by court-martial in lieu of nonjudicial punishment and the judge advocate does not refer the case, the commander's general military authority—and thus her operational effectiveness—is irretrievably diminished. If the prosecutor does not refer the charges, the commander is limited to administrative remedies such as a reprimand or involuntary separation. More importantly, the commander's trust that she can rely on the military justice system to hold accountable those who engage in disorderly behavior is diminished. This could, in turn, incentivize deleterious behavior.

This phenomenon is best illustrated by example. A commander of a unit responsible for rigging parachutes is presented with evidence that a parachute rigger has tested positive for using marijuana, an offense which carries a maximum punishment of greater than one year.<sup>535</sup> The commander, after considering the evidence, the importance of ensuring that the personnel who pack parachutes for other service members are capable of performing their duties, and the example that she wants to set in the unit with regard to this misconduct, recommends that the service member be tried before a military judge-alone special court-martial.<sup>536</sup> The prosecutor, having no experience as a parachutist or as a commander, realizes that service members who test positive for marijuana are often given nonjudicial punishment and administratively separated and declines to refer the case to court-martial. The prosecutor also chooses to prioritize the devotion of resources to other cases over this case.<sup>537</sup> Left with only administrative and nonjudicial options, the commander offers the service member nonjudicial punishment, and not surprisingly, the service member demands trial by court-martial. The commander must now reapproach the judge advocate requesting trial by court-martial.

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<sup>535</sup> UCMJ art. 112a (2019); MANUAL FOR COURTS-MARTIAL, Pt. IV, ¶ 50(d)(1)(a) (2019).

<sup>536</sup> See UCMJ art. 16(c)(2) (2019).

<sup>537</sup> See page 39, *supra*, for an example in the Australian system where it is the prosecutor, and not the commander, who determines how to allocate limited resources to maintain good order and discipline (note 224).

The judge advocate's decision not to refer the case to court-martial irretrievably diminishes the commander's mechanism to enforce her authority.

Thus, the only way to address this problem would be to amend Article 15 (nonjudicial punishment) and Article 20 (summary courts-martial), to remove the right of a service member to demand trial by court-martial. This should be a nonstarter; nonjudicial punishment can carry with it career-ending consequences and service members should have the right to force the government to put evidence before the crucible of trial. On the other hand, shifting prosecutorial discretion to attorneys not held accountable under the law in the same manner as commanders removes from commanders the enforcement mechanism buttressing their command authority and vests it in attorneys with seemingly unchecked discretion.

## **X. THE FEASIBILITY AND ADVISABILITY OF A PILOT PROGRAM TO ASSESS THE FEASIBILITY AND ADVISABILITY OF THE ALTERNATIVE MILITARY JUSTICE SYSTEM**

Similar to the service academy pilot program proposed in Section 550 of H.R. 6395 (National Defense Authorization Act for Fiscal Year 2021), a broader pilot program is both infeasible and inadvisable. As outlined below, there are numerous reasons for this conclusion. First, there is a significant risk a conviction obtained through a pilot program would be invalidated on equal protection or due process grounds. If the pilot program were invalidated, it would put at risk all convictions obtained through the new system, as well as call into question any data regarding the alternative prosecutorial system obtained from the program. Second, a pilot program has the potential to undermine good order and discipline. As noted by the Superintendents of the Military Service Academies in their letter to the leaders of the House and Senate Armed Services Committees regarding the service academy military justice pilot program, such a pilot would divest commanders of their authority to respond to offenses. In turn, this weakens commanders' ability to enforce and maintain cohesion and standards within their units, ultimately degrading those units' ability to execute their missions. Moreover, such a pilot program would require redrafting of enormous portions of the Rules for Courts-Martial. The process of drafting the rules governing such an alternative system and having them issued as an Executive Order would be extraordinarily time consuming. Failure to devote the necessary time to a methodical analysis of whether each rule would have to be amended to make the pilot program work would almost inevitably result in a flawed system at risk of judicial invalidation. Adopting a pilot program would, therefore, require a lengthy lead time to ensure its viability. Devoting the necessary resources to developing the rules for such a system would necessarily divert personnel resources from existing tasks. Congress should not mandate the implementation of an alternative prosecutorial authority pilot program.

Significant structural changes to the UCMJ such as the one identified by Section 540F should first be referred to the MJRP established by Congress in Article 146, UCMJ, as amended by the Military Justice Act of 2016, before consideration. Congress replaced the former Code Committee under Article 146, UCMJ, for the purpose of creating a body to "conduct independent periodic reviews and assessments of the operation of this chapter." The MJRP review process, as proposed by the Military Justice Review Group, was "based on the concept that periodic review needs to be scheduled on a regular basis, but that it should not be so frequent that the constant process of review and change becomes more disruptive than helpful to judges and lawyers who must have a degree of stability in order to engage in effective practice."<sup>538</sup> The MJRP is made up of "private United States citizens with expertise in criminal law, as well as appropriate and diverse experience in investigation, prosecution, defense, victim representation, or adjudication with respect to courts-martial, Federal civilian courts, or State courts."<sup>539</sup>

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<sup>538</sup> Report of the Military Justice Review Group, Part I, 1024 (December 22, 2015) (available at [https://ogc.osd.mil/images/report\\_part1.pdf](https://ogc.osd.mil/images/report_part1.pdf).

<sup>539</sup> UCMJ, art. 146(b)(3)(c) (2019).

The MJRP is empowered to hold hearings in order to take testimony and study proposed changes to the UCMJ. Congress created this important resource to ensure the orderly operation of the military justice system. Any proposal to radically alter the underpinnings of the commander's authority and responsibility under the UCMJ should be referred to the MJRP before consideration.

Implementing such a pilot program is not feasible or advisable for several reasons. First, the legal authorities do not exist to execute an alternative system where an attorney makes decisions to prefer and refer cases, requiring a systemic overhaul before any such pilot program were to be legally viable. Second, the force structure does not exist amongst legal personnel to adequately execute a reliable, efficient, and proficient pilot program without threatening mission accomplishment of the current system. Third, the institution and then end of a pilot program could create major risks to the ability to prosecute offenses committed during the pilot period. An offense committed during the pilot program may not be discovered and prosecuted until long after the pilot program ends. The accused in such a case may raise an ex post facto challenge to being tried by the system in place after the pilot program ends. As a result, it may become almost impossible to try some offenses committed during the pilot period. Finally, the pilot program would subject service members to a bifurcated military justice system and potential equal protection violations. Not only would experimenting with changes to the military justice system create a perception of unfairness, any resulting conviction would certainly be challenged on appeal.

## XI. CONCLUSION

The JSS-PAS finds that implementation of the alternative military justice system defined by Section 540F is neither feasible nor advisable. Likewise, the JSS-PAS finds that conducting a pilot program for such a system would be infeasible and inadvisable.

Commanders are central to the military justice system and the current commander-centric system works. Commanders are trained to make decisions and rely on their experience and the legal advice of their judge advocates to inform those decisions. Careful study has shown that commanders are well-equipped and capable of decision-making in the field of discipline. Commanders have been proven to make reasonable disposition decisions in penetrative sexual assault cases, and the military justice system compares favorably in terms of reporting, investigation, and prosecution in sexual assault cases with civilian jurisdictions.

Comparing the U.S military justice systems to the systems of allied military justice systems is a false equivalency. Allied militaries, particularly the “Five Eyes” allies, are but a small fraction of the size of the active U.S. military, and the few cases tried in each of those allied militaries is proportionally even smaller (with convictions even proportionately smaller still). Despite having far fewer cases and smaller militaries, changing to prosecutor-centric military justice systems has shown no improvement in reporting, investigating, or prosecuting criminal offenses in the military justice systems of U.S. allies. And in the case of one of those allies, the reform led to an invalidation of the military justice system – something that would be enormously detrimental to the U.S. military, which remains engaged in ongoing combat operations. The U.S. should be wary of change for the sake of change; the data from allied military justice systems does not support any assertion that such a radical change will make our own system better.

Commanders need full authority under the UCMJ to enforce good order and discipline. Commanders must have the full range of tools available to rehabilitate service members capable of continued service, punish those whose conduct risks military readiness, and set the expectation amongst all service members that indiscipline will be handled swiftly by a commander with authority. Parcelling out these tools amongst differing authorities with differing perspectives and purposes will only serve to weaken the effectiveness of all of the tools. Divesting commanders of the mechanism to enforce good order and discipline will result in a less effective military and will weaken the national security of the United States.

## **Appendix A**



DEPARTMENT OF DEFENSE  
OFFICE OF THE GENERAL COUNSEL  
1600 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1600

February 4, 2020

MEMORANDUM FOR CHAIR, JOINT SERVICE COMMITTEE ON MILITARY JUSTICE  
(JSC)

SUBJECT: Report Required by Section 540F of the National Defense Authorization Act for Fiscal Year 2020

Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 (2019), requires the Secretary of Defense to submit a report to the Committees on Armed Services of the Senate and the House of Representatives setting forth the results of a study on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial for offenses for which the maximum punishment includes confinement for more than one year are made by a judge advocate in the grade of O-6 or higher rather than by a commanding officer. Section 540F(b) sets out detailed requirements for the study and resulting report.

Please conduct the study and prepare a draft of the report required by section 540F. The statutory due date for the report is October 15, 2020. To provide adequate time for coordination and review by the General Counsel, please submit a draft of the report to me no later than Monday, August 31, 2020. If the JSC determines that a subcommittee should be formed to carry out the study and/or prepare the required report on the study, in accordance with section 3.1.d of DoD Instruction 5500.17, Role and Responsibilities of the Joint Service Committee on Military Justice (JSC) (February 21, 2018), please submit a request and draft subcommittee charter to the DoD General Counsel through me. If you have any questions concerning this matter, please contact Dwight Sullivan of my office. He is available by phone at 703-695-1055 or by email at dwight.h.sullivan.civ@mail.mil.

Both the DoD General Counsel and I continue to be aware of the extraordinary demands on the JSC and its voting group and working group members. I am grateful to you as the chair and to all of the JSC's personnel for your exceptional efforts to ensure that the military justice system remains fair and just while also providing commanders an essential tool for preserving good order and discipline and ensuring their commands are ready to accomplish their assigned missions.

Paul S. Koffsky  
Senior Deputy General Counsel/Deputy General  
Counsel for Personnel and Health Policy

## **Appendix B**

CHARTER OF THE SUBCOMMITTEE OF THE JOINT SERVICE COMMITTEE ON  
MILITARY JUSTICE TO CONDUCT THE STUDY REQUIRED BY SECTION 540F OF THE  
NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2020

**1. Name of Committee:** Joint Service Subcommittee for Prosecutorial Authority Study (JSS-PAS).

**2. Date Tasking Established:** Upon written approval of this Charter by the General Counsel of the Department of Defense.

**3. Duration:** The JSS-PAS is tasked with studying the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial for offenses for which the maximum punishment includes confinement for more than one year are made by a judge advocate in the grade of O-6 or higher rather than by a commanding officer. The JSS-PAS shall submit recommendations to the Joint Service Committee on Military Justice (JSC) Voting Group. The JSC Voting Group shall then submit an approved report to the General Counsel of the Department of Defense via the Senior Deputy General Counsel/Deputy General Counsel for Personnel and Health Policy (SDGC/DGC (P&HP)) no later than August 31, 2020.

**4. Category and Type of Committee:** The JSC was established by a predecessor to DoD Instruction 5500.17, Role and Responsibilities of the Joint Service Committee on Military Justice (February 21, 2018), to execute a mandate in Executive Order 12473 (1984). The JSS-PAS is created by this charter.

**5. Mission:** The JSS-PAS will conduct a study and make recommendations to the JSC Voting Group on the feasibility and advisability of an alternative military justice system in which determinations as to whether to prefer or refer charges for trial by court-martial for offenses for which the maximum punishment includes confinement for more than one year are made by a judge advocate in the grade of O-6 or higher rather than by a commanding officer. The JSC Voting Group will assess the subcommittee's analysis and recommendations and submit those recommendations with which it concurs, or recommendations with which it concurs as revised, to the General Counsel of the Department of Defense via the SDGC/DGC (P&HP).

**6. Objectives:** In accordance with Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 (2019), the JSS-PAS shall:

a. Assess relevant procedural, legal, and policy implications and considerations of the alternative military justice system described in paragraph 5.

b. Analyze the following in connection with the implementation and maintenance of the alternative military justice system:

- (1) Legal personnel requirements.
- (2) Changes in force structure.
- (3) Amendments to law.
- (4) Impacts on the timeliness and efficiency of legal processes and court-martial adjudications.
- (5) Potential legal challenges to the system.
- (6) Potential changes in prosecution and conviction rates.
- (7) Potential impacts on the preservation of good order and discipline, including the ability of a commander to carry out nonjudicial punishment and other administrative actions.
- (8) Such other considerations the subcommittee considers relevant.

c. Make a comparative analysis of the military justice systems of relevant foreign allies with the current military justice system of the United States and the alternative military justice system, including whether approaches of the military justice systems of such allies are appropriate for the military justice system of the United States.

d. Assess the feasibility and advisability of conducting a pilot program to assess the alternative military justice system, and, if the pilot program is determined to be feasible and advisable—

- (1) analyze potential legal issues in connection with the pilot program, including potential issues for appeals; and
- (2) make recommendations on the following:
  - (A) The populations to be subject to the pilot program.
  - (B) The duration of the pilot program.
  - (C) Metrics to measure the effectiveness of the pilot program.
  - (D) The resources to be used to conduct the pilot program.

**7. Direction and Control:** The JSS-PAS will report to and receive its direction from the JSC, which, in turn, will report to and receive its direction from the General Counsel.

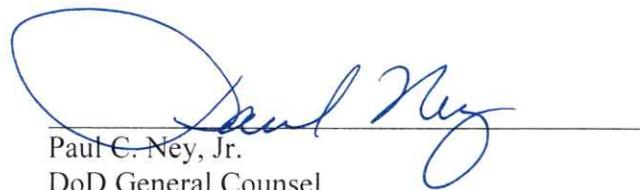
**8. Authority:** Section 540F of the National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92 (2019); DoD Instruction 5500.17.

**9. Staff Arrangements:** The JSS-PAS shall consist of at least one current or former special court-martial convening authority or general court-martial convening authority from each of the Department of Defense Military Services, and at least one primary legal expert from each of the Department of Defense Military Services as designated by the Judge Advocates General of the Army, Navy, and Air Force, and the Staff Judge Advocate to the Commandant of the Marine Corps, with access to at least one additional legal expert who can assist with travel, research, or document review, and drafting. The Judge Advocate General of the Coast Guard is invited to provide members to the subcommittee as well. The Army will provide a senior judge advocate in the grade of O-6 to coordinate the subcommittee's activities. The subcommittee may invite advisory members who are serving military members or civilian employees of the Federal Government to participate in the study. For any matter that requires a vote of the subcommittee, each Service will exercise one vote, regardless of the number of representatives the Service provides to the subcommittee.

**10. Committee Level:** The JSS-PAS is a subcommittee of the JSC, with no additional subcommittees.

**11. Correspondence:** The POC for any communications to or from the subcommittee will be the Chair of the JSC, Colonel Patrick D. Pflaum, JAGC, USA, at (571) 256-8131 or by email at patrick.d.pflaum.mil@mail.mil.

4/14/20  
Date



Paul C. Ney, Jr.  
DoD General Counsel

## **Appendix C**

## APPENDIX 2.1

### NON-BINDING DISPOSITION GUIDANCE

This Appendix provides non-binding guidance issued by the Secretary of Defense, in consultation with the Secretary of Homeland Security, pursuant to Article 33 (Disposition Guidance) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 833.

#### **SECTION 1: IN GENERAL**

- 1.1. Policy
- 1.2. Purpose
- 1.3. Scope
- 1.4. Non-Litigability

#### **SECTION 2: CONSIDERATIONS IN ALL CASES**

- 2.1. Interests of Justice and Good Order and Discipline
- 2.2. Consultation with a Judge Advocate
- 2.3. Referral
- 2.4. Determining the Charges and Specifications to Refer
- 2.5. Determining the Appropriate Type of Court-Martial
- 2.6. Alternatives to Referral
- 2.7. Inappropriate Considerations

#### **SECTION 3: SPECIAL CONSIDERATIONS**

- 3.1. Prosecution in Another Jurisdiction
- 3.2. Plea Agreements
- 3.3. Agreements Concerning Disposition of Charges and Specifications
- 3.4. Agreement Concerning Sentence Limitations

#### **SECTION 1: IN GENERAL**

##### **1.1. Policy.**

a. This Appendix provides non-binding guidance regarding factors that convening authorities, commanders, staff judge advocates, and judge advocates should consider when exercising their duties with respect to the disposition of charges and specifications under the UCMJ, and to further promote the purpose of military law.<sup>1</sup>

b. This Appendix supplements the Manual for Courts-Martial. The guidance in this Appendix does not require a particular disposition decision or other action in any given case. Accordingly, the disposition factors set forth in this Appendix are cast in general terms, with a view to providing guidance rather than mandating

results. The intent is to promote regularity without regimentation; encourage consistency without sacrificing necessary flexibility; and provide the flexibility to apply these factors in the manner that facilitates the fair and effective response to local conditions in the interest of justice and good order and discipline.

**1.2. Purpose.** This non-binding guidance is intended to:

- a. Set forth factors for consideration by those assigned responsibility under the UCMJ for disposing of alleged violations of the UCMJ on how best to exercise their authority in a reasoned and structured manner, consistent with the principle of fair and evenhanded administration of the law;
- b. Serve as a training tool for convening authorities, commanders, staff judge advocates, and judge advocates in the proper discharge of their duties;
- c. Contribute to the effective utilization of the Government's law enforcement and prosecutorial resources; and
- d. Enhance the relationship between military commanders, judge advocates, and law enforcement agencies, including military criminal investigative organizations (MCIOs), with respect to investigations and charging decisions.

**1.3. Scope.** This Appendix is designed to support the exercise of discretion with respect to the following disposition decisions:

- a. Initiating and declining action under the UCMJ;
- b. Selecting appropriate charges and specifications;
- c. Selecting the appropriate type of court-martial or alternative mode of disposition, if any; and
- d. Considering the appropriateness of a plea agreement.

**1.4. Non-Litigability.** This non-binding guidance was developed solely as a matter of internal Departmental policy in accordance with Article 33. This Appendix is not intended to, does not, and may not be relied upon to

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<sup>1</sup> “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” MANUAL FOR COURTS-MARTIAL, UNITED STATES, Pt. I, ¶ 3 (2016 ed.).

## APPENDIX 2.1

create a right, benefit, or defense, substantive or procedural, enforceable at law or in equity by any person.

### SECTION 2: CONSIDERATIONS IN ALL CASES

**2.1. Interests of Justice and Good Order and Discipline.** The military justice system is a powerful tool that preserves good order and discipline while protecting the civil rights of Service members. It is a commander's duty to use it appropriately. In determining whether the interests of justice and good order and discipline are served by trial by court-martial or other disposition in a case, the commander or convening authority should consider, in consultation with a judge advocate, the following:

- a. The mission-related responsibilities of the command;
- b. Whether the offense occurred during wartime, combat, or contingency operations;
- c. The effect of the offense on the morale, health, safety, welfare, and good order and discipline of the command;
- d. The nature, seriousness, and circumstances of the offense and the accused's culpability in connection with the offense;
- e. In cases involving an individual who is a victim under Article 6b, the views of the victim as to disposition;
- f. The extent of the harm caused to any victim of the offense;
- g. The availability and willingness of the victim and other witnesses to testify;
- h. Whether admissible evidence will likely be sufficient to obtain and sustain a conviction in a trial by court-martial;
- i. Input, if any, from law enforcement agencies involved in or having an interest in the specific case;
- j. The truth-seeking function of trial by court-martial;
- k. The accused's willingness to cooperate in the investigation or prosecution of others;
- l. The accused's criminal history or history of misconduct, whether military or civilian, if any;
- m. The probable sentence or other consequences to the accused of a conviction; and
- n. The impact and appropriateness of alternative disposition options—including nonjudicial punishment or administrative action—with respect to the accused's potential for continued service and the responsibilities of the command with respect to justice and good order and discipline.

**2.2. Consultation with a Judge Advocate.** If a member of a command is accused or suspected of committing an offense punishable under the UCMJ, the commander should seek advice from a judge advocate regarding all possible dispositions of the allegation. The judge advocate's advice should include a discussion of the advantages and disadvantages of each of the available dispositions. The cognizant commander should consider all available options.

**2.3. Referral.** Probable cause must exist for each charge and specification referred to a court-martial. However, when making a referral decision, the convening authority should also consider the matters described in paragraph 2.1 of this appendix.

**2.4. Determining the Charges and Specifications to Refer.** Ordinarily, the convening authority should refer charges and specifications for all known offenses to a single court-martial. However, the convening authority should avoid referring multiple charges when they would:

- a. Unnecessarily complicate the prosecution of the most serious, readily provable offense or offenses;
- b. Unnecessarily exaggerate the nature and extent of the accused's criminal conduct or add unnecessary confusion to the issues at court-martial;
- c. Unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; or
- d. Be disposed of more appropriately through an alternative disposition.

**2.5. Determining the Appropriate Type of Court-Martial.** In determining the appropriate type of court-martial, a convening authority should consider:

- a. The advice of a judge advocate;
- b. The interests of justice and good order and discipline (*see* paragraph 2.1);
- c. The authorized maximum and minimum punishments for the offenses charged;
- d. Any unique circumstances in the case requiring immediate disposition of the charges;
- e. Whether the type of court-martial would unnecessarily expose the accused to a harsher potential sentence or range of punishments than the circumstances of the case justify; and
- f. Whether the potential of the accused for rehabilitation and continued service would be better addressed in a specific type of court-martial.

## NON-BINDING DISPOSITION GUIDANCE

**2.6. Alternatives to Referral.** In determining whether a case should not be referred to court-martial for trial because there exists an adequate alternative, a judge advocate should advise the convening authority on, and the convening authority should consider, in addition to the considerations in paragraph 2.1:

- a. The effect of alternative disposition on the interests of justice and good order and discipline;
- b. The options available under the alternative means of disposition;
- c. The views of the victim, if any, concerning the alternative disposition of the case; and
- d. The likelihood of an effective outcome.

**2.7. Inappropriate Considerations.** The disposition determination must not be influenced by:

- a. The accused's race, ethnicity, religion, gender, sexual orientation, national origin, or lawful political association, activities, or beliefs;
- b. The personal feelings of anyone authorized to recommend, advise, or make a decision as to disposition of offenses concerning the accused, the accused's associates, or any victim or witness of the offense;
- c. The time and resources already expended in the investigation of the case;
- d. The possible effect of the disposition determination on the commander or convening authority's military career or other professional or personal circumstances; or
- e. Political pressure to take or not to take specific actions in the case.

### SECTION 3: SPECIAL CONSIDERATIONS

**3.1. Prosecution in Another Jurisdiction.** When the accused is subject to effective prosecution in another jurisdiction, a judge advocate should advise on and the convening authority should consider the following additional factors when determining disposition:

- a. The strength of the other jurisdiction's interest in prosecution;
- b. The other jurisdiction's ability and willingness to prosecute the case effectively;
- c. The probable sentence or other consequences if the accused were to be convicted in the other jurisdiction;
- d. The views of the victim, if any, as to the desirability of prosecution in the other jurisdiction;

e. Applicable policies derived from agreements with the Department of Justice and foreign governments regarding the exercise of military jurisdiction; and

f. The likelihood that the nature of the proceedings in the other jurisdiction will satisfy the interests of justice and good order and discipline in the case, including any burdens on the command with respect to the need for witnesses to be absent from their military duties, and the potential for swift or delayed disposition in the other jurisdiction.

**3.2. Plea Agreements.** In accordance with Article 53a, the convening authority may enter into an agreement with an accused concerning disposition of the charges and specifications and the sentence that may be imposed. A judge advocate should advise on and the convening authority should consider the following additional factors in determining whether it would be appropriate to enter into a plea agreement in a particular case:

- a. The accused's willingness to cooperate in the investigation or prosecution of others;
- b. The nature and seriousness of the offense or offenses charged;
- c. The accused's remorse or contrition and his or her willingness to assume responsibility for his or her conduct;
- d. Restitution, if any;
- e. The accused's criminal history or history of misconduct, whether military or civilian;
- f. The desirability of prompt and certain disposition of the case and of related cases;
- g. The likelihood of obtaining a conviction at court-martial;
- h. The probable effect on victims and witnesses;
- i. The probable sentence or other consequences if the accused is convicted;
- j. The public and military interest in having the case tried rather than disposed of by a plea agreement;
- k. The time and expense associated with trial and appeal;
- l. The views of the victim with regard to prosecution, the terms of the anticipated agreement, and alternative disposition; and
- m. The potential of the accused for rehabilitation and continued service.

**3.3. Agreements Concerning Disposition of Charges and Specifications.** With respect to the convening authority's disposition of charges and specifications,

## APPENDIX 2.1

the plea agreement should require the accused to plead guilty to charges and specifications that:

- a. Appropriately reflect the nature and extent of the criminal conduct;
- b. Are supported by an adequate factual basis;
- c. Would support the imposition of an appropriate sentence under all the circumstances of the case;
- d. Do not adversely affect the investigation or prosecution of others suspected of misconduct; and
- e. Appropriately serve the interests of justice and good order and discipline.

**3.4 Agreements Concerning Sentence Limitations.** A convening authority, in consultation with a judge advocate, should ensure that any sentence limitation of a plea agreement takes into consideration the sentencing guidance set forth in Article 56(c).

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**Analysis:**

This appendix implements Article 33, as amended by Section 5204 of the Military Justice Act of 2016, Division E of the National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016), and section 12 of Executive Order 13825 of March 1, 2018. The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association (ABA), Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association (NDAA), National Prosecution Standards. Practitioners are encouraged to familiarize themselves with the disposition factors contained in this appendix as well as these related civilian prosecution function standards. The disposition factors have been adapted with a view toward the unique nature of military justice and the need for commanders and convening authorities to exercise wide discretion to meet their responsibilities to maintain good order and discipline.

## **Appendix D**

**Appendix D:**  
**UCMJ Articles that would Require Revision if the Proposed Alternative Military**  
**Justice System Described in Section 540F is Enacted**

**Group 1: Court-martial statutes and rules that would require revision:** The below statutes and rules would require revision in order for a judge advocate to take over as convening authority. Many of the below statutes and rules listed below provide commanders with authority they would not possess under a judge advocate operated system. Other statutes and rules on this list establish procedures that would be unnecessary in a judge advocate convening authority based system.

- **Article 17, UCMJ (10 U.S.C. § 817).** Section b. of the statute, when discussing review authority in cross-department court-martial cases, makes reference to “the officer with authority to convene a general court-martial for the command that held the trial...” This will require revision that reflects the fact that commands no longer independently hold court-martial. R.C.M. 201, which currently describes combatant and unified commander convening authority, will require similar modification.
- **Article 22, UCMJ (10 U.S.C. § 822).** This article describes all of the different types of commanders who possess general court-martial convening authority. The full extent of the revision will depend on the form of judge advocate authority. If the power of the judge advocate is limited to referring cases to courts-martial already convened, then revision may be minimal. However, if changes in judge advocate authority include giving the judge advocate convening authority more authority substantial amendment will be required. Any change to this statute will require parallel revisions to R.C.M. 504.
- **Article 23, UCMJ (10 U.S.C. § 823).** This statute covers special court-martial convening authority, and would require similar revisions as those in Article 22. The scope and limitation of the revisions to Article 23 would again depend on the exact nature of the judge advocate authority created. A revision of Article 23 would also require parallel revision to R.C.M. 504.
- **Article 24, UCMJ (10 U.S.C. § 824).** Revision to convening authority for summary courts-martial under this statute would require similar consideration as the revisions in Articles 22 and 23. When making changes to summary court-martial authority, special attention should be paid to ensuring the forum remains a viable option for commanders seeking to address misconduct not requiring confinement beyond 1 year. Changes to the statute would necessitate changes to RCMs 504 and 1302.
- **Article 26, UCMJ (10 U.S.C. § 826).** Modification of this statute to prevent the newly created judge advocate authority from influencing military judges will be required to ensure continued judicial independence. Specifically, the statute will need to include language preventing the judge advocate in charge of referring, and possibly convening, cases to the courts from serving in the professional evaluation

chain of military judges. The changes made to this statute will require parallel adjustment of RCMs 502 and 503.

- **Article 27, UCMJ (10 U.S.C. § 827).** New language that prevents the judge advocate referring charges to court-martial from serving as the trial counsel, assistant trial counsel, or defense counsel in the same case will need to be added. The same language will need to be added to RCM 506.
- **Article 30, UCMJ (10 U.S.C. § 830).** This statute will need revision to include language clarifying that the new judge advocate authority is required to prefer cases involving offenses carrying maximum sentences of more than one year in confinement. The statute will require an amendment clarifying whether the judge advocate or commander is responsible for informing the accused of the charges and initial disposition. Additionally, this statute is the appropriate location for language identifying the manner in which commanders are to determine whether the case requires a judge advocate referral. The changes to this statute will impact a significant number of rules that will require adjustment to ensure consistency including RCMs 301, 303, 306-308, 401-405, 601, 707, and 1304. Finally, in order to implement the changes to this statute, the Department of Defense will need to amend DD Form 548 and the services will likely need to adjust their respective implementation policies.
- **Article 33, UCMJ (10 U.S.C. § 833).** At a minimum this statute will need to have the term “commander” removed. Other changes to this statute will depend on the exact process that is created with the implementation of the new authority. Possible changes include replacing the term “convening authority” with something more appropriate and removing or clarifying the role of the staff judge advocate in providing referral advice to the new judge advocate authority. Corresponding changes to R.C.M. 306, 601, 604, 812, and 1304 will also be necessary.
- **Article 34, UCMJ (10 U.S.C. § 834).** A change to this statue is required; however, the exact nature of the change depends on the process created and the desired level of coordination or advisement required between the new judge advocate authority and staff judge advocates. A possible approach is to merely replace current references to “convening authority” with the new appropriate term. However, given the expected experience of the new judge advocate authority, the complete elimination of any requirement for separate staff judge advocate advice prior to referral is also possible. Finally, language clarifying the referral process for offenses with maximum confinement below one year is needed. Whatever changes are made will impact R.C.M. 306, 401, 406-407, 601, 603-604, 812, 902A, 915, 1004, and 1304 which need corresponding amendments. The Department of Defense will also need to adjust DD Form 458, which is used to implement this statute.
- **Article 37, UCMJ (10 U.S.C. § 837).** The scope of unlawfully influencing action of court will need expansion to include the newly created judge advocate authority, members of their staff, and other positions of authority created for the new system.

The language in Article 37(a)(5) permitting a superior convening authority or officer to discuss cases with subordinate convening authority will require clarification to remain relevant to new processes. As the authorities of the new authority and commanders are clarified, this statute will need revision to ensure the communication between the new authority and commanders is appropriately controlled. Corresponding changes to R.C.M. 104 and 912 are also required.

- **Article 43, UCMJ (10 U.S.C. § 843).** Language identifying “the officer exercising summary court-martial jurisdiction” as party responsible for receiving charges will change. This portion of the statute will need to be amended to ensure it is consistent with the new referral processes and breakdown of responsibilities between commanders and the judge advocate authority. Changes to R.C.M. 403 and R.C.M. 907 will be needed to ensure consistency.
- **Article 53a, UCMJ (10 U.S.C. § 853a).** Referring to “convening authority” as party responsible for negotiating and entering into plea agreements with the accused will no longer be sufficient. This statute will require an amendment that identifies the party with authority to negotiate plea agreements in cases involving offenses with a maximum confinement of greater than one year, and will need language clarifying whether commanders can negotiate in cases involving misconduct that has a maximum confinement of less than one year. Any change will need to be incorporated into R.C.M. 705 and 910 to ensure consistency.
- **Article 56, UCMJ (10 U.S.C. § 856).** The current statute permits a convening authority to set aside certain sentences. An amendment will be required to clarify which party should retain this power, if it should be retained at all, once the new judge advocate authority is created. Any change to this statute will need to be incorporated into R.C.M. 1001, 1003, 1005, 1006, and 1009.
- **Article 57, UCMJ (10 U.S.C. § 857).** The current statute permits the convening authority to act on requests for deferral of portions of the adjudged sentence. An amendment clarifying whether this power exists in the newly structure system and who has the power to wield this authority will be necessary. The statute will need to clarify whether the authority to defer sentences is limited to certain cases and whether commanders retain the authority in cases where misconduct carries a maximum of one year of confinement. Changes to this statute will create a need for corresponding changes to R.C.M. 1102, 1107, 1108, and 1113.
- **Article 58b, UCMJ (10 U.S.C. § 858b).** The changes to Article 58b will be similar to those required for Article 57. This statute permits a convening authority to waive certain forfeitures for the benefit of the accused’s dependents. An amendment will be necessary to clarify who, if anyone, has this authority under the new system and whether that power depends on the maximum sentences of the offense at issue. If changed, corresponding changes will be required in R.C.M. 1103.

- **Article 60, UCMJ (10 U.S.C. § 860).** Like the other post-trial statutes, this article describes convening authority powers that will need to be reassessed, reassigned, or clarified with the establishment of a judge advocate authority. Specifically, the statute will need to be revised to clarify who receives a copy of the Statement of Trial Results and whether they have the authority to take “post-trial action.” The statute must indicate if procedures differ depending on the maximum amount of confinement in the case. Any change to this statute will create a corresponding requirement for change in R.C.M. 1009, 1010, 1101, 1104-1106A, and 1109-1110.
- **Article 60a, UCMJ (10 U.S.C. § 860a).** Currently this statute describes the scope of convening authority power to reduce, commute, or suspend sentences; order a rehearing; and receive submissions from accused and victim. The updated statute must clarify whether the power is now vested in the judge advocate authority and if commanders retain any power to act on misconduct having a maximum punishment of less than one year. Since 2014, convening authority power has been limited to a narrow group of cases. An evaluation of these restrictions and whether they are required under the new system is also required. Any amendment to this statute will require parallel change in R.C.M. 1109 and 1110.
- **Article 60b, UCMJ (10 U.S.C. § 860b).** With the creation of a new judge advocate focused system this statute will need to undergo assessment akin to the other post-trial statutes. In particular, the authority of commanders and the judge advocate authority to act on sentences, order rehearing, receive post-trial submissions, etc. in cases falling outside the limits of Article 60a will need to be clarified. Any change to this statute will require parallel change in R.C.M. 1109-1110 and 1306.
- **Article 60c, UCMJ (10 U.S.C. § 860c).** Presently this statute requires the military judge to record “any post-trial action by the convening authority” in their entry of judgement and references the power of convening authority to modify judgements at summary court-martial. This language will need to be amended, and any amendment to this article will need to remain consistent with any realignment of authorities and processes in Articles 60-60c. Changes to this statute will need to be incorporated into parallel changes to R.C.M. 1111.
- **Article 65, UCMJ (10 U.S.C. § 865).** This statute currently permits convening authorities to dismiss charges if they determine a rehearing ordered pursuant to review by The Judge Advocate General is impractical. A change to this statue to clarify that the authority to dismiss charges reviewed by The Judge Advocate General resides with the Section 540F judge advocate will be necessary. Revisions to this statute must be paralleled in R.C.M. 810, 1111, and 1112.
- **Article 66, UCMJ (10 U.S.C. § 866).** This statute provides convening authorities with the same power to dismiss charges when they deem the prospect of holding a rehearing ordered by a Court of Criminal Appeals impractical. An amendment will be needed to realign this power with the new judge advocate authority. A change to this statute will create the need for parallel change to R.C.M. 810 and 1203.

- **Article 67, UCMJ (10 U.S.C. § 867).** This statute provides the convening authority with the power to dismiss charges if they determine a rehearing is impractical after a rehearing has been ordered by the Court of Appeals for the Armed Forces. An amendment that realigns this power with the new judge advocate authority will be necessary. Changing this statute will require parallel revision of R.C.M. 810 and 1204.
- **Article 69, UCMJ (10 U.S.C. § 869).** This statute provides convening authorities with the power to dismiss charges if they determine a rehearing ordered pursuant to review by The Judge Advocate General is impractical. This article will require an amendment that realigns this power with the new judge advocate authority. A change to this statute will require parallel revision of R.C.M. 810 and 1201.
- **Article 72, UCMJ (10 U.S.C. § 872).** The realignment and adjustment to the post-trial action to include a judge advocate authority will necessitate an amendment of process for vacating any suspension that is granted. This article will specifically need to address new procedures for notification to the accused, identify parties responsible for conducting the hearing, and who would review the record of hearing. Whatever changes are made to this statute will need to be incorporated into R.C.M. 1108.
- **Article 74, UCMJ (10 U.S.C. § 874).** Currently this statute refers to “commanding officers” specifically when assigning power to remit or suspend unexecuted portions of a sentence. This reference will require an amendment that appropriately realigns this authority consistent with the new post-trial process and other authorities created with the new judge advocate position. A change to this statute will require revision of R.C.M. 1107 for consistency.
- **Article 138, UCMJ (10 U.S.C. § 938).** The system of redress for abuse of the court-martial process currently runs through the commanding officer and their chain of command. Since under the studied system commanders’ involvement in court-martial decision making will be limited, this statute will require revision to ensure that personnel have a proper avenue for redress in cases of abuse. Some portion of the current system for complaints will need to be retained depending on how much authority commanders maintain in terms of addressing misconduct with a maximum confinement of one year or less.
- **Article 139, UCMJ (10 U.S.C. § 939).** Like Article 138, the system of redress for victims of property crime runs through the convening authority. Legislators will need to revise this statute to make sure it clearly identifies whether the power to provide compensation for injury to property resides with commanders or the new judge advocate authority.

**Group 2: Court-martial statutes and rules which would likely be revised:** The below listed statutes and rules likely would need to be revised. However, the exact nature of any revision is dependent on how the proposed judge advocate convening authority system is implemented. More particularly, the controlling factor will be the degree and nature of any decision making authority commanders retain. It is conceivable that some practices and procedures created through the below statutes could be left unmodified, but any decision to not modify these statutes should be based on thorough analysis of the military justice system as a whole.

- **Article 1, UCMJ (10 U.S.C. § 801).** The definition of “accuser” may need modification. Exact change would depend on any changes to the preferral process. Any modification of this article would necessitate amendment to R.C.M. 103, which contains detailed definitions for the purpose of implementation. The definition of “convening authority” would likely require revision and definitions may need to be added to address newly created positions (e.g. a Prosecution Director, Court-Martial Registrar, etc.).
- **Article 6, UCMJ (10 U.S.C. § 806).** Presently, Article 6(b) requires convening authorities to communicate directly with their staff judge advocates or legal officers concerning military justice. The necessity of this provision if a judge advocate were the convening authority is questionable. Maintaining this provision would likely require an amendment describing any required communication between staff judge advocates and the newly created convening authority. Corresponding changes to the portions of R.C.M. 105, 406, and 1106 that discuss communication between convening authority and staff judge advocates may also be needed.
- **Article 10, UCMJ (10 U.S.C. § 810).** Due to the role the judge advocate convening authority would play in the preferral process, legislators will likely need to review this statute to ensure it accurately reflects the role the judge advocating convening authority will play in pretrial confinement decisions. If charges are made to Art. 10, corresponding changes to R.C.M. 304-305 and 707 will be necessary.
- **Article 25, UCMJ (10 U.S.C. § 825).** This statute governing the identification of members to serve on the court-martial panel refers frequently to “convening authority.” As the exact roles of the new judge advocate authority and current commanders are redefined, this statute will likely require modification to clarify who details members and what criteria are utilized. Revision of this statute will effect R.C.M. 502, 503, 505, and 903 all of which would need to be updated to ensure consistency.
- **Article 28, UCMJ (10 U.S.C. § 828).** As with other powers of the convening authority, the power to detail and employ court reporters and interpreters for court-martial will need to be reevaluated to determine whether it should remain with commanders or moved to the judge advocate authority. Revision of this statute will necessitate change to R.C.M. 501 and 502.

- **Article 29, UCMJ (10 U.S.C. § 829).** A modification of this statute governing the authority to authorize and excuse alternate members of courts-martial panels will be required along with any change to the authorities listed in Article 25. Whether the statute will require any modification depends on whether commanders remain responsible for the detailing of members. Any amendment of this statute will require revision of R.C.M. 505, 912A, and 912B.
- **Article 32, UCMJ (10 U.S.C. § 832).** A change that identifies the new judge advocate authority as responsible for all duties associated with preliminary hearings rather than leaving the current reference to “convening authority” is likely needed. In addition to the semantic changes, drafters will need to determine whether the powers and role currently associated with Article 32 convening authority require modification. Corresponding changes will be needed in R.C.M. 404A and 405.
- **Article 44, UCMJ (10 U.S.C. § 844).** The rules covering former jeopardy currently require the “convening authority” to dismiss or terminate previously adjudicated charges. It is likely that this will need to be changed to a more precise term. However, if the role of the newly created judge advocate authority is defined so that calling them the convening authority is appropriate then no change will be required.
- **Article 46, UCMJ (10 U.S.C. § 846).** A change to this statute that ensures parties know who may authorize government counsel to issue subpoenas prior to referral is likely. However, whether amendment is necessary depends on how authorities are divided and whether the term “general court-martial convening authority” is alone sufficient to identify the appropriate party. For example, if the judge advocate authority is made responsible for authorizing subpoenas and serves as the general court-martial convening authority no change is needed. If a change is made, R.C.M. 701-704 will require revision for consistency.
- **Article 47, UCMJ (10 U.S.C. § 847).** This statute refers to the “convening authority” as the appropriate party to certify facts to the U.S. Attorney for the purpose of securing civilian controlled evidence or civilian witnesses who refuse to testify. A change to this statute to include more precise language is likely; however, the need for change depends on how the term “convening authority” is used in the new system and how authorities are aligned. If changes are made, R.C.M. 701-704 will need to be adjusted for consistency.
- **Article 48, UCMJ (10 U.S.C. § 848).** The identification of the “convening authority” as responsible for reviewing contempt punishments is likely to require change. The need for change will depend on how the term “convening authority” is used in the new system. Additionally, the distribution of court-martial related authority and realignment of personnel under the judge advocate authority may require adjustment of this statute. If changed a corresponding change will need to be made to R.C.M. 809.

- **Article 49, UCMJ (10 U.S.C. § 849).** This statute identifies the “convening authority” as the party responsible for ordering depositions at the request of one of the parties. This statute is likely to require change since it is unlikely the current convening authorities will retain this authority. However, any requirement for change will depend on exactly whether the power to order a deposition is realigned in the new judge advocate based system. If amended, R.C.M. 702 will need to be revised to ensure consistency.
- **Article 76b, UCMJ (10 U.S.C. § 876b).** This statute requires “general court-martial convening authority” to ensure any accused deemed incompetent to stand trial is committed to the custody of the Attorney General. This statute could stay the same if the new judge advocate convening authority is made responsible for coordinating with the Attorney General. However, if commanders are deemed to be in the better position to coordinate, the statute will require an amendment to make the language more clear. Revising this statute will create a need for parallel change to R.C.M. 706 and 909.
- **Article 137, UCMJ (U.S.C. § 937).** It is likely that the portions of this statute requiring officers with court-martial convening authority to receive specialized training on the UCMJ will undergo adjustment. Any decision to amend this statute will depend on the level of authority commanders possess in the new court-martial system.
- **Article 146a, UCMJ (10 U.S.C. § 946a).** Amendment to the annual reporting requirements is not a prerequisite for creating a judge advocate court-martial authority. Amendment of the reporting requirements is likely, since the current statute does not focus on all measures of effectiveness that would be needed to determine whether the judge advocate authority is being properly implemented.

**Group 3: Lower forum statutes and rules which would likely require revision:** The below statutes, rules, and guidance apply to aspects of military justice falling below the court-martial level. Revision of these authorities must be considered with any modification to court-martial convening authority to prevent the system from becoming cumbersome or unbalanced. The exact revision to non-judicial disciplinary forums might range from minor adjustments aimed at administrative processes to broader jurisdictional modifications. Ultimately, legislators must ensure any revisions are focused on ensuring commanders are empowered to address misconduct falling below court-martial level.

- **Article 15, UCMJ (10 U.S.C. § 815).** This statute addresses the non-judicial disciplinary powers of commanders. It is possible that amending Part V of the MCM could adequately modify the non-judicial punishment process. However, legislators will need to review the statute and make any modification necessary to ensure it does not prevent or interfere with the ability of commanders to adequately address

offenses carrying a maximum confinement of below one year. For example, legislators should consider revising the statute to address situations in which the accused refuses non-judicial punishment and the judge advocate convening authority believes the misconduct is not serious enough to warrant court-martial.

- **Article 20, UCMJ (10 U.S.C. § 820).** As with non-judicial punishments under Article 15, legislators would need to reevaluate the summary court-martial and its role in the military justice system if choosing to make changes to high disciplinary forums. A reevaluation of which offenses are appropriate for summary court-martial and whether the judge advocate would be required for referral should be among the considerations. Any changes to Article 20 would create a need for parallel revision of R.C.M. 1300, *et seq.* which describe the practical administration of summary courts-martial.
- **Article 64, UCMJ (10 U.S.C. § 864).** This statute currently addresses the post-trial review process applicable to the summary court-martial forum. A reevaluation of this statute should be undertaken along with all other statutes applicable to summary court-martial to ensure the forum is properly incorporated into the modified military justice system. Any change in how summary courts-martial are utilized or to who may refer cases to them will create a need for change in the summary post-trial process. Amendments to this statute must be incorporated into R.C.M. 1112, 1201, and 1307.

## **Appendix E**



# REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

June 2014

## 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.<sup>864</sup> 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.<sup>865</sup> And, therefore, commanders must retain convening authority to remain credible leaders with the ability to administer justice and enforce values.<sup>866</sup> They also testified that commanders need prosecutorial discretion in order to create a command environment in which victims feel comfortable reporting crimes.<sup>867</sup>

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.<sup>868</sup>

### 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.<sup>869</sup> 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.<sup>870</sup>

Similarly, as previously noted, the Panel found that civilian jurisdictions face under-reporting challenges similar to those of the military.<sup>871</sup> 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.<sup>872</sup> 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.”<sup>873</sup> The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions

that ignored the wishes of sexual assault survivors.<sup>874</sup> 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.”<sup>875</sup>

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.<sup>876</sup> 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.<sup>877</sup> 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.<sup>878</sup>

### 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.<sup>879</sup> 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.<sup>880</sup> 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.<sup>881</sup> 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.<sup>882</sup> 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.

## CHAPTER TEN: ASSESSING MILITARY AND CIVILIAN JUSTICE SYSTEM STRUCTURE AND PROPOSED LEGISLATIVE CHANGES

*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.<sup>883</sup>

#### 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.<sup>884</sup> 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.<sup>885</sup> 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.<sup>886</sup>

*The Panel recommends that Congress not enact Section 2 of the VPA. [RSP Recommendation 41]* In addition to the Panel's concern, discussed earlier<sup>887</sup> 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.<sup>888</sup>

*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.<sup>889</sup> 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.<sup>890</sup>

*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.<sup>891</sup> Senator Gillibrand's proposal is broader and would remove commanders' authority to decide disposition of most "felony" offenses under the UCMJ.<sup>892</sup> 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,<sup>893</sup> and re-introduced it as H.R. 1593 in 2013.<sup>894</sup> 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.<sup>895</sup> 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.<sup>896</sup> 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.<sup>897</sup> All other offenses under the UCMJ would remain under the current system. Congress has not enacted the STOP Act.<sup>898</sup>

On May 16, 2013, Senator Gillibrand introduced S. 967, the MJIA.<sup>899</sup> 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.<sup>900</sup> 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.<sup>901</sup> 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,"<sup>902</sup> including sexual assault and many other offenses that are not "excluded offenses,"<sup>903</sup> 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.<sup>904</sup>

## CHAPTER TEN: ASSESSING MILITARY AND CIVILIAN JUSTICE SYSTEM STRUCTURE AND PROPOSED LEGISLATIVE CHANGES

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.<sup>905</sup> 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.<sup>906</sup>

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.<sup>907</sup>

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,<sup>908</sup> *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.

## REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

<sup>854</sup> 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).

<sup>855</sup> Army's Response to RSP Request for Information 147 (Apr. 11, 2014).

<sup>856</sup> *Id.*

<sup>857</sup> *Id.*

<sup>858</sup> *Id.*

<sup>859</sup> *Id.*

<sup>860</sup> *Id.*

<sup>861</sup> 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).

<sup>862</sup> See *id.* at 90 (testimony of Mr. Russell Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School).

<sup>863</sup> 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).

<sup>864</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 94-97.

<sup>865</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 101-06.

<sup>866</sup> *Id.* at 104-05.

<sup>867</sup> *Id.* at 105-06.

<sup>868</sup> For further discussion on barriers to reporting, *see* Chapter Two, *supra*, at Part A.

<sup>869</sup> 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.

<sup>870</sup> *Id.*

<sup>871</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 113.

<sup>872</sup> *Id.*; *see* *Transcript of RSP Public Meeting* 198-290 (Nov. 8, 2013).

<sup>873</sup> WHITE HOUSE REPORT, *supra* note 16, at 5.

<sup>874</sup> *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).

<sup>875</sup> *Id.*

<sup>876</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 88.

<sup>877</sup> *Id.*

<sup>878</sup> 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).

<sup>879</sup> 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).

<sup>880</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 114.

## ENDNOTES TO CHAPTERS 1-10

<sup>881</sup> See, e.g., *Transcript of RSP Public Meeting* 325-26 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our 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).

<sup>882</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 113.

<sup>883</sup> See H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Revision 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.

<sup>884</sup> S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).

<sup>885</sup> See FY14 NDAA, *supra* note 4, § 1744, discussed, *supra*, at Chapter 8, Part C.

<sup>886</sup> *Id.* at § 1744(c)(d); S. 1917 § 2.

<sup>887</sup> See Chapter 8, *supra*, at Part C.

<sup>888</sup> *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.

<sup>889</sup> 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.

<sup>890</sup> S. 1917 at § 3(g); CSS REPORT TO RSP, Annex, *infra*, at 196-200.

<sup>891</sup> H.R. 1593, at § 5.

<sup>892</sup> S. 1752, at § 2. The UCMJ does not classify offenses as misdemeanors or felonies.

<sup>893</sup> H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2012).

<sup>894</sup> H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevention Act (2013).

<sup>895</sup> *Id.* at § 4.

<sup>896</sup> *Id.* at § 3.

<sup>897</sup> *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.*

<sup>898</sup> 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>.

<sup>899</sup> S. 967, 113th Cong., Military Justice Improvement Act of 2013 (2013).

<sup>900</sup> S. 1197, § 552, amend. no. 2099 (2013).

<sup>901</sup> See Senator Kirsten E. Gillibrand, "Floor Speech on Technical Issues," available at <http://www.gillibrand.senate.gov/mjia/technical-fixes>.

<sup>902</sup> S. 1752 at § 2(a)(2).

<sup>903</sup> *Id.* § 2(a)(3).

<sup>904</sup> *Id.* at § 3.

<sup>905</sup> *Id.* at § 3(c).

<sup>906</sup> *Id.* at § 3(a).

<sup>907</sup> RoC SUBCOMMITTEE REPORT TO RSP, Annex, *infra*, at 42-43; see S. 1752, § 4.

<sup>908</sup> See, *supra*, this chapter at Section A.

## **Appendix F**

# ANNEX TO



# REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL

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ANNEX A: Report of the Comparative Systems Subcommittee

ANNEX B: Report of the Role of the Commander Subcommittee

ANNEX C: Report of the Victim Services Subcommittee

June 2014



# Report of the Role of the Commander Subcommittee

## to the Response Systems to Adult Sexual Assault Crimes Panel

**May 2014**

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



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

**MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL**

**SUBJECT:** Report of the Role of the Commander Subcommittee

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

  
Barbara Jones  
Subcommittee Chair

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# REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE

## EXECUTIVE SUMMARY

### SUBCOMMITTEE MISSION STATEMENT

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

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

### ASSESSMENT METHODOLOGY

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

## ROLE OF THE COMMANDER SUBCOMMITTEE

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

### CONCLUSION OF THE SUBCOMMITTEE

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

### RECOMMENDATIONS AND FINDINGS

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

#### **Commander and Convening Authority Concepts:**

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

#### **Legislation and Policy:**

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

## EXECUTIVE SUMMARY

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

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

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

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

### **Sexual Assault Prevention:**

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

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

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

### **Sexual Assault Response:**

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

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

### **Military Justice Responsibilities:**

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

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

## EXECUTIVE SUMMARY

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

### Perspectives on Military Justice Responsibilities:

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

Based on its review, the Subcommittee believes Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses. Evidence considered by the Subcommittee does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase conviction rates in these cases. Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization. Further, civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.

The Subcommittee also believes Congress should not further modify the authority under the UCMJ to refer charges for sexual assault crimes to trial by court-martial beyond the recent amendments to the UCMJ and changes to DoD policy. According to these recent changes, the authority to make disposition decisions regarding sexual assault allegations is sufficiently limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution. Additionally, Congress should not further amend Article 60 of the UCMJ beyond the significant limits on discretion already adopted, and the President should not impose additional limits to the post-trial authority of convening authorities. However, the Subcommittee believes additional consideration and study is warranted to evaluate the feasibility and consequences of modifying other pretrial and trial responsibilities currently assigned under the UCMJ to convening authorities. The Subcommittee heard recommendations for and against changes to these authorities, and we believe further study is appropriate to fully assess what positive and negative impacts would result.

### Command Climate for Sexual Assault Prevention and Response:

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

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

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

### **Accountability for Sexual Assault Response:**

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

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

## **CONCLUSION**

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

# ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

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

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

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

**Recommendation 2:** Congress should not adopt Section 2 of the Victims Protection Act of 2014 (VPA). The decision whether to refer a case to courts-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate.

**Finding 2-1:** Section 2 of the VPA would mandate Secretarial review of cases involving sex-related offenses when the senior trial counsel detailed to a case recommends that charges be referred to trial and the convening authority, upon the advice of his or her staff judge advocate, decides not to refer charges. Most "senior trial counsel" assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. This provision inappropriately elevates the assessments of generally more junior judge advocates and would likely prove to be unproductive, disruptive, and unnecessary to ensuring the fair disposition of cases.

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

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

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

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

## COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Recommendation 9:** The Secretary of Defense and Service Secretaries should ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure SAPR training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and resolution, and access to witnesses or evidence.

**Finding 9-1:** In addition to supporting victims of sexual assault, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.

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

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

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

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

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

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

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

### COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

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

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

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

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

### COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

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

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

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

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

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

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

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

**Finding 16-1:** Further study is appropriate to fully assess what positive and negative impacts would result from changing some pretrial or trial responsibilities of convening authorities.

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

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

## ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

### PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

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

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

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

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

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

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

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

### ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

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

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

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

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

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

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

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

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

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

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

## ABSTRACT OF SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

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

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

### COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

# I. OVERVIEW OF SUBCOMMITTEE ASSESSMENT

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

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

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

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

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

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

### A. RESPONSIBILITY OF THE SUBCOMMITTEE

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

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

- Examine the roles and effectiveness of commanders at all levels in the administration of the UCMJ and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.
- Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes, including the role of a commander under Article 60, UCMJ.
- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.
- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.

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

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

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- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the Response Systems Panel recommends such a formal statement, the Response Systems Panel shall provide key elements or principles that should be included in the formal statement.

## B. METHODOLOGY OF SUBCOMMITTEE REVIEW

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

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

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

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

## II. COMMANDER AND CONVENING AUTHORITY CONCEPTS

### A. COMMANDER AUTHORITY AND RESPONSIBILITY

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

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

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

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

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

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

6 *Id.* at pt. I, ¶ 3.

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

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

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

### B. DISTINCTION BETWEEN COMMANDERS AND CONVENING AUTHORITIES

While all commanders have disciplinary responsibility for subordinates, the authority vested by the UCMJ to convene courts-martial is legally distinct from command authority. The authority to convene general, special, and summary courts-martial<sup>12</sup> is purely statutory in nature, and is established by Articles 22, 23, and 24 of the UCMJ, respectively.<sup>13</sup> Under these articles, convening authority is a specific statutory authority that attaches to individual officers serving in certain positions and designations.

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

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

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

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

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

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

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

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

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

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

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

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

The following chart illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCAs and even smaller number of GCMCAs:<sup>17</sup>

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

## C. LEGISLATIVE ORIGIN OF COMMANDER AUTHORITY UNDER THE UCMJ

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

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

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

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

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

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

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

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,<sup>25</sup> 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.”<sup>26</sup> 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.<sup>27</sup> More specifically, in its 1949 report on the UCMJ, the House Armed Services

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

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

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

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

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

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

26 H.R. REP. NO. 81-491, at 7-8 (1949). The Committee addressed such testimony in its report as follows:

We fully agreed that such a provision might be desirable if it were practicable, but we are of the opinion that it is not practicable. We cannot escape the fact that the law which we are now writing will be as applicable and must be as workable in time of war as in time of peace, and, regardless of any desires which may stem from an idealistic conception of justice, we must avoid the enactment of provisions which will unduly restrict those who are responsible for the conduct of our military operations. Our conclusions in this respect are contrary to the recommendations of numerous capable and respected witnesses who testified before our committee, but the responsibility for the choice was a matter which had to be resolved according to the dictates of our own conscience and judgment.

*Id.*

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

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

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

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

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

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

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

31 10 U.S.C. § 837(a).

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

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

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

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

Despite Congress's initial attempt to prevent unlawful command influence, some commanders viewed the original Article 37 as an obstacle to execution of their disciplinary responsibilities, just as others overcame it by exerting improper influence in more subtle ways.<sup>37</sup> In 1960, the Powell Committee<sup>38</sup> recommended that the Chief of Staff of the Army "publish a directive to clarify for all commanders the distinction between proper exercise of command responsibility and improper command influence."<sup>39</sup> Ultimately, Congress added a provision to Article 37 in its 1968 amendments to the UCMJ that prohibited adverse personnel actions based on members' participation in courts-martial.<sup>40</sup>

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

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

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

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

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

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

39 *Id.* at 3, 16.

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

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

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

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

### D. SUPREME COURT REVIEW OF COMMANDER AUTHORITY UNDER THE UCMJ

Since the UCMJ was adopted, the Supreme Court has reviewed, but not substantially modified, the authority vested in military commanders to convene courts-martial for criminal offenses committed by military personnel. One notable exception was *O'Callahan v. Parker*,<sup>45</sup> a challenge to court-martial jurisdiction over an accused convicted of the rape of a civilian and related offenses that were committed off the installation. In a split decision, the majority of Justices held that any grant of jurisdiction to courts-martial must be limited to offenses that are "service connected" in order to bring the constitutional grant of power to Congress over the military<sup>46</sup> into harmony with the guarantees of the Bill of Rights.<sup>47</sup>

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

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

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

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

45 395 U.S. 258 (1969).

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

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

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

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

48 401 U.S. 355 (1971).

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

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

In *Parker v. Levy*,<sup>52</sup> the Supreme Court noted that the military’s purpose distinguishes it and its laws from civilian society, and the Court recalled the “particular position of responsibility and command” held by military officers.<sup>53</sup> *Parker* concerned a constitutional challenge to convictions under Articles 133 (“conduct unbecoming an officer and a gentleman”) and 134 (conduct prejudicial to “good order and discipline”) of the UCMJ<sup>54</sup> that arose out of an Army officer’s on-base public statements critical of the Vietnam War to enlisted Service members. In affirming the convictions, the Court noted it had “long recognized that the military is, by necessity, a specialized society separate from civilian society,” and that “[t]he differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or ready to fight wars should the occasion arise.’”<sup>55</sup> The *Parker* Court liberally quoted from earlier judicial deference decisions.<sup>56</sup> In particular, the Court took care to highlight

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

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49 *Id.* at 367.

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

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

52 417 U.S. 733 (1974).

53 *Id.* at 743.

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

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

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

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

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

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

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

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

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

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

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

58 425 U.S. 25 (1976).

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

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

61 483 U.S. 435 (1987).

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

63 510 U.S. 163 (1994).

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

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

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

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

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

## A. RECENT LEGISLATION

### 1. National Defense Authorization Act for Fiscal Year 2012

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

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

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

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

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### 2. National Defense Authorization Act for Fiscal Year 2013

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

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

### 3. National Defense Authorization Act for Fiscal Year 2014

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

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

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

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

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

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

## B. DEPARTMENT OF DEFENSE POLICY

In addition to congressional mandates, the Secretary of Defense has issued numerous policy changes that impact commander and convening authority roles and responsibilities in sexual assault cases. Most notably, on April 20, 2012, the Secretary of Defense elevated the initial disposition authority for sexual assault offenses to commanders in the grade of O-6 or above who also serve as special or general court-martial convening authorities.<sup>70</sup> This change vested initial disposition authority at a level of command that is normally distanced from the accused and/or accuser. Since convening authorities at this level are generally removed by multiple levels of command from the unit to which an accused or accuser is assigned, the policy substantially mitigated the likelihood that a commander exercising disposition authority for these offenses will have a close personal connection to the victim or accused Service member. The Secretary of Defense's withholding policy became effective on June 28, 2012.<sup>71</sup> Prior to the policy's implementation, Rule for Courts-Martial (R.C.M.) 401 authorized any commander who received preferred charges to dismiss or otherwise dispose of charges,<sup>72</sup> unless that authority had otherwise been withheld or limited by a superior competent authority.<sup>73</sup> In practice, this meant

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

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

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

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

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

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

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

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

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

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

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

<sup>76</sup> 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).

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

<sup>78</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

## C. PROPOSED LEGISLATION

Following the broad reforms in the FY14 NDAA, the President directed the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to conduct a full-scale review of progress made with respect to sexual assault prevention and response. This report is due to the President by December 1, 2014.<sup>83</sup> The President indicated he will consider additional reforms to the military justice system if significant improvements are not realized by that time.<sup>84</sup>

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

### 1. Sexual Assault Training Oversight and Prevention Act

On November 16, 2011, Representative Jackie Speier (D-CA) introduced H.R. 3435, the Sexual Assault Training Oversight and Prevention Act (STOP Act).<sup>86</sup> The bill was not passed during the 112th Congress. On April 17, 2013, Representative Speier reintroduced the STOP Act as H.R. 1593.<sup>87</sup> The STOP Act proposes to remove reporting, oversight, investigation and victim care of sexual assaults from the military chain of command and place jurisdiction in the newly created, autonomous Sexual Assault Oversight and Response Office.<sup>88</sup>

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

<sup>84</sup> *Id.*

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

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

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

<sup>88</sup> *Id.*

In addition, the STOP Act would create a Sexual Assault Oversight and Response Council, composed primarily of civilians “independent from the chain of command within the Department of Defense,” which would oversee the Sexual Assault Oversight and Response Office and appoint a Director of Military Prosecutions.<sup>89</sup> 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.<sup>90</sup> All other offenses under the UCMJ would remain under the current system. For discussion of arguments for and against changes to commander’s disposition authority in military justice actions, see Part VII, Sections B and C, respectively.

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

### 2. Military Justice Improvement Act of 2013

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

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

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89 *Id.* at § 189(e).

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

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

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

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

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

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

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

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The Subcommittee heard testimony about technical challenges with S. 967.<sup>97</sup> Among the criticisms presented to the Subcommittee, the proposal appeared to create a bifurcated system where some crimes (covered offenses) were removed to a separate system for prosecution and others remained under the current system, at times with illogical outcomes. For example, an attempt to commit rape under Article 80 would be tried under the current system and a rape under Article 120 (which is a covered offense) would be tried in this new system.<sup>98</sup> The proposal also included no mechanism for combining covered and not-covered offenses that arose out of the same alleged criminal acts into one prosecution system. Consequently, it was unclear how multiple offenses arising out of the same alleged criminal conduct would be addressed.<sup>99</sup> This uncertainty raised due process concerns, with the potential for delayed trials and double jeopardy issues.

The Senate Armed Services Committee did not include the MJIA in its mark of the FY14 NDAA. On November 18, 2013, Senator Gillibrand filed an amended version of the MJIA.<sup>100</sup> 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.<sup>101</sup> The amendment was not enacted as part of the FY14 NDAA. On November 20, 2013, Senator Gillibrand filed the MJIA as a stand-alone bill, S. 1752. On Thursday, March 6, 2014, the Senate, on a 55 to 45 vote, rejected a motion for cloture on the MJIA, which precluded the Senate from voting on the underlying bill.<sup>102</sup> The MJIA remains pending in the Senate and Senator Gillibrand could try to incorporate it, or another version of it, into the next defense authorization bill.

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

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

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

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

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

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

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

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

103 S. 1752, § 2(a)(4)(C).

104 See Floor Speech, *supra* note 101.

105 S. 1752, § 2(a)(4)(D).

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

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

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

### 3. Victims Protection Act of 2014

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

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

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106 *Id.* at § 3(c).

107 *Id.* at § 3(a)

108 *Id.* at § 2(a)(4)(c).

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

110 *Id.*

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

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

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

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

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

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

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

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

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

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

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

<sup>116</sup> S. 1917, § 3(c).

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

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

### D. PART III SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

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

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

**Recommendation 2:** Congress should not adopt Section 2 of the Victims Protection Act of 2014 (VPA). The decision whether to refer a case to courts-martial should continue to be a decision formed by the convening authority in consultation with his or her staff judge advocate.

**Finding 2-1:** Section 2 of the VPA would mandate Secretarial review of cases involving sexual-related offenses when the senior trial counsel detailed to a case recommends that charges be referred to trial and the convening authority, upon the advice of his or her staff judge advocate, decides not to refer charges. Most "senior trial counsel" assigned to cases are more junior and less experienced than the staff judge advocate advising the convening authority. This provision inappropriately elevates the assessments of generally more junior judge advocates and would likely prove to be unproductive, disruptive, and unnecessary to ensuring the fair disposition of cases.

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

**Finding 3-1:** Evaluating a unit's culture or climate may be helpful or may provide relevant information in some criminal investigations, but it is not clear how organizational climate assessments would be effective following each report of a sexual offense. Organizational climate may not be a contributing factor in every alleged crime

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of sexual assault. Additional survey requirements for personnel and the possibility of survey fatigue may also reduce the accuracy of feedback and the effectiveness of assessments.

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

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

# IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

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

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

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

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

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

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

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

### A. CONSENSUS AND DEBATES IN CURRENT PREVENTION RESEARCH

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

#### 1. Public Health Approach to Sexual Assault Prevention

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

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

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

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

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

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

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

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

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

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

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

### 2. Myths and popular misconceptions about sexual violence

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

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

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

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

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

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

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

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

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

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

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

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

138 David Lisak, "The Undetected Rapist" (Mar. 2002), *at* [http://www2.binghamton.edu/counseling/documents/RAPE\\_FACT\\_SHEET1.pdf](http://www2.binghamton.edu/counseling/documents/RAPE_FACT_SHEET1.pdf).

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

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

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

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

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

### 3. Current gaps in research

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

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

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

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

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

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

### 4. Effective Prevention Strategies and Programs

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



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

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

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

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### a. Bystander intervention

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

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

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

### b. Alcohol policy

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

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

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

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

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

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

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

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

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

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

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

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

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

### Identifying populations with heightened vulnerability

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

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note 144, at 1.

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

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

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

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

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

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

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

### B. DOD SEXUAL ASSAULT PREVENTION EFFORTS

#### 1. Evolution of DoD's Approach to Prevention

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

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

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

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

164 *Id.* at 72-74.

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

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

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

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

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

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

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

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

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

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

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

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

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

173 See *id.*

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

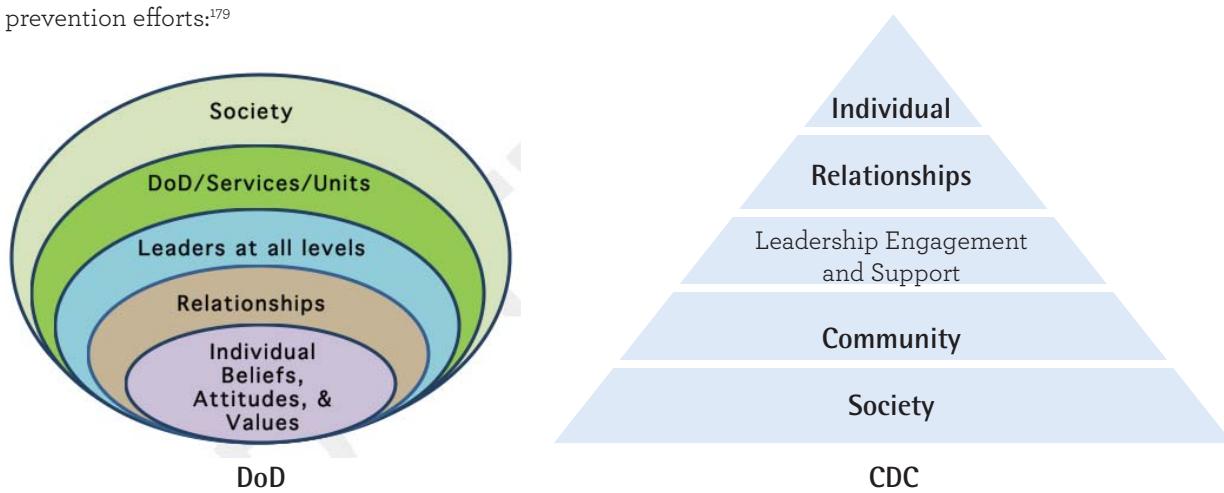
175 U.S. DEP’T OF DEF., SEXUAL ASSAULT PREVENTION AND RESPONSE STRATEGIC PLAN 18 (Apr. 30, 2013) [hereinafter 2013 SAPR STRATEGIC PLAN]; *Transcript of RoC Subcommittee Meeting 198-202* (Feb. 12, 2014) (testimony of Colonel Alan R. Metzler).

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

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

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



### 2. DoD Prevention Policies and Requirements

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

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

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

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

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

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

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

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

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

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

rape myths, facts, and trends;

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

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

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

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

184 DoD SAPRO, “Fact Sheet: SAPR Training” at [http://www.saprmil/public/docs/prevention/CoreCompetencies\\_LearningObjectives\\_FactSheet\\_20140407.pdf](http://www.saprmil/public/docs/prevention/CoreCompetencies_LearningObjectives_FactSheet_20140407.pdf).

## IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

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

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

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

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

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

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

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

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

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

188 DoDI 6495.02 Glossary.

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

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

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

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

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

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

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

### 3. DoD Assessment of Effectiveness of Prevention Efforts

In 2012, DoD revised its strategic SAPR policy to mandate that the Under Secretary of Defense for Personnel and Readiness “[d]evelop metrics to measure compliance and effectiveness of SAPR training, awareness, prevention, and response policies and programs” and to “[a]nalyze data and make recommendations regarding the SAPR policies and programs to the Secretaries of the Military Departments.”<sup>195</sup> The Director of SAPRO was similarly directed on March 28, 2013.<sup>196</sup> In addition, DoD’s policy mandated that its annual reports on sexual assault in the military must include an assessment of the implementation of SAPR policies and procedures, including those concerning prevention to determine their effectiveness.<sup>197</sup>

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.<sup>198</sup> Pursuant to the President’s directive, DoD SAPRO recently developed twelve new assessment metrics that are in addition to the six metrics currently used.<sup>199</sup> Five of these new metrics will focus on prevention efforts.<sup>200</sup> In the shorter term, DoD SAPRO told the Subcommittee it will focus on other assessment measures such as surveys, research studies, and on-site visits.<sup>201</sup> The Defense Equal Opportunity

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

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

195 DoDD 6495.01 encl. 2., ¶ 1.c.

196 See DoDI 6495.02 encl. 3, ¶ 1.g.

197 *Id.* at encl. 12, ¶ 1.b.

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

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

200 *Id.* at 215.

201 *Id.* at 216-19.

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

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

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

#### 1. Service SAPR Training

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

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

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

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202 *Id.*

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

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

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

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

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

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

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

### 2. Recent Prevention Initiatives in the Services

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

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

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

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

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

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

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

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

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

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- use of physical surveys of facility lighting and visibility to identify needed safety improvements to reduce members' vulnerability in transit on bases<sup>212</sup> and a comprehensive alcohol de-glamorization campaign, including implementing Alcohol Detection Devices and changes to the sale of distilled spirits in on-base stores co-located with barracks and ships.<sup>213</sup>
- during Fiscal Year 2013, presentation of "No Zebras, No Excuses," a 90-minute theater-based training show with twelve vignettes to over 41,000 junior Sailors and Marines. Discussions followed the presentations, with facilitators addressing issues relating to laws, behaviors, and the inactive bystander mentality;<sup>214</sup>
- during Fiscal Year 2012, presentation of "All Hands" SAPR training to all Marines; the training included messages from the Commandant and video-based "ethical decision games" that present opportunity for bystanders to intervene passes;<sup>215</sup> and
- presentation to all Marine NCOs during Fiscal Year 2012 of "Take A Stand," a three-hour bystander intervention course comprised of mini-lectures, guided group discussions, activities, and video recordings.<sup>216</sup>

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

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

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

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

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

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

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

216 *Id.*

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

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

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

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

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

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

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

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

<sup>219</sup> 10 U.S.C. § 654 (repealed Dec. 22, 2010).

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

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

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

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

Commanders must focus on meaningful prevention strategies and must demonstrate leadership of DoD's prevention approach and its principles. They must ensure members of their command are effectively trained by qualified and motivated trainers who are skilled in teaching methods that will keep participants tuned in to prevention messages.

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

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

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

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

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

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

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

Given existing training and curriculum mandates, the Subcommittee does not believe DoD should promulgate an additional formal statement of what accountability, rights, and responsibilities a member of the Armed Forces has with regard to matters of sexual assault prevention and response. As described in Enclosure 10 of DoD Instruction 6495.02, DoD has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on SAPR principles, reporting options and resources for help, SAPR program and command personnel roles and responsibilities, prevention strategies and behaviors, and sexual assault report document retention requirements. DoD SAPRO recently established core SAPR training competencies with tailored instruction requirements for the following situations: accessions training, annual refresher training, pre- and post-deployment training, professional military education, pre-command and senior enlisted leader training, sexual assault response coordinator (SARC) and victim advocate (VA) training, and chaplain training.

### E. PART IV SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

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

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

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

**Finding 5-5:** Scientists' understanding of the various risk and protective factors for sexual violence continues to evolve, and much remains to be learned. DoD's prevention policies and requirements adopted since 2012 reflect its efforts to be informed by the best available science. While DoD's prevention approach currently reflects

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its consultation with the CDC and leading private organizations like the National Sexual Violence Resource Center, it is too soon to assess the effectiveness of specific prevention programs initiated in the Services.

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

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

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

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

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

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

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

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

**Recommendation 9:** The Secretary of Defense and Service Secretaries should ensure prevention programs address concerns about unlawful command influence. In particular, commanders and leaders must ensure SAPR training programs and other initiatives do not create perceptions among those who may serve as panel members at courts-martial that commanders expect particular findings and/or sentences at trials or compromise an accused Service member's presumption of innocence, right to fair investigation and resolution, and access to witnesses or evidence.

**Finding 9-1:** In addition to supporting victims of sexual assault, commanders have an equally important obligation to support and safeguard the due process rights of those accused of sexual assault crimes.

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

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

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

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

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

**Finding 13-1:** As described in Enclosure 10 of DoD Instruction 6495.02, DoD has established comprehensive, mandatory training requirements that are designed to ensure all personnel receive tailored training on

#### IV. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT PREVENTION

SAPR principles, reporting options and resources for help, SAPR program and command personnel roles and responsibilities, prevention strategies and behaviors, and sexual assault report document retention requirements.

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

# V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

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

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

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

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

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

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

### A. REPORTING CHANNELS FOR VICTIMS OF SEXUAL ASSAULT

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

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

Only SARCs, SAPR VAs, and healthcare personnel are authorized to accept restricted reports.<sup>231</sup> A SARC or SAPR VA is required to report the fact of the assault to the installation commander,<sup>232</sup> but the report will not contain personally identifiable information and may not be used for investigative purposes.<sup>233</sup> Accordingly, the victim's identity remains confidential in a restricted report.<sup>234</sup> 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.<sup>235</sup>

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

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

230 U.S. Dep't of Def. Instr. 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES encl. 4, ¶ 1.b (Mar. 28, 2013) [hereinafter DoDI 6495.02].

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

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

233 DoDI 6495.02 encl. 4, ¶ 1.b.

234 *Id.*

235 *Id.* at encl. 4, ¶ 1.e.

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

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

238 *Id.* at encl. 4, ¶ 1.c(1).

## V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

Though several categories of military personnel are trained as initial responders to sexual assault reports, only SARCs and SAPR VAs are responsible for documenting reports on a Defense Department Form 2910.<sup>239</sup> The following chart depicts the different reporting resources available within DoD to victims of sexual assault:

<b>Unrestricted Reporting Resources</b>	<b>Restricted Reporting Resources<sup>240</sup></b>
<ul style="list-style-type: none"><li>• Sexual Assault Response Coordinators (SARCs)</li><li>• Victim Advocates (VAs)</li><li>• Health Care Professionals or Personnel</li><li>• <i>Chaplains</i><sup>241</sup></li><li>• <i>Legal Personnel</i></li><li>• <i>Chain of Command</i></li><li>• <i>Law Enforcement – Military Police or Military Criminal Investigative Organizations</i></li></ul>	<ul style="list-style-type: none"><li>• Sexual Assault Response Coordinators (SARCs)</li><li>• Victim Advocates (VAs)</li><li>• Health Care Professionals or Personnel</li><li>• <i>Chaplains</i><sup>242</sup></li><li>• <i>Legal Assistance Attorneys</i><sup>243</sup> and <i>Special Victims Counsel</i></li></ul>

Reporting options are well and broadly publicized throughout the military. DoD policy requires that all military personnel must receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and leadership development training, before and after deployments, and prior to filling a command position.<sup>244</sup> 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.<sup>245</sup>

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

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

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

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

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

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

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

245 *Id.* at encl. 10, ¶ 2.d(6, 11).

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

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

### B. INVESTIGATION OF SEXUAL ASSAULT ALLEGATIONS

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

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

Allegations of sexual assault by a Service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction and may accept investigative responsibility if the MCIO declines, or the investigation may be worked jointly by the MCIO and the civilian agency.<sup>252</sup> 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.<sup>253</sup>

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

247 U.S. Dep’t of Def. Instr. 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE ¶ 3.c (May 1, 2013) [hereinafter DoDI 5505.18]. Section 1742 of the FY14 NDAA codifies this requirement. FY14 NDAA, Pub. L. No. 113-66, § 1742, 127 Stat. 672 (2013).

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

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

250 DoDI 5505.18 encl. 2, ¶ 6.

251 *Id.* at encl. 2, ¶ 1.

252 *Id.* at ¶ 3.c(3).

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

## V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

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

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

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

## C. DISPOSITION AUTHORITY FOR REPORTS OF SEXUAL ASSAULT

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

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

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

255 DTM-14-002 at Glossary.

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

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

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

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

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

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

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

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

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

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

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

264 *Id.* at encl. 12, ¶ d.

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

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

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

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

269 DoDI 5505.18 encl. 2, ¶¶ 4, 5.

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

### D. OTHER COMMANDER RESPONSIBILITIES

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

After a victim files an unrestricted report, which triggers an investigation and informs the chain of command of an allegation, the commander has means to safeguard the victim. A commander may impose a military protective order or other lawful order (e.g., a no-contact order) to insulate an alleged victim from the subject of the allegation.<sup>273</sup> The commander may restrict or confine a subject, if warranted.<sup>274</sup> The commander may also move the victim or subject to a different workplace or unit or pursue a location transfer for either individual. If a victim requests to change his or her unit, assignment, or location, DoD and Service policies require the commander to act on the request within 72 hours, and any request that is denied must be reviewed by the first general officer in the chain of command.<sup>275</sup> In addition, a commander must ensure a victim has sufficient time to attend medical, legal, or other appointments and ensure he or she does not experience retaliation<sup>276</sup> through personnel actions or from others in the organization when he or she reports or is a victim of a crime.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## V. COMMANDER RESPONSIBILITIES IN SEXUAL ASSAULT RESPONSE

### E. PART V SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

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

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

# VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

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

## A. PRETRIAL RESPONSIBILITIES OF COMMANDERS

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

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

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

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

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

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

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

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

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

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

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

### B. PRETRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES

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

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

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

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

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

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

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

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

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

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

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

## VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

officer.<sup>296</sup> 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.”<sup>297</sup> In addition to other amendments, Section 1702(a) of the National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) changes the review standard under Article 32 from a “thorough and impartial investigation” of charges to a preliminary hearing for the narrow purposes of: (1) determining whether probable cause exists to believe an offense has been committed and that the accused committed the offense; (2) determining whether the convening authority has court-martial jurisdiction over the offense and the accused; (3) consideration of the form of charges; and (4) recommending disposition.<sup>298</sup> These changes are effective December 27, 2014, one year after enactment of the FY14 NDAA.<sup>299</sup>

Once the investigation is complete, the Article 32 investigating officer provides findings and recommendations to the convening authority who directed the Article 32.<sup>300</sup> That convening authority then makes an informed decision on the disposition of charges. Where the evidence supports the charged offenses, the charges and the Article 32 investigating officer’s report, recommendations of subordinate commanders, and any documents accompanying the charges will normally be forwarded to the GCMCA. A convening authority disposing of charges may also return the charges to a subordinate commander for action, but may not direct or influence that action.<sup>301</sup> For any offense committed after June 24, 2014, Section 1705 of the FY14 NDAA amends Article 18 of the UCMJ to restrict jurisdiction for charges of rape or sexual assault under Article 120(a) or (b), rape or sexual assault of a child under Article 120b, forcible sodomy under Article 125, or attempts to commit these offenses under Article 80 of the UCMJ to general courts-martial.<sup>302</sup> As such, an initial disposition authority or GCMCA will not have authority to return charges for these offenses to a subordinate commander for possible referral to a special court-martial.

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

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

297 10 U.S.C. § 832 (UCMJ art. 32).

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

299 *Id.* at § 1702(d)(1).

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

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

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

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

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

## ROLE OF THE COMMANDER SUBCOMMITTEE

A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command.<sup>305</sup> Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6.<sup>306</sup> Before the convening authority may refer charges to a general court-martial, the staff judge advocate must provide, in writing, his or her own personal legal opinion expressing whether the charges state an offense, whether the charges are warranted<sup>307</sup> by the Article 32 investigation report, and whether a court-martial would have jurisdiction over the individual and the offense. In advising convening authorities, all military attorneys acting on behalf of the Government are bound by their Service's rules of professional conduct, which require them to advise the convening authority when a charge is not warranted by the evidence or supported by probable cause.<sup>308</sup> 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.<sup>309</sup> Once the staff judge advocate has provided written advice and a disposition recommendation, the GCMCA may decide whether to refer the case to court-martial or send it to a lesser forum for adjudication.<sup>310</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. TRIAL RESPONSIBILITIES OF CONVENING AUTHORITIES AND THE MILITARY JUDGE

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

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

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

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

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

325 *Id.* at §§ 1702(b), 1705.

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

## VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

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

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

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

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

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

328 *Id.*

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

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

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

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

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

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

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

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

### D. POST-TRIAL RESPONSIBILITIES OF COMMANDERS AND CONVENING AUTHORITIES

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

After trial, a court reporter assigned to the staff judge advocate prepares the record of trial, which is then reviewed by all counsel and authenticated by the military judge. The record is served on the accused with a copy of the staff judge advocate's recommendation to the convening authority, which summarizes the trial result, advises whether any corrective action should be taken on allegation of legal error, and provides a recommendation on clemency. The accused, with the advice of counsel, has ten days (up to 30 days with an extension request), to submit additional clemency matters to the convening authority.<sup>342</sup> 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

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

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

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

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

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

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

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

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

## VI. COMMANDER RESPONSIBILITIES IN MILITARY JUSTICE CASES

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

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

In contrast to the presumptive regularity of court-martial findings, the convening authority must take action on the adjudged sentence.<sup>346</sup> A convening authority may not increase the severity of the sentence. While Article 60 provides broad discretion to convening authorities as a matter of “command prerogative” to disapprove, commute, or suspend punishments, Section 1702 of the FY14 NDAA reduces this discretion.<sup>347</sup> 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.<sup>348</sup> 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.<sup>349</sup>

Following convening authority action on the sentence,<sup>350</sup> 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

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

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

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

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

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

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

349 *Id.*

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

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appellate action in accordance with Articles 66 and 69 of the UCMJ, respectively.<sup>351</sup> 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.<sup>352</sup>

### E. PART VI SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

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

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

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

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

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

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

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

**Finding 16-1:** Further study is appropriate to fully assess what positive and negative impacts would result from changing some pretrial or trial responsibilities of convening authorities.

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

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

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

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

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

**Finding 18-1:** Section 1702 of the FY 14 NDAA, which modifies Article 60 of the UMCJ, significantly limits the post-trial authority and discretion of convening authorities for serious sexual offenses by precluding them from disapproving findings and reducing their discretion to reduce the court-martial sentence for such offenses.

# VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

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

## A. RECENT STUDIES OF COMMANDER AUTHORITY UNDER THE UCMJ

Recent reviews conducted by organizations outside of DoD have considered the disciplinary powers of commanders under the UCMJ. In 2001, the Cox Commission<sup>353</sup> undertook a review of the system in light of the many changes the U.S. military experienced after a half-century under the UCMJ as well as significant military-justice reforms adopted in several Allied countries. As the Commission noted in its report, many witnesses testified that “the far-reaching role of commanding officers in the court-martial process remains the greatest barrier to operating a fair system of criminal justice within the armed forces.”<sup>354</sup>

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

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

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

355 *Id.* at 8.

356 *Id.* at 7-8.

357 *Id.* at 7.

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

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

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

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

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

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

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

359 *Id.* at 135.

360 *Id.* at 135-36.

361 *Id.* at 137.

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

363 *Id.* at 200-01.

364 *Id.* at 201.

## VII. PERSPECTIVES ON THE MILITARY JUSTICE AUTHORITY OF COMMANDERS

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

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

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

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

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

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

366 *Id.* at 146-47.

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

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

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

370 *Id.* at 10.

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

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

### 1. Victim Reporting

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

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

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

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

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

### 2. Reprisal and Retribution against Alleged Victims

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3. Expectations of Victims and Survivors

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

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

### 4. Fundamental Fairness and Objectivity

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

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

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

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

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

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

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

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

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

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

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

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

### 5. Independence and Training of Judge Advocates

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

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

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

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

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

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

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

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

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

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

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

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

### 6. Problems Arising from Conflicts of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 7. Military Justice Systems of Allied Nations

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

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

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

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

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

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

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

413 *Id.* at 329.

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

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

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

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

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

#### 1. Good Order and Discipline

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

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

415 *Id.* at 54-55.

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

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

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

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

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

## 2. Command Authority

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

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

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

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

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

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

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

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

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

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

### 3. Commander Objectivity and Perceived Conflicts of Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

A retired senior Navy commander added to the Subcommittee that the role of staff judge advocates on military justice matters and recent changes providing for review of case disposition decisions by more senior commanders also alleviate real or perceived concerns about conflicts of interest. He called the commander’s authority and oversight afforded on such decisions “a very positive element for the victim and for justice.”<sup>435</sup>

### 4. Operational Effectiveness

Proponents for retaining commanders in convening authority roles also addressed the potential impact that change could have on military operations. The Legal Counsel to the Chairman of the Joint Chiefs of Staff told the RSP that “the question of military discipline is fundamentally intertwined with the greater question of the commander’s responsibility for operational readiness,”<sup>436</sup> and some presenters described potential negative consequences to military operations if commanders lacked military justice convening authority.

Military officials expressed concern that removing or limiting a commander’s military justice authority may impair the essential decisiveness of effective military operations. Speaking about his recent experiences in Afghanistan, a senior Army commander observed that Allied commanders lacked the comprehensive military justice authority he held, which he believed “made for tentative actions on the battlefield or on decision making in general.”<sup>437</sup> Similarly, The Judge Advocate General of the U.S. Army said that “commanders and other forces sometimes hesitate to engage the opposing force in combat operations based on their concerns that their

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432 *Id.* at 133 (testimony of Lieutenant General (Retired) Ralph Jodice, II, U.S. Air Force).

433 *Id.* at 134.

434 *Id.* at 137-38 (testimony of General (Retired) Ann Dunwoody, U.S. Army).

435 *Transcript of RSP RoC Subcommittee Meeting 260* (Jan. 8, 2014) (testimony of Vice Admiral (Retired) Scott R. Van Buskirk, U.S. Navy)

436 *Transcript of RSP Public Meeting 205-06* (Sept. 25, 2013) (testimony of Brigadier General Richard C. Gross, U.S. Army).

437 *Id.* at 11 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

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actions will be viewed in hindsight by individuals who do not understand combat. There is actually a term of art used to describe this hesitation. It is called ‘judicial insecurity.’”<sup>438</sup>

Additionally, some argue that removing convening authority from a commander with operational responsibility may create issues for subordinates. A retired senior Army commander observed that removing court-martial authority from a commander “would seriously undermine the ability of that commander to ensure justice in his or her entire organization and thereby gain the trust that is absolutely essential to success in any kind of military operation.”<sup>439</sup> The Judge Advocate General of the Air Force said that removing a commander’s military justice authority would send a message that “you can trust your commander to send you into battle where his or her decisions may cause you to pay the ultimate price . . . but you cannot trust your commander to hold your fellow airm[a]n accountable for his crime against you. This message is more than just confusing and counterintuitive. It degrades airmen’s trust and confidence in their commanders and, in turn, degrades military discipline.”<sup>440</sup>

### 5. Commander Accountability for Sexual Assault Prevention and Response

Many presenters emphasized the importance of commanders in addressing the issue of sexual assault in the military. A senior Army commander said that “[i]ncreasing commander involvement and accountability is key to solving this problem.”<sup>441</sup> According to a professor who presented to the RSP, removing commanders from responsibility “could create a perverse incentive for military justice matters in which commanders feel a diminished sense of responsibility because a distant set of judge advocates somewhere else is in charge of these things. This could erode the relationship between the military justice system and the command it is designed to serve.”<sup>442</sup>

Some presenters articulated issues of particular importance to victims of sexual assault that could be affected by removing convening authority from commanders. “In every Service, we have heard that victims are concerned about the length of the process, their inclusion and ability to voice preferences within the process, and the opacity of the system. Taking military justice decision-making authority away from commanders will exacerbate all of these problems.”<sup>443</sup> A senior Air Force commander noted that

in my experience, . . . one of the top reasons people don’t report is because they perceive that the environment into which they are going to report is either, at worst, hostile or, at best, not welcoming. And my experience is in many cases that’s true, but it’s not at the level of the commander, it’s the level below the commander and the individual offices and the unit. I believe the way forward is not to take the commander further out of that responsibility to make

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438 *Id.* at 222-23 (testimony of Lieutenant General Flora D. Darpino, U.S. Army) (noting that judge advocates from other countries indicated commanders were reluctant to engage in aggressive operations when they perceived their actions would be reviewed, investigated, or prosecuted according to common law principles rather than through the lens of armed conflict).

439 *Transcript of RSP RoC Subcommittee Meeting* 322 (Jan. 8, 2014) (testimony of General (Retired) Fred M. Franks, Jr., U.S. Army).

440 *Transcript of RSP Public Meeting* 236 (Sept. 25, 2013) (testimony of Lieutenant General Richard C. Harding, U.S. Air Force).

441 *Id.* at 13 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

442 *Written Statement of Professor Christopher Behan, Southern Illinois University School of Law, to RSP* (undated).

443 *Written Statement of Brigadier General Richard C. Gross, U.S. Army, to RSP* 3 (Sept. 25, 2013).

sure that that environment is the one that we want to . . . increase reporting, but to hold them further accountable for it.<sup>444</sup>

Presenters also stressed that addressing sexual assault in military organizations requires more than changes to legal authority or procedures. “The eradication of sexual assault within the Coast Guard requires more than extra lawyers or added legal procedures. It requires a cultural change. Cultural change requires leadership; and leadership in the military is provided by the commander. . . . It is imperative that the commander have a role in the disciplinary process so that they remain engaged in the fight to eliminate sexual assault and that their subordinates see that commitment. . . . Currently, our commanders are openly and frankly discussing the issues of sexual assault with their subordinates while at the same time backing up that talk by holding those accountable who fail to follow the law. If the ability to hold members accountable is removed, the importance of the prevention message will also be diminished, no matter how much the commanders stress it.”<sup>445</sup>

The Subcommittee considered views of survivors of sexual assault who did not advocate removing the commander from the process and from those who expressed satisfaction at the manner in which their cases were handled in the military justice system.<sup>446</sup> One survivor told the RSP in November that “[t]he chain of command must be held responsible and accountable for serious errors in judgment. Complainants and victims must be protected from retaliation and reprisal. A process must be in place now to ensure this does not happen. This is the only area that should be taken out of the Department of Defense.”<sup>447</sup>

### 6. Convening Authority and Staff Judge Advocate Relationship and Interaction

Proponents stressed the importance and nature of the relationship between a convening authority and his or her staff judge advocate. Current GCMCAs said they value and rely on advice and recommendations of their staff judge advocates and legal staffs in making military justice decisions. Commanders said they communicate frequently with their legal advisors, and they highlighted the importance of the advice provided to them in evaluating cases. A current Army GCMCA noted he didn’t always view cases with the same perspective as his staff judge advocate, but he knew he could count on receiving “the very best legal advice, unvarnished and free from influence, except by the laws of our military.”<sup>448</sup>

Legal advisors indicated they felt comfortable and well trained to independently advise senior commanders and disagree with their decisions, when appropriate. A staff judge advocate to a Navy GCMCA said Navy judge advocates receive ethics training from the Naval Justice School prior to serving as advisors to Navy flag officers, which helps them understand how to respond to disagreements with their commanders.<sup>449</sup> A current GCMCA from the Marine Corps said he expects his staff judge advocate “to be a second and third order

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444 *Transcript of RSP Public Meeting 156-57* (Sept. 25, 2013) (testimony of General Edward A. Rice, Jr., U.S. Air Force).

445 *Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard, to RSP* (Sept. 25, 2013).

446 *Transcript of RSP Public Meeting 411-22* (Nov. 7, 2013) (public comment of DA); *Transcript of RSP Public Meeting 7-17* (Nov. 8, 2013) (testimony of Command Sergeant Major JG, U.S. Army); *Transcript of RSP Public Meeting 496-505* (Dec. 11, 2013) (testimony of Major MB, Texas National Guard); *Letter with Enclosures from Lieutenant General Flora D. Darpino, U.S. Army, to RSP* (Nov. 6, 2013), available at <http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08>.

447 *Transcript of RSP Public Meeting 418-19* (Nov. 7, 2013) (public comment of DA).

448 *Transcript of RSP Public Meeting 13-14* (Sept. 25, 2013) (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

449 *Id.* at 124-25 (testimony of Captain David M. Harrison, U.S. Navy).

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thinker,”<sup>450</sup> and a staff judge advocate from the Coast Guard observed that legal advisors must have “open and frank conversation with the commander” at levels unlike any other staff officers.<sup>451</sup>

Lawyers stressed, however, that convening authorities weigh factors differently than lawyers when assessing whether cases should be tried by court-martial. “Commanders have consistently shown willingness to go forward in cases where attorneys have been more risk adverse. Commanders zealously seek accountability when they hear there’s a possibility that misconduct has occurred within their units, both for the victim and in the interest of military discipline, and we need to maintain the ability to do so.”<sup>452</sup> Brigadier General Richard Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff, cited information provided by the Vice Chairman of the Joint Chiefs of Staff to the Senate Armed Services Committee that indicated commanders took recent action in roughly 100 cases where civilian prosecutors had declined to prosecute.<sup>453</sup> The Judge Advocate General of the Army described 79 cases where Army commanders chose to prosecute off-post offenses after civilians declined to prosecute or could not prosecute. She said the cases demonstrated that “Army commanders are willing to pursue difficult cases to serve the interests of both the victims and our community.”<sup>454</sup> Legal advisors said commanders bring other factors to the table, including responsibility for good order and discipline and accountability to the organization, which legal advisors do not.<sup>455</sup>

When legal advisors have concerns about military justice decisions of a convening authority, they described the statutory authority of the staff judge advocate under Article 6 of the UCMJ<sup>456</sup> as an effective check on convening authority discretion. The Judge Advocate General of the Army said Article 6 gives judge advocates “the authority . . . to take [cases] up . . . through the judge advocate chains, and make sure that justice is done. It is an independent authority that exists by statute that while we work for the commander, we are also independent of the commander when it comes to our legal advice, because our client is the Army, not the commander.”<sup>457</sup> A staff judge advocate to a Marine Corps GCMCA called Article 6 authority “an effective method which a staff judge advocate can use in order to get to the right decision for the organization.”<sup>458</sup>

### 7. Deployability and Logistics of the U.S. Military Justice System

Numerous presenters mentioned the transportability of the U.S. military justice system, which is controlled by commanders and deployable to any location where U.S. Forces operate. Unlike civilian court systems, one staff judge advocate observed that military “courts martial are not standing. They’re created for limited purposes and limitation durations. And so all of the resources that are required to constitute that, or most of the resources, right now are owned by the commander.”<sup>459</sup>

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450 *Id.* at 135 (testimony of Major General Steven W. Busby, U.S. Marine Corps).

451 *Id.* at 62 (testimony of Commander William Dwyer, U.S. Coast Guard).

452 *Id.* at 207 (testimony of Brigadier General Richard Gross, U.S. Army).

453 *Id.* at 206-07.

454 *Letter with Enclosures from Lieutenant General Flora D. Darpino, U.S. Army, to RSP* (Nov. 6, 2013).

455 *Transcript of RSP Public Meeting 148-50* (Sept. 25, 2013) (testimony of Commander William Dwyer, U.S. Coast Guard, and Captain David Harrison, U.S. Navy).

456 10 U.S.C. § 806.

457 *Transcript of RSP Public Meeting 271-72* (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, U.S. Army).

458 *Id.* at 123-24 (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps).

459 *Id.* at 80.

A senior commander with GCMCA authority said he perceived benefits in the current system when operating in a deployed location. “Operationally, I have witnessed firsthand . . . the advantages U.S. commanders had in making use of the military justice system that affords investigation, prosecution, and adjudication cases from a deployed footprint, while affording the military justice system access to witnesses, trial attorneys representing both sides, and an impartial judge, and, if necessary, a military jury.”<sup>460</sup> In contrast, he observed that the military justice systems of Allied nations were “inefficient, costly, and less effective system[s] for dealing with these unique cases.”<sup>461</sup> For example, statistics provided by the former Army Prosecuting Authority for the British Army showed the United Kingdom had not tried any cases in theater in either of the conflicts in Iraq or Afghanistan, despite its commitment of forces to those operations.<sup>462</sup>

Numerous presenters discussed resource impacts if convening authority were vested in someone other than the organizational commander. Some said the U.S. military is sufficiently resourced and adaptable to accommodate increased logistical requirements that might result, if such requirements are prioritized.<sup>463</sup> However, a senior Service legal official said “[c]reating two parallel systems of military justice, each run by a completely different authority will create an inefficient system that will stress existing resources.”<sup>464</sup> A staff judge advocate stated that “when you have the decision making process bifurcated, you create the inherent possibility of a conflict in prioritization . . . [T]here may be times where a referral decision authority may view the importance of when and where that court-martial stands differently than a commander. And by bifurcating that, you create the possibility of conflict in that decision making process.”<sup>465</sup>

### 8. Military Justice Systems of Allied Nations

Many presenters highlighted differences between the U.S. and Allied military justice systems, and many noted that our Allies have not produced better results under different legal frameworks in combating sexual assault crimes. The Legal Counsel to the Chairman of the Joint Chiefs of Staff said that “the move by our [A]llies to more civilianized systems mirrors a general global trend towards demilitarization, especially among countries that no longer require or maintain truly expeditionary militaries. The role of the United States military is different, and it will continue to be different. While many countries can afford for the center of the[ir] military justice systems to be located . . . far from the arenas of international armed conflict, we require a more flexible capability that can travel with the unit as it operates in any part of the world.”<sup>466</sup> General Gross further noted that “[i]t is also important to keep in mind that the scope and scale of our [A]llies’ caseloads are vastly different than ours. None of our [A]llies handle the volume of cases that the U.S. military does. This is likely due to the greater size of our military forces in comparison.”<sup>467</sup>

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460 *Id.* at 10-11 (testimony of Lieutenant General Michael S. Linnington, U.S. Army).

461 *Id.* at 11.

462 See Brigadier (Retired) Anthony Paphiti, “UK Military Prosecutions for Sexual Offences” at 2 n.6 (undated), *currently available at* [http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/uk-mj-sys/02\\_UK\\_Mil\\_Pro\\_Sexual\\_Offenses.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/uk-mj-sys/02_UK_Mil_Pro_Sexual_Offenses.pdf).

463 See *Transcript of RSP Public Meeting 64* (Sept. 25, 2013) (testimony of Captain David M. Harrison, U.S. Navy); *Transcript of RSP Public Meeting 100-01* (Sept. 24, 2013) (testimony of Professor Eugene R. Fidell, Yale Law School); *id.* at 55-56 (testimony of Professor Amos N. Guiora, S.J. Quinney College of Law, University of Utah).

464 *Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP 12* (Sept. 25, 2013).

465 *Transcript of RSP Public Meeting 81-82* (Sept. 25, 2013) (testimony of Lieutenant Colonel Kevin C. Harris, U.S. Marine Corps).

466 *Id.* at 209 (testimony of Brigadier General Richard C. Gross, U.S. Army).

467 *Id.*

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Changes made by our Allies to their military justice systems have occurred at different times, and Allied representatives told the RSP that changes were not made in order to improve sexual assault reporting or prosecution.<sup>468</sup> A professor stated that our Allies removed prosecutorial discretion and the ability to convene and administer courts-martial from commanders “in the wake of court decisions interpreting treaty obligations and changes in national charters of rights and freedoms.” He noted that “similar changes are not constitutionally required in our system. With respect to military justice, the foundational constitutional principles [in the United States] have never been amended or changed.”<sup>469</sup> A recent article observed that, contrary to the view that the United States is “lagging behind” its Allies in modifying its military justice system, the United States was actually “the forerunner in considering the role of the commander in its military justice system.”<sup>470</sup> The article notes that the Elston Act of 1948, the adoption of the UCMJ, the Military Justice Act of 1968, the enactment of the Military Rules of Evidence in 1980, and the Military Justice Act of 1983 all reflect the civilianization of the U.S. military justice system, but they “did not fundamentally alter the command-centric focus of the chain of command in relation to court martial procedures.”<sup>471</sup>

Current and former military officials from our Allied partners addressed structural changes that removed the commander from the prosecution of cases and what effect, if any, the changes had on reporting trends for sexual assault offenses. None found the changes increased sexual assault reporting. The Deputy Military Advocate General for the Israeli Defense Forces (IDF) noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increase.<sup>472</sup> Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue.<sup>473</sup> The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010.<sup>474</sup> The Canadians were unable to present statistics addressing whether the change in commanders’ role in the military justice system affected sex crime reporting.<sup>475</sup> The Commodore of Naval Legal Services for Britain’s Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had “no discernible” effect on the reporting of sexual assault offenses.<sup>476</sup> The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and

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468 *Transcript of RSP Public Meeting 181* (Sept. 24, 2013) (testimony of Major General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces); *id.* at 244-45 (testimony of Commodore Andrei Spence, Naval Legal Services, British Royal Navy); *id.* at 238-39 (testimony of Air Commodore Paul A. Cronan, Director General, Australian Defence Force Legal Service).

469 *Written Statement of Professor Christopher Behan, Southern Illinois University School of Law, to RSP* (Sept. 21, 2013).

470 Stephen S. Strickey, ‘Anglo-American’ Military Justice Systems and the Wave of Civilianization: Will Discipline Survive?, (2)4 CAMBRIDGE J. INT'L & COMP. L. 763, 793 (2014).

471 *Id.*

472 For discussion regarding Israel’s reporting increase and Colonel Bar-On’s assessment that this increase cannot be attributed to changes in prosecutorial authority for sexual offenses see note 410, *supra*.

473 *Id.*

474 *Transcript of RSP Public Meeting 163-64* (Sept. 24, 2013) (testimony of Major General Blaise Cathcart, Canadian Armed Forces).

475 *Id.* at 181-82.

476 *Id.* at 282-83 (testimony of Commodore Andrei Spence, British Royal Navy). Recent discussion also indicates that prosecution authority changes in the United Kingdom have not quelled concern about sexual assault reporting and prosecution or the protection of Service members. Member of Parliament Madeleine Moon, commenting on recent data from the Ministry of Defence on sexual assault reporting and prosecution, said that the figures could simply be the “tip of the iceberg” and that many more sex attacks in the armed forces could be going unreported. She said “[n]ot enough is being done to make sure that people who join the armed forces are safe from attack and abuse by colleagues.” *Sexual assault allegations in military number 200 in three years*, THE GUARDIAN (Mar. 2, 2014).

2006 reforms.<sup>477</sup> The Australian Defence Force, however, estimates that between 2008 and 2011, 80% of sexual assaults in their armed forces were unreported even though, by that time, sex offenses had been removed from the criminal jurisdiction of their defense forces.<sup>478</sup>

Moreover, the Legal Counsel to the Chairman of the Joint Chiefs of Staff said he surveyed legal advisors from Allied nations and learned that none could correlate system changes to increased or decreased sexual assault reporting. He indicated there was no statistical or anecdotal evidence among U.S. Allies that removing commanders from the charging decision had any effect on victims' willingness to report crimes.<sup>479</sup>

### 9. Progress Indicated through Recent Efforts under Current System

Senior command and legal officials from the Services stated that any proposals for change to the U.S. military justice system must be considered carefully in the context of changes already made and functionality of the overall system. The Staff Judge Advocate to the Commandant of the Marine Corps observed that the Services are "in the middle of executing a remarkable amount of change. Included in this change was a complete revision of the substantive law defining sexual assault."<sup>480</sup> The Judge Advocate General of the Navy said "when you [consider] . . . the importance of discipline in our business, changing the system, frankly, standing it on its head to get at the possibility is something that we should think very, very carefully about before we go forth and do it, particularly when we've improved a lot of the victim support processes, reporting processes."<sup>481</sup> The Chief of Staff of the Army stated that changes to the UCMJ, even where everyone agrees change is required, should "not be made in a piecemeal fashion. . . By taking a deliberate and thoughtful approach, we can ensure that the UCMJ remains a first class piece of legislation, but also ensure that unforeseen or unanticipated consequences do not adversely affect our military legal system. Any changes to our system must be done with a full appreciation for the second and third order effects on our pre-trial, post-trial and appellate process."<sup>482</sup>

Service officials also warned against implementing systemic change before there is adequate time to assess the effects of current initiatives, and in the absence of any evidence that change would achieve the objectives those advocating removal of convening authority seek. The Staff Judge Advocate to the Commandant of the Marine Corps commented that there has been a "staggering amount of evolutionary change for one particular class of offenses. We should embrace these changes if they improve our ability to prosecute and defend cases, and protect victims. We must also fully assess the effects of these changes before implementing more revolutionary and fundamental changes to the military justice system. Replacing a commander-driven system of justice with a lawyer-driven model is revolutionary, not evolutionary, and will do more harm than good."<sup>483</sup>

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<sup>477</sup> Transcript of RSP Public Meeting 238-39 (Sept. 24, 2013) (testimony of Air Commodore Paul A. Cronan, Australian Defence Force Legal Service).

<sup>478</sup> Lisa M. Schenck, "Fact Sheet on Australian Military Justice," at 4-5 (Sept. 18, 2013), currently available at [http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/other/01\\_Australia\\_Fact\\_Sheet.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/other/01_Australia_Fact_Sheet.pdf).

<sup>479</sup> Transcript of RSP Public Meeting 207-09 (Sept. 25, 2013) (testimony of Brigadier General Richard C. Gross, U.S. Army).

<sup>480</sup> Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP 11 (Sept. 25, 2013).

<sup>481</sup> Transcript of RSP Public Meeting 299-300 (Sept. 25, 2013) (testimony of Vice Admiral Nanette DeRenzi, U.S. Navy).

<sup>482</sup> Written Statement of General Raymond T. Odierno, U.S. Army, to SASC 11-12 (June 4, 2013).

<sup>483</sup> Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps, to RSP (Sept. 25, 2013).

### D. RECENT SEXUAL ASSAULT REPORTING AND PROSECUTION TRENDS

The DoD Sexual Assault Prevention and Response Office (SAPRO) oversees DoD policy for the sexual assault prevention and response (SAPR) program and is responsible for oversight activities assessing SAPR program effectiveness. Pursuant to reporting requirements imposed by Congress, DoD SAPRO maintains statistical data by fiscal year on restricted and unrestricted reports of sexual assault.

In Fiscal Year 2012 (FY12), DoD SAPRO reported the Services received 3,374 reports of sexual assault involving Service members as either victims or subjects.<sup>484</sup> This number includes both restricted and unrestricted reports. The number of reports received in FY12 increased by 6 percent from Fiscal Year 2011 (FY11), and FY12 represented the highest number of reports received since DoD began tracking reports in 2004.<sup>485</sup> FY12 reports increased for every Service,<sup>486</sup> and the number of Service members making reports of sexual assault increased by eight percent from FY11 and 33 percent compared to Fiscal Year 2007 (FY07).<sup>487</sup> Unrestricted reporting increased by 5 percent in FY12, and restricted reporting increased by 12 percent.<sup>488</sup> Restricted report conversions to unrestricted reports increased from 14.1 percent in FY11 to 16.8 percent in FY12.<sup>489</sup>

In FY12, courts-martial charges were preferred in 68 percent of cases under military jurisdiction where sexual assault allegations were substantiated by investigation, up from 30 percent in FY07.<sup>490</sup> Cases resolved through nonjudicial punishment dropped from 34 percent to 18 percent over the same year comparison, and 157 of the 158 cases resolved in FY12 through nonjudicial punishment were for non-penetrating crimes.<sup>491</sup> According to DoD SAPRO, the differences in case resolution data from FY07 to FY12 indicate a “large change in how commanders are choosing to address the sexual assault charges brought to them by criminal investigators.”<sup>492</sup>

### E. SUBCOMMITTEE ASSESSMENT OF THE MILITARY JUSTICE ROLES OF COMMANDERS IN SEXUAL ASSAULT CASES

The Subcommittee heard many perspectives and reviewed considerable information about the commander’s role in the military justice system as the prosecutorial disposition authority for sexual assault allegations. Proponents advocating for system change and those defending the UCMJ’s current convening authority

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484 FY12 SAPRO ANNUAL REPORT, *supra* NOTE 167, AT 57. DoD SAPRO’S SEXUAL ASSAULT REPORTING DATA DOES NOT NECESSARILY REFLECT THE NUMBER OF SEXUAL ASSAULTS THAT OCCURRED IN A FISCAL YEAR, SINCE A REPORT MAY BE MADE AT ANY TIME.

485 *Id.* at 57-58. At the November 7, 2013, RSP public meeting, the DoD SAPRO Director provided initial estimates of Fiscal Year 2013 (FY13) reporting statistics. Preliminary data indicated receipt of more than 4,600 reports in FY13, a 46-percent increase over FY12. *Transcript of RSP Public Meeting* 37-38 (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

486 *Transcript of RSP RoC Subcommittee Meeting* 174-75 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D., Senior Executive Advisor, DoD SAPRO); see also Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, at 6.

487 FY12 SAPRO REPORT, *supra* NOTE 167, AT 59.

488 *Id.* AT 58.

489 *Transcript of RSP RoC Subcommittee Meeting* 166 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); see also Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, at 6.

490 *Transcript of RSP RoC Subcommittee Meeting* 177-78 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.); Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, at 20. Substantiated allegations also included lesser offenses that were resolved through nonjudicial punishment, other administrative actions, or administrative discharge.

491 Oct. 2014 SAPRO PowerPoint Presentation, *supra* note 227, at 20.

492 *Transcript of RSP RoC Subcommittee Meeting* 178 (Oct. 23, 2013) (testimony of Nathan Galbreath, Ph.D.).

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framework offered differing opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what consequences, positive or negative, would result from substantially changing the UCMJ's convening authority framework. Accordingly, the Subcommittee believes caution is warranted, and systemic change is not advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening authority for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September RSP public meeting observed that it "assumes too much, that somehow a prosecutor is always going to be better at this than commanders."<sup>493</sup> Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective. A recent White House report, describing the civilian sector, notes that "[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them."<sup>494</sup>

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors.<sup>495</sup> 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."<sup>496</sup> Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Many proponents of removing convening authority from commanders highlight the predicted impact on reporting rates and victims' confidence as key reasons for making the change. Nevertheless, the evidence does not support the conclusion that removal of convening authority from commanders would increase reporting rates. Further, the totality of the information received by the Subcommittee does not support a conclusion that removing convening authority from commanders will reduce concerns that victims express about possible retaliation for making reports of sexual assault. Retaliation concerns raised by victims generally relate to peers or direct supervisors and rarely involve convening authorities. Under Section 1709 of the FY14 NDAA, such retaliation will now constitute a criminal offense. Commanders must remain involved, exercising oversight of the treatment of victims after they report and taking action when victims suffer retaliation. Commanders must be held accountable when they fail to do so.

Although the Subcommittee recommends against modification of convening authority responsibilities for sexual assault offenses, it may be appropriate to consider other changes to authorities currently assigned to commanders and convening authorities under the UCMJ. In particular, the Subcommittee believes that expanding the role of military judges, who are independent from the chain of command, may improve case

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493 *Transcript of RSP Public Meeting 91* (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).

494 WHITE HOUSE REPORT, *supra* NOTE 126, AT 5.

495 *Id.* at 17 ("One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted [their] desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.") (footnote omitted).

496 *Id.*

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processing and enhance perceptions of the fairness and independence of courts-martial proceedings. The Subcommittee believes further study is necessary to fully assess what positive and negative impacts would result from changing pretrial or trial responsibilities of commanders. In particular, the Subcommittee believes discovery oversight, court-martial panel member selection, search authorization and other magistrate duties, appointment and funding of expert witnesses, and procurement of witnesses are responsibilities that are currently assigned in whole or in part to commanders that should be considered and fully assessed.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of potential changes to senior commander authority in the military justice system, commanders and leaders at all levels must enhance their efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility.

### F. PART VII SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 19:** Congress should not further modify the authority vested in senior commanders to convene courts-martial under the UCMJ for sexual assault offenses.

**Finding 19-1:** The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces.

**Finding 19-2:** The evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will improve the quality of investigations and prosecutions or increase the conviction rate in these cases.

**Finding 19-3:** Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.

**Finding 19-4:** Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective.

**Finding 19-5:** None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the

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convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.

**Finding 19-6:** It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.

# VIII. ASSESSING CLIMATE WITHIN COMMANDS FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

Perspectives differ about the role commanders should have in military justice processing for sexual assault crimes, but there is near universal agreement that military commanders and their subordinate leaders are essential to establishing and maintaining an organizational climate that reduces and eliminates sexual assault crimes and responds appropriately to incidents when they occur. Senator Carl Levin (D-MI) observed that “[o]nly the chain of command has the authority needed to [address] any problems with command climate that foster or tolerate sexual assaults. Only the chain of command can protect victims of sexual assaults by ensuring that they are appropriately separated from the alleged perpetrators during the investigation and prosecution of a case. And only the chain of command can be held accountable if it fails to change an unacceptable military culture.”<sup>497</sup> Senator Kirsten Gillibrand (D-NY) agreed, noting that “[o]nly commanders are responsible for setting command climate. Only commanders are responsible for good order and discipline.”<sup>498</sup> General Martin E. Dempsey, Chairman of the Joint Chiefs of Staff, stated that “[c]ommanders are accountable for all that goes on in a unit, and ultimately, they are responsible for the success of the missions assigned to them. Of course, commanders and leaders of every rank must earn that trust and, therefore, to engender trust in their units.”<sup>499</sup>

## A. ASSESSMENT METHODS

The Department of Defense and the Services use a variety of tools and methods to assess institutional and command effectiveness in preventing sexual assault and responding appropriately to sexual assault reports. Institutional assessment measures include metrics based on sexual assault case report information in the Defense Sexual Assault Incident Database (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 sexual assault prevention and response personnel, and fifteen additional metrics are in development.<sup>500</sup> DoD SAPRO and the Services also use information from the Workplace and Gender Relations Surveys, which are conducted biannually by the Defense Manpower Data Center (DMDC), and the Defense Equal Opportunity Management Institute (DEOMI) Equal Opportunity Climate Surveys (DEOCS) to assess DoD and Service effectiveness in sexual assault prevention and response.<sup>501</sup>

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497 *Transcript of SASC Hearing 4* (June 4, 2013) (opening statement of Senator Carl Levin).

498 *Transcript of RSP Public Meeting 311* (Sept. 24, 2013) (public comment of Senator Kirsten E. Gillibrand).

499 *Transcript of SASC Hearing 8-9* (June 4, 2013) (testimony of General Martin E. Dempsey, U.S. Army).

500 *Transcript of RSP Public Meeting 26-29* (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO); see also DoD SAPRO, “DoD Sexual Assault Prevention and Response Metrics” at 6-14 (Nov. 7, 2013) (PowerPoint Presentation to RSP [hereinafter Nov. 2013 SAPRO PowerPoint Presentation]).

501 *Transcript of RSP Public Meeting 27-28* (Nov. 7, 2013) (testimony of Major General Gary S. Patton); see also SAPRO Nov. 2013 PowerPoint Presentation at 3.

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The Services assess the effectiveness of individual commands in sexual assault prevention and response in a variety of ways. All of the Services use command climate surveys as a primary information source to assess the SAPR climate within commands, requiring units to conduct surveys when a new commander assumes responsibility for the organization and annually thereafter. Additionally, a variety of other assessment methods, including individual incident reports, SAPR office feedback from training course evaluations and Case Management Group and Sexual Assault Response Team meetings, DoD and Service inspectors general inspections, SAPR program compliance inspections, 360-degree and other leadership assessments, and local personnel surveys, are used to obtain information about the climate in a command.

### B. COMMAND CLIMATE SURVEYS

DEOMI conducts command climate surveys for DoD organizations. DEOMI was established in 1971 as the Defense Race Relations Institute (DRRI), responsible for race relations education for all members of the Armed Forces. DRRI became DEOMI in 1979, and its training mission expanded to include military and civilian equal opportunity and organizational management practices. In the 1990s, DEOMI developed an organizational assessment questionnaire designed to provide organization leaders information about the equal opportunity climate perceptions of assigned personnel. This survey, now called the DEOCS, has since been expanded to address a wide variety of human relations issues, including sexual assault, sexual harassment, hazing, and bullying.<sup>502</sup>

Initially, DEOCS was a voluntary tool available to commanders to assess perceptions within their organizations. The Services also had internal climate survey instruments, and commanders used surveys in conjunction with focus groups, interviews, and other local information gathering methods to assess their command's organizational climate. As the DEOCS evolved, it became the primary assessment survey for all military commanders at all levels of command. DEOCS became DoD's exclusive command climate survey instrument to assess perceptions within an organization on January 1, 2014.<sup>503</sup> DEOMI administered more than 1.8 million DEOCS surveys to DoD personnel in 2013, up from 154,381 surveys in 2005.<sup>504</sup>

The DEOCS survey asks respondents questions related to specific factors that impact command and organizational climate. DEOCS Version 3.3.5, which DEOMI implemented in March 2012, assessed fourteen workplace climate factors, including sexual harassment and discrimination; differential command behavior; positive equal opportunity behavior; racist behaviors; age, religious, and disability discrimination; organizational commitment and trust; work group effectiveness and cohesion; leadership cohesion; job satisfaction; and leadership support for sexual assault prevention and response. Version 3.3.5 was the first version of the DEOCS to include SAPR climate questions as a core component of the survey.<sup>505</sup> Survey

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502 *Transcript of RSP RoC Subcommittee Meeting 77-80* (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director, Military Equal Opportunity and Defense Equal Opportunity and Management Institute (DEOMI) Liaison, DoD Office of Diversity Management and Equal Opportunity).

503 *Id.* at 83-85 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI). Dr. McDonald said DEOCS assessments have increased from ten to 15 assessments per week in 2005 to 250 per week currently, reaching approximately 50,000 personnel with a 53-percent return rate on surveys. *Id.* at 84-85.

504 DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SAPR CLIMATE REPORT: DEPARTMENT OF DEFENSE AND RESERVE COMPONENT RESULTS 2 (MAR. 2014) [HEREINAFTER DEOMI SAPR CLIMATE REPORT].

505 Prior to transitioning to the DEOCS on January 1, 2014, the Air Force used the Air Force Unit Climate Assessment for its climate assessment surveys. The six SAPR questions incorporated into DEOCS Version 3.3.5 were also included in the Air Force's Unit Climate Assessment starting May 31, 2012. See DEOMI DIRECTORATE OF RESEARCH DEVELOPMENT AND STRATEGIC INITIATIVES, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) CLIMATE REPORT: DoD-WIDE ANALYSES AND RESULTS I, 1 (Oct. 2013).

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respondents answered six questions and sub-parts that assessed four dimensions of the SAPR climate within the command:

- Perceptions of leadership support for SAPR
- Perceptions of barriers to reporting sexual assault
- Bystander intervention climate
- Knowledge of sexual assault reporting options<sup>506</sup>

To provide leaders with a more comprehensive snapshot of the climate within their commands, DEOMI developed and released DEOCS Version 4.0 in January 2014. Version 4.0 includes 95 questions with sub-parts that assess 23 workplace climate factors. SAPR questions in DEOCS Version 4.0 were significantly revised and expanded, in part to meet the requirement in Section 572(a)(3) of the FY13 NDAA to assess the command “for purposes of preventing and responding to sexual assaults.” SAPR climate factors assessed through nine questions with sub-parts on DEOCS Version 4.0 include:

- Perceptions of safety
- Chain of command support
- Publicity of SAPR information
- Unit reporting climate
- Perceived barriers to reporting
- Unit prevention climate/bystander intervention
- Restricted reporting knowledge<sup>507</sup>

In addition, commanders may incorporate up to ten locally developed questions and five short-answer questions into the DEOCS to provide more information on specific topics of interest or focus to the commander. DEOMI provides commanders with examples of locally developed questions and works with commanders to ensure additional questions are valid for survey purposes.

### C. FREQUENCY, USE, AND REPORTING OF COMMAND CLIMATE SURVEYS

Prior to 2013, the Services had individual policies for frequency and use of command climate surveys. Section 572(a)(3) of the FY13 NDAA established a common command climate assessment standard, mandating that all military commanders must conduct a climate assessment of the command within 120 days after assuming command and at least annually thereafter.<sup>508</sup> In July 2013, the Under Secretary of Defense for Personnel and Readiness required the Secretaries of the Military Departments to establish procedures to ensure commanders of all units of 50 or more persons conduct climate assessments in accordance with the FY13 NDAA requirement. Section 587(b) of the FY14 NDAA required performance evaluations for all commanders to include a statement whether required climate assessments were conducted, and Section 587(c) directed that failure to conduct required assessments must be noted in a commander’s performance evaluation.<sup>509</sup>

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506 See *id.* at i.

507 DEOMI SAPR Climate Report, *supra* note 504, at I-III. In January and February 2014, DEOMI administered 2,582 climate surveys for DoD and Coast Guard units, which resulted in 122,003 responses from personnel. *Id.* at 16.

508 FY13 NDAA, Pub. L. No. 112-239, § 572(a)(3), 126 Stat. 1632 (2013). SECTION 1721 OF THE FY14 NDAA SUBSEQUENTLY AMENDED SECTION 572 OF THE FY13 NDAA TO ADD A REQUIREMENT THAT THE SECRETARY OF DEFENSE DIRECT THE SECRETARIES OF THE MILITARY DEPARTMENTS TO VERIFY AND TRACK COMPLIANCE OF COMMANDING OFFICERS IN CONDUCTING ORGANIZATIONAL CLIMATE ASSESSMENTS. FY14 NDAA, Pub. L. No. 113-66, § 1721, 127 Stat. 672 (2013).

509 FY14 NDAA, Pub. L. No. 113-66, § 587(b),(c), 127 Stat. 672 (2013).

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In addition, DoD's July 2013 policy mandated that the commander at the next level in the chain of command also receive survey results and analysis within 30 days after the requesting commander received the survey results.<sup>510</sup> This policy took effect prior to passage of Section 587(a) of the FY14 NDAA, which mandated that results of command climate assessments must go to the individual commander and the next higher level of command. The Services have since established policies in accordance with DoD's guidance for survey frequency and result reporting requirements.<sup>511</sup>

According to DEOMI, administering a survey does not complete assessment of a command's climate, because the results obtained from a DEOCS are only the "starting point" that may "highlight issues."<sup>512</sup> The results of climate surveys are compared against the normal distribution of the respective Service, and commands receive grades of "below average," "average," or "above average" on each survey factor.<sup>513</sup> If results for a particular survey factor indicate below-average assessment, such as leadership cohesion, the survey alone will not distinguish if the problem lies with the commander or subordinate leaders in the organization. Based on survey results, DEOMI provides additional recommendations for assessment tools, such as focus groups, interviews, or records reviews, that a commander may use to better diagnose areas of concern. Additionally, DEOMI provides training tools and other resources for commanders to improve command performance in specific focus areas that are assessed through the DEOCS.<sup>514</sup>

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.<sup>515</sup> Since July 2013, commanders requesting a DEOCS must provide the email address of their superior commander, and that commander is able to access survey results at the same time as the requesting commander.<sup>516</sup> In addition to receiving access to results through DEOMI, each of the Services has established policies requiring commanders to brief survey results to their superior commanding officer within 30 days. In September 2013, the Marine Corps implemented a policy requiring commanders to develop an action plan that addresses concerns identified in a DEOCS report and identifies periodic evaluations for assessing the plan's effectiveness. Marine Corps commanders must brief the survey results, analysis, and action plan to the

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510 U.S. Dep't of Def., Memorandum from the Under Secretary of Defense for Personnel and Readiness on Command Climate Assessments (July 25, 2013).

511 All Service policies comply with the frequency and reporting requirements of the FY13 NDAA mandate, but the Service policies differ in terms of the required frequency for completing command climate surveys and how survey results are shared or conveyed to the next echelon commander. See Marine Corps Administrative Message 464/13, "Command Climate Assessments" (Sept. 17, 2013) [hereinafter MARADMIN 464/13]; Army Directive 2013-29, "Army Command Climate Assessments" (Dec. 23, 2013) [hereinafter Army Dir. 2013-29]; Navy Personnel Command, "Command Climate Assessment Process," *at* [http://www.public.navy.mil/bupers-npc/support/21st\\_Century\\_Sailor/equal\\_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx](http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx); Dep't of the Air Force, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).

512 *Transcript of RSP RoC Subcommittee Meeting 108* (Nov. 20, 2013) (testimony of Mr. Jimmy Love, Acting Director, Military Equal Opportunity and DEOMI Liaison, DoD Office of Diversity Management and Equal Opportunity).

513 *Id.* at 106 (testimony of Dan McDonald, Ph.D., Executive Director, Research, Development and Strategic Initiatives, DEOMI).

514 *Id.* at 104-05.

515 *Id.* at 101. Additionally, DoD Directive 1350.2 requires the Service Secretaries to ensure commanders are held accountable for the equal opportunity climates within their commands. U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM ¶ 6.2.2 (Nov. 21, 2003).

516 *Transcript of RSP RoC Subcommittee Meeting 120-21* (Nov. 20, 2013) (testimony of Lieutenant Colonel Kay Emerson, Chief, Equal Opportunity Program and Policy, U.S. Army Resiliency Directorate).

next higher-level commander, who must approve the plan prior to implementation.<sup>517</sup> Other Services recently implemented similar policies for climate assessment action plans and reporting.<sup>518</sup>

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.<sup>519</sup>

### D. SUBCOMMITTEE ASSESSMENT OF COMMAND CLIMATE ASSESSMENT INITIATIVES

DoD and the Services have developed tools for individual commanders and senior leaders to assess the climate within commands for sexual assault and response. Mandates from Congress, DoD, and the Services establish baseline requirements for conducting and reporting climate assessments that seek to ensure commanders are attuned to and accountable for the SAPR climate within their unit. However, surveys alone do not provide a comprehensive assessment of the climate in an organization, and DoD and the Services must develop and implement other means to assess and measure organizational culture and culture change for sexual assault prevention and response. A command climate survey may not identify issues in an organization that warrant attention from leadership, and commanders must seek information from a variety of sources to fully assess the climate within their unit.

In addition to personnel surveys, DoD, the Services, and commanders should identify other resources for feedback on SAPR programs and local command climate. Chaplains, social services providers, military judges, inspectors general, and officers and enlisted personnel participating in professional military education courses may be underutilized resources for obtaining accurate, specific, and unvarnished information about institutional and local climate. Victim satisfaction interviews may provide direct insight into climate factors and feedback on installation services and organizational support.

Additionally, external evaluation of institutional and installation command climate is important to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness. DoD SAPRO serves as the Department's single point of accountability and oversight for developing and implementing SAPR programs and initiatives, and it is also responsible for assessing and monitoring the effectiveness of these efforts. External, independent reviews of SAPR efforts in DoD, no matter if they validate or disprove DoD's own internal assessments, would provide useful feedback to the Department and the public on SAPR programs and initiatives.

Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations. DEOMI stresses that command climate surveys are only a first step in organizational assessment. Additional interviews, targeted surveys, focus groups, audits, and records reviews are important follow-up tools to fully assess and understand indicators from survey results. Action plans developed by commanders following a climate survey, which are mandated by some Services but not by all, should first outline the steps the command will take to validate or expand upon survey information. Commanders should

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517 See MARADMIN 464/13.

518 See Army Dir. 2013-29; Navy Personnel Command, "Command Climate Assessment Process," at [http://www.public.navy.mil/bupers-npc/support/21st\\_Century\\_Sailor/equal\\_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx](http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx).

519 See DEOMI Responses to Requests for Information 33c, 33e (Nov. 21, 2013).

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also be accountable for developing a plan for assessing and monitoring the organization's SAPR climate through means other than periodic surveys.

Commanders are ultimately accountable for their unit's performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including other officers, enlisted leaders, supervisors, and noncommissioned officers. Most issues and concerns expressed by victims are with lower-level leaders, not senior commanders or convening authorities. Assessment of command climate must accurately assess and evaluate the effectiveness of subordinate organizational leaders in addition to commanders. Commanders must pay particular attention to the critical role played by noncommissioned officers and subordinate leaders and supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

The dramatic increase and large volume of surveys administered by DEOMI last year raises concern about survey fatigue. Surveys administered by DEOMI have increased substantially, and it appears this trend will continue based on new statutory and policy climate survey requirements. Although a climate survey can be a valuable tool for assessment, accurate and thoughtful feedback from unit members is essential to ensuring meaningful survey information. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide meaningful input. DoD and the Services must be mindful of survey fatigue, and they should monitor and assess what impact increased survey requirements have on survey response rates and survey results.

Section 3(d) of the Victims Protection Act of 2014 proposes to further expand climate assessment mandates by requiring climate assessments for the commands of the accused and the victim following an incident involving a covered sexual offense. The results of these climate assessments must be provided to the MCIO investigating the offense concerned and next higher level commander of the command. While information about a unit's culture or climate may prove helpful or relevant in some criminal investigations, it is not clear how organizational climate surveys would be effective following each report of a sexual assault offense. Organizational climate may not be a contributing factor in every alleged crime of sexual assault. Additional survey requirements increase concerns about survey fatigue and the accuracy of the information collected.

## E. PART VIII SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 20:** DoD and the Services must identify and utilize means in addition to surveys to assess and measure institutional and organizational climate for sexual assault prevention and response.

**Finding 20-1:** Although surveys may provide helpful insight into positive and negative climate factors within an organization, surveys alone do not provide a comprehensive assessment of the climate in an organization.

**Recommendation 21:** In addition to personnel surveys, DoD, the Services, and commanders should identify and utilize other resources to obtain information and feedback on the effectiveness of SAPR programs and local command climate.

**Finding 21-1:** Commanders must seek additional information beyond survey results to gain a clear picture of the climate in their organizations.

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**Recommendation 22:** The Secretary of Defense and Service Secretaries should ensure commanders are trained in methods for monitoring a unit's SAPR climate, and they should ensure commanders are accountable for monitoring their command's SAPR climate outside of the conduct of periodic surveys.

**Recommendation 23:** The Secretary of Defense and Service Secretaries should ensure commanders are required to develop action plans following completion of command climate surveys that outline steps the command will take to validate or expand upon survey information and steps the command will take to respond to issues identified through the climate assessment process.

**Recommendation 24:** The Secretary of Defense should direct periodic and regular evaluations of DoD SAPR programs and performance, to be conducted by independent organizations, which would serve to validate or disprove DoD's own internal assessments and would provide useful feedback to the Department and enhance public confidence in SAPR programs and initiatives.

**Finding 24-1:** Evaluations conducted by independent organizations of institutional and installation command climate are essential to achieving credible, unbiased measurement of SAPR initiatives, programs, and effectiveness.

**Recommendation 25:** DoD SAPRO and the Defense Equal Opportunity Management Institute (DEOMI) should ensure survey assessments and other methods for assessing command climate accurately assess and evaluate the effectiveness of subordinate organizational leaders and supervisors in addition to commanders.

**Finding 25-1:** Commanders are ultimately accountable for their unit's performance and climate, but unit climate assessments must consider the effectiveness of all leaders in the organization, including all subordinate personnel exercising leadership or supervisory authority.

**Finding 25-2:** Because officers and noncommissioned officers who are subordinate to the commander will inevitably have the most contact with sexual assault victims in their units, unit climate assessments and response measures must be sufficiently comprehensive to include leaders and supervisors at every level.

**Finding 25-3:** Commanders at all levels must be attuned to the critical role played by subordinate officers, noncommissioned officers, and civilian supervisors, and they must set expectations that establish appropriate organizational climate and ensure unit leaders are appropriately trained to effectively perform their roles in sexual assault prevention and response.

**Recommendation 26:** DoD and the Services must be alert to the risk of survey fatigue, and DoD SAPRO and DEOMI should monitor and assess what impact increased survey requirements have on survey response rates and survey results.

**Finding 26-1:** The dramatic increase and large volume of surveys administered by DEOMI last year creates risk of survey fatigue. Personnel who are tasked repeatedly to complete surveys for their immediate unit and its parent commands may become less inclined to participate or provide thoughtful input.

# IX. COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

As part of their statutory responsibility of exemplary conduct,<sup>520</sup> commanders at all levels are responsible for maintaining good order and discipline within their unit and caring for those in their charge. A retired general officer testified before the panel and spoke of the responsibility: “[W]e are charged with maintaining good order and discipline, and that means we’re responsible for setting the climate, a climate of mutual respect and trust, and everybody must know what our commander’s intent is.”<sup>521</sup> As commanders are responsible for unit climate and direct day-to-day unit operations, they are responsible and directly accountable for the implementation and support of SAPR initiatives.

Enhancing commander accountability therefore extends beyond evaluating the quasi-judicial authority and function of the convening authority or how a commander responds to an allegation of sexual assault. Both proponents and opponents of allowing commanders to exercise convening authority agree that all military commanders — whether they exercise court-martial convening authority or not — are responsible for the climate of their commands, and should be held accountable when that climate is assessed as contributing to incidents of sexual violence committed by or against subordinates. As emphasized by a retired U.S. Marine who also served in Congress and as a senior Department of Defense official, “[c]ompany commanders never had convening authority but they were still held accountable and responsible for all aspects, everything that went on in their company.”<sup>522</sup>

Defining, assessing, and improving command accountability for incidents of sexual violence is central to reducing sexual assault and sex-related offenses. The Subcommittee received overwhelming evidence that indicates the climate established by commanders has a direct causal relationship to increasing reporting of sexual assaults when they occur and to the legally appropriate, timely, and compassionate response to reported sexual assaults. The Services seek to select commanders who possess the highest standards of professional competence and character to discharge their responsibilities effectively. The effort to ensure only the very best are selected for command increases proportionally according to the level of command, with the process becoming more centralized and deliberate for levels of command that are also vested with special and general court-martial convening authority.

To enhance confidence that commanders will establish command climates that contribute to the reduction of sexual violence, the DoD and Congress have sought to ensure those selected for command are appropriately

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520 See 10 U.S.C. § 3583 (requiring exemplary conduct for Army commanding officers); 10 U.S.C. § 5947 (requiring exemplary conduct for commanding officers in Navy and Marine Corps); 10 U.S.C. § 8583 (requiring exemplary conduct for Air Force officers).

521 *Transcript of RSP RoC Subcommittee Meeting 219* (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

522 *Transcript of RSP Public Meeting 31* (Jan. 30, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense for Homeland Defense and U.S. Representative).

trained in their role in preventing and responding to sex-related offenses and, as climate assessment tools continue to develop, are held accountable when the climate within their commands undermines this effort. Determining and standardizing methods and mechanisms by which commanders are held accountable, however, is not a simple task. Command climate survey data provides limited information for fully understanding and assessing climate, and surveys cannot be the sole basis on which command climate, and in turn commanders, are evaluated.

### A. TRAINING AND SELECTION OF COMMANDERS

Military commanders are a select group, comprising approximately 1.0 percent of the active military service.<sup>523</sup> 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.<sup>524</sup> From the earliest opportunity to command, normally at the company or platoon level, commanders receive training and guidance on command and leadership expectations and the weight of the responsibility they hold in their positions. As officers become more senior in grade, command selection becomes more competitive and more rigorous. The Deputy Chief of DoD SAPRO outlined the deliberate nature of the command selection screening process to the Subcommittee:

[T]hrough your development as a junior officer, you are singled out as somebody that could compete for command. And if you don't have a record that supports even competing for command and getting on a command list, you're not going to be there. Then you have to be competitively selected to be on the command list, and then you have to be hired because usually there's two to three times as many people qualified for command as those that get hired.<sup>525</sup>

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.<sup>526</sup>

Throughout their career professional development, military officers receive continual training and education. Each Service has a command and staff college where a command-tracked officer spends "an entire year learning about and studying command."<sup>527</sup> As officers develop and are groomed for command, they attend additional training courses and leadership schools, with each Service offering instruction in legal roles and responsibilities.<sup>528</sup> 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.<sup>529</sup>

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523 See *supra* Part II, Section B.

524 See Army Response to RSP Request for Information 1c (Nov. 1, 2013).

525 *Transcript of RSP RoC Subcommittee Meeting 151-52* (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Chief, DoD SAPRO).

526 See *id.* at 152.

527 *Id.* The courses of study for the command and staff colleges each last about ten months.

528 See Services' Responses to RSP Request for Information 1c (Nov. 1, 2013).

529 See *id.*

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For senior commanders, the Naval Justice School (NJS) and the Army Judge Advocate General's Legal Center and School (TJAGLCS) provide commander-focused courses in military law, including the commander's role in the military justice process.<sup>530</sup> TJAGLCS courses are offered as resident courses in Charlottesville, Virginia, while the NJS courses are offered through on-site training at various Navy installations. Formal Air Force legal training for senior commanders is less robust and is incorporated into group and wing commander courses hosted by Air University at Maxwell Air Force Base, Alabama.<sup>531</sup>

In January 2012, the Secretary of Defense directed a DoD-wide evaluation of pre-command SAPR training.<sup>532</sup> 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."<sup>533</sup> In May 2012, DoD SAPRO completed its final evaluation, with 13 recommendations to sustain and improve pre-command SAPR training.<sup>534</sup> Notable among DoD SAPRO's improvement recommendations was the proposal to create a standardized SAPR curriculum across the Services, expand training time for quality instruction time, and assess training participants to ensure mastery of key SAPR concepts.<sup>535</sup> In a January 2013 report to the Secretary of Defense, the Under Secretary of Defense for Personnel and Readiness noted that pre-command SAPR training enhancements across the Services included standardized core competencies, learning objectives, and methods for assessing training effectiveness to be implemented across the Services for both pre-command and senior enlisted leader training.<sup>536</sup>

### B. DOD INITIATIVES TO ENHANCE ACCOUNTABILITY AND ASSESS COMMANDER PERFORMANCE IN SEXUAL ASSAULT PREVENTION AND RESPONSE

With standardized training objectives and core competencies in sexual assault prevention and response, the DoD has attempted to develop methods to evaluate commanders and ensure accountability. One retired general officer told the Subcommittee that "[c]ommand without accountability is a failed model. It absolutely will not work."<sup>537</sup> Requirements in the FY13 NDAA, several of which were incorporated by the Undersecretary of Defense for Personnel and Readiness into mandates for pre-command SAPR training, provided additional measures to improve commander accountability by requiring a SAPR module in training for new or prospective commanders and requiring commanders to conduct regular climate assessments.<sup>538</sup>

On May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan. He also announced several additional measures to address sexual

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530 See *id.*

531 See *id.*

532 Because the evaluation was directed by the Secretary of Defense, Coast Guard sexual assault prevention and response training was not evaluated.

533 DEP'T OF DEF., SAPRO, EVALUATION OF PRE-COMMAND SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING 5 (May 2012).

534 *Id.* at 3-4.

535 *Id.*

536 DEP'T OF DEF., SAPRO, ENHANCEMENTS TO PRE-COMMAND AND SENIOR ENLISTED LEADER SEXUAL ASSAULT PREVENTION AND RESPONSE TRAINING (Jan. 2013).

537 Transcript of RSP RoC Subcommittee Meeting 236 (Jan. 8, 2014) (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps).

538 FY13 NDAA, Pub. L. No. 112-239, §§ 572(a)(3), 574, 126 Stat. 1632 (2012).

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assault in the military, two of which focused on commander accountability.<sup>539</sup> He directed the Services to develop methods to hold military commanders accountable for command climate, and he required the next-superior commander to receive copies of annual command climate surveys from subordinate commanders.<sup>540</sup> Command climate surveys are a principal method used by the Department of Defense to evaluate climate factors and assess a commander's performance in sustaining an appropriate unit climate. However, at the unit level, these surveys are only one source of information within the totality of information that senior commanders utilize to oversee and mentor subordinate commanders. Thus, insight from surveys provides senior commanders an opportunity to detect and intervene when command climate issues exist in a subordinate unit, and the information also provides a method for superior commanders to assess how effectively subordinate commanders execute their important responsibility to contribute to the reduction of sexual violence in the Armed Forces. However, commanders at all levels must be continuously engaged with subordinate commanders and their units to assess subordinate command climate.

The Secretary of Defense also directed the Services to report on implementation of DoD's 2013 SAPR Strategic Plan. Consistent with the plan, he required each Service to develop methods and metrics for enhancing commander accountability, tailored to Service needs and structure.<sup>541</sup> As described below, each of the Services reported back on their initiatives. The Secretary of Defense meets weekly with senior Service leadership to review SAPR efforts and progress to ensure full implementation of all initiatives.<sup>542</sup>

Each of the Services reported modification of performance evaluations as a primary initiative. Performance appraisals in each Service directly impact promotion potential and future assignments, including command selection. The Navy, Army, and Air Force issued Service-wide, direct guidance on performance evaluations that now requires specific consideration of command climate and SAPR issues in officer and noncommissioned officer performance appraisals. However, the evaluation scope and level of detail required vary among the Services:

- Army evaluation reporting now requires raters to assess how the rated officer or noncommissioned officer supported Army Sexual Harassment and Assault Response and Prevention (SHARP) programs. It also requires commentary if the rated soldier was the subject of a substantiated sexual harassment or sexual assault allegation, failed to report an incident of sexual harassment or assault, or failed to respond to a reported incident or retaliated against the reporting individual.<sup>543</sup>
- Air Force officers and noncommissioned officers are evaluated on what they did to ensure a "healthy unit climate."<sup>544</sup> In particular, Air Force commanders are evaluated on their ability to

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539 Dep't of Def., News Transcript, Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy From the Pentagon (May 7, 2013); see also U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013). For additional discussion on the DoD SAPRO Strategic Plan and the commander's role in prevention, see Part IV, *supra*.

540 *Id.* Section 587 of the FY14 NDAA codified this requirement and provided that failure to conduct required climate assessments must be noted in a commander's performance evaluation. FY14 NDAA, Pub. L. No. 113-66, § 587, 127 Stat. 672 (2013).

541 See U.S. Dep't of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013).

542 U.S. Dep't of Def., News Release, Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013).

543 U.S. Dep't of the Army, Memorandum from the Secretary of the Army on Sexual Assault Prevention and Response (SAPR) – Enhancing Commander Accountability (Nov. 1, 2013).

544 U.S. Dep't of the Air Force, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and

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ensure a “healthy climate in their command,” specifically in light of their “special responsibility and authority” to ensure good order and discipline.<sup>545</sup> An Air Force representative told the Subcommittee it is updating its evaluation forms to specifically address organizational climate and support of SAPR initiatives.<sup>546</sup>

- Marine Corps officer fitness reports, which have not been revised, include a leadership assessment section, which includes five sub-category evaluations in how well the officer leads subordinates, develops subordinates, sets the example, ensures well-being of subordinates, and communication skills.<sup>547</sup> One presenter said he felt new command climate mandates gave “teeth” to the fitness report’s evaluation for developing subordinates.<sup>548</sup> The Marine Corps indicated they are “reviewing [their] performance evaluation system to ensure it promotes command climate accountability.”<sup>549</sup>
- Navy evaluation and fitness reports now require all sailors to demonstrate how they have “cultivated or maintained a positive command climate” where “improper discrimination of any kind, sexual harassment, sexual assault, hazing, and other inappropriate conduct [are] not tolerated.”<sup>550</sup>

Commander effectiveness in sexual assault prevention and response to allegations is now a part of evaluation reporting systems.<sup>551</sup> 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.”<sup>552</sup>

Section 3(c) of the Victims Protection Act of 2014 (VPA)<sup>553</sup> would further expand assessment of SAPR support on all performance appraisals, and it would statutorily require assessment of a commander’s sexual assault response efforts. Section 3(c) provides:

The Secretaries of the military departments shall ensure that the performance appraisals of commanding officers . . . indicate the extent to which each such commanding officer has or has not established a command climate in which (A) allegations of sexual assault are properly managed and fairly evaluated; and (B) a victim can report criminal activity, including

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Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).

545 *Id.*

546 *Transcript of RSP RoC Subcommittee Meeting 189-92* (Nov. 20, 2013) (testimony of Brigadier General Gina M. Grosso, Director of Force Management Policy, U.S. Air Force).

547 *Id.* at 234-35 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters & Service Battalion Quantico, U.S. Marine Corps).

548 *Id.* at 148-49 (testimony of Colonel T.V. Johnson, Diversity & Equal Opportunity Office, U.S. Marine Corps).

549 U.S. Marine Corps, Memorandum from the Deputy Commandant for Manpower and Reserve Affairs on Enhancing Commander Accountability (Sept. 19, 2013).

550 U.S. Dep’t of the Navy, Memorandum from the Secretary of the Navy on Report on Enhancing Commander Accountability (Oct. 28, 2013); Navy Administrative Message, 216/13, Navy Performance Evaluation Changes (Aug. 2013) [hereinafter NAVADMIN 216/13].

551 See *Transcript of RSP RoC Subcommittee Meeting 153* (Oct. 23, 2013) (testimony of Colonel Alan R. Metzler, Deputy Chief, DoD SAPRO).

552 *Id.* at 95.

553 For further discussion on the Victims Protection Act of 2014, see Part III, *supra*.

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sexual assault, without fear of retaliation, including ostracism and group pressure from other members of the command.<sup>554</sup>

This provision would require assessment of the ability of commanders to foster a safe climate for crime reporting and adequately respond to allegations of sexual assault, but it would not require performance appraisals to specifically address how a commander performs his or her sexual assault prevention responsibilities.<sup>555</sup>

Section 3(c) of the VPA mirrors Section 1751 of the FY14 NDAA, which expresses the sense of Congress on a commanding officer's responsibility for a command climate free of retaliation and the responsibility for senior officers to evaluate subordinate commanding officers on their performance in these areas.<sup>556</sup> Section 1751 further specifies the sense of the Congress that commander evaluations should be maintained for use in personnel assignment decisions as well as promotion and command selection boards.<sup>557</sup>

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."<sup>558</sup>

As described, Service requirements vary for documenting subordinate leader and Service member support of SAPR programs in performance evaluation reports. If performance evaluation assessment increases attention to and support of SAPR programs, these differences may result in uneven support and attention among subordinate leaders and personnel. Section 3(c) of the VPA would extend evaluation requirements to all Service members by mandating that the Service Secretaries "ensure that the written performance appraisals of members of the Armed Forces . . . include an assessment of the extent to which each such member supports the sexual assault prevention and response program of the Armed Force concerned."<sup>559</sup>

In addition to performance evaluation mandates, the Air Force and Navy reported additional enhancements to commander accountability, including training mandates for improving the treatment of victims by their peers, co-workers, and chains of command. The Air Force transitioned from an Air Force-specific Unit Climate Survey to the DEOCS administered by DEOMI and indicated increased frequency and use of climate assessments. The Air Force also indicated improved SAPR training that includes enhanced sensitivity training for all Air Force members, to "improve victim care and trust in the chain of command," and to "improve understanding of victim trauma and care."<sup>560</sup>

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554 Victims Protection Act of 2014, S. 1917, § 3(c)(2), 113th Cong. (2014).

555 See *id. at* § 3(c).

556 See FY14 NDAA, PUb. L. No. 113-66, § 1751, 127 Stat. 672 (2013).

557 See *id.*

558 *Transcript of RSP RoC Subcommittee Meeting 223* (Jan. 8, 2014) (testimony of Major General (Retired) Mary Kay Hertog, U.S. Air Force).

559 Victims Protection Act of 2014, S. 1917, § 3(c)(1), 113th Cong. (2014).

560 U.S. Dep't of the Navy, Memorandum from the Acting Secretary of the Air Force on Enhancing Commander Assessment and Accountability, Improving Response and Victim Treatment (Oct. 28, 2013).

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The Navy reported it adopted a definition for “positive command climate” that extends beyond sexual assault prevention to also include professionalism, dignity and respect, and efforts to oppose improper discrimination, sexual harassment, hazing, and other inappropriate conduct.<sup>561</sup> The Navy provided tailored and specific guidance on implementation of Navy SAPR program initiatives to the entire fleet, including programs, directives, and expectations focused on “improving the safety of our Sailors and reducing incidents of sexual assault” for immediate implementation by Navy commanders.<sup>562</sup>

### C. METHODS OF ACCOUNTABILITY

The most fundamental way a commander may be held accountable for any failure in his or her responsibilities is relief from command. Commanders serve at the discretion of their superior commanders and leaders, and a retired senior Air Force commander explained to the RSP that “[t]here is no process in our society that is easier to execute than removing a commander. That person’s superior only has to say: ‘I have lost confidence in your ability to command this organization.’ That’s it.”<sup>563</sup> 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.”<sup>564</sup> 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.”<sup>565</sup>

In addition to relief from command, other provisions of law and policy provide accountability mechanisms for commanders who fail to meet their SAPR obligations. Section 1701(b)(2)(E) of the FY14 NDAA authorizes disciplinary sanctions against members who willfully or wantonly fail to comply with victim rights requirements under the revised Article 6b of the UCMJ.<sup>566</sup> Punitive sanctions may also be imposed for illegal conduct during an investigation or trial, particularly if a substantial right of the accused or the victim was impacted. Article 92 of the UCMJ criminalizes failure to obey a lawful order, as well as willful or negligent dereliction of duty, which includes failure to obey the statutory obligations related to the reporting and resolution of sexual assault reports. Article 98 of the UCMJ criminalizes noncompliance with procedural rules in the UCMJ. Article 133 and 134 are more general in nature, and they may apply to other illegal conduct which is unbecoming of an officer or which may be prejudicial to good order and discipline or of a nature to bring discredit upon the Armed Forces, including obstruction of justice or interference with administrative proceedings.<sup>567</sup>

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561 NAVADMIN 216/13.

562 Navy Administrative Message, 181/13, Implementation of Navy Sexual Assault Prevention and Response Program Initiatives (July 2013) [hereinafter NAVADMIN 181/13].

563 *Transcript of RSP Public Meeting* 105 (Jan. 30, 2013) (testimony of General (Retired) Roger A. Brady, U.S. Air Force); see also *Transcript of RSP RoC Subcommittee Meeting* 211 (Nov. 20, 2013) (testimony of Lieutenant General Howard B. Bromberg, Deputy Chief of Staff for Personnel, U.S. Army, noting Army’s standard for relief for cause of commander is loss of trust and confidence in subordinate’s ability to perform his or her job).

564 *Id.* at 235 (testimony of Colonel Robin A. Gallant, Commanding Officer, Headquarters & Service Battalion Quantico, U.S. Marine Corps).

565 See FY14 NDAA, Pub. L. No. 113-66, § 1751, 127 Stat. 672 (2013).

566 *Id.* at § 1701(b)(2)(E).

567 10 U.S.C. §§ 892, 898, 933, 934 (UCMJ arts. 92, 98, 133, 134).

Relief from command and punitive or criminal sanctions are severe options when a commander fails in his or her fundamental responsibilities, but lesser means are also available to hold commanders accountable for SAPR performance. Commanders may receive administrative correction from their superiors, such as a letter of reprimand or admonishment. As described above, poor performance may be documented on the commander's evaluation and fitness report. An officer who has been selected for promotion to the next higher grade may be recommended for a promotion delay or removal from the promotion list, which elevates review of the officer's capacity to serve in the higher grade to the Service Secretary. Officer promotions and selection for higher command are extremely competitive, and any indicators in an officer's record that reflect negatively on his or her performance in command will undoubtedly impact the officer's prospect for future promotion or command selection.

### D. SUBCOMMITTEE ASSESSMENT OF COMMANDER ACCOUNTABILITY FOR SEXUAL ASSAULT PREVENTION AND RESPONSE

It is important to continue to leverage accountability mechanisms that focus on encouraging commanders to set a positive command climate that contributes to sexual assault prevention and appropriate response to sexual assault allegations. Commanders should be consistently held accountable in three primary instances: (1) when they are personally involved in misconduct, (2) when they fail to act in a legally or ethically proper manner in response to an incident, or (3) when a superior commander determines that there are poor climate indicators demonstrating inadequate prevention or response efforts within the organization. While ineffective or inadequate commanders should be relieved, accountability must also include positive reinforcement that will strengthen good commanders. DoD and the Services must pay particular attention to developing leaders who are well suited for command at every level, selecting the best among this pool for positions of command, and training them in effective leadership and oversight of SAPR issues.

The consequences of rank in the military are profound, and there is a persistent perception of immunity and/or protection for high-ranking officers—both for wrongful or criminal behavior and for oversight and response. Regardless of whether these perceptions are accurate or inaccurate, failure to take appropriate action on misconduct or improper action by senior leaders leads to a perception that high-ranking members are impervious to disciplinary action for wrongdoing, which results in an erosion of trust among the force. The opposite is also possible: taking inappropriate action in an attempt to demonstrate “zero tolerance” or to “do something” in response to problematic allegations can backfire and lead to further erosion of trust. As with all other adverse actions, any response to allegations against any Service member, regardless of rank, must be individually tailored based on the facts and law, with both due process of law and the presumption of innocence intact.

Transparency is important in commander accountability, and lack of transparency may contribute to a perception of favorable treatment based on rank. The Subcommittee noted that the Services have different perspectives on Privacy Act<sup>568</sup> implications of administrative actions that hold commanders accountable, because Service policies for releasing or publicizing instances where commanders are relieved differ substantially. For example, the Navy publicizes when and why a commander is relieved for cause, while the Air Force and Army generally release information only if the commander is a general officer or the incident receives substantial public interest.

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<sup>568</sup> Privacy Act of 1974, 5 U.S.C. § 552a.

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Assessment of a commander's performance does not necessarily culminate when the commander relinquishes the position and departs the unit. Most command assignments are relatively short, with officers serving in a command position for only two years, and problems related to a commander's tenure may not be known until after a commander departs. Command climate surveys conducted by new commanders shortly after assuming command will likely provide insight into the effectiveness of previous unit leadership. This insight should be appropriately assessed and fully validated, but the Services must ensure post-command feedback on a commander's service is considered and appropriately documented, even if the commander has moved on to other duties.

### E. PART IX SUBCOMMITTEE RECOMMENDATIONS AND FINDINGS

**Recommendation 27:** DoD and the Services should consider opportunities and methods for effectively factoring accountability metrics into commander performance assessments, including climate survey results, indiscipline trends, sexual assault statistics, and equal opportunity data.

**Finding 27-1:** Results-based assessment provides both positive and negative reinforcement and highlights the importance of a healthy command climate.

**Finding 27-2:** Although statutory provisions require assessment of a commander's success or failure in responding to incidents of sexual assault, there are no provisions that mandate assessment or evaluation of a commander's success or failure in sexual assault prevention.

**Finding 27-3:** All Services have policies and methods for evaluating commanders on their ability to foster a positive command climate, but definitions and evaluation mechanisms vary across the Services.

**Recommendation 28:** The Service Secretaries should ensure assessment of commander performance in sexual assault prevention and response incorporates more than results from command climate surveys.

**Finding 28-1:** Commanders should be measured according to clearly defined and established standards for SAPR leadership and performance.

**Finding 28-2:** Mandated reporting of command climate surveys to the next higher level of command has the potential to improve command visibility of climate issues of subordinate commanders. Meaningful review by senior commanders increases opportunities for early intervention and can improve command response to survey feedback. However, commanders and leaders must recognize that surveys may or may not reflect long-term trends, and they provide only one measure of a unit's actual command climate and the commander's contribution to that climate.

**Recommendation 29:** To hold commanders accountable, DoD SAPRO and the Service Secretaries must ensure SAPR programs and initiatives are clearly defined and establish objective standards when possible.

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**Finding 29-1:** The Navy's accountability effort, which provides specific direction and command-tailored direction on SAPR and other command climate initiatives, offers an encouraging model for ensuring compliance and fostering program success.

**Finding 29-2:** Detailed standards and expectations provide commanders clear guidance on supporting SAPR programs.<sup>569</sup>

**Recommendation 30:** The Service Secretaries should ensure SAPR performance assessment requirements extend below unit commanders to include subordinate leaders, including officers, noncommissioned officers, and civilian supervisors.

**Finding 30-1:** Service policies on SAPR expectations for subordinate accountability vary.

**Finding 30-2:** If performance evaluation assessment increases attention to and support of SAPR programs, differences among the Services in assessment requirements may result in uneven support and attention among subordinate leaders and personnel.

**Finding 30-3:** Subordinate leaders in a unit play a significant role in the success or failure of SAPR efforts, and accountability should extend beyond commanders to junior officers, noncommissioned officers, and civilian supervisors.

**Finding 30-4:** SAPR program effectiveness will be limited without the full investment of subordinate leaders.

**Finding 30-5:** Section 3(c) of the Victims Protection Act of 2014 would extend evaluation requirements to all Service members.

**Recommendation 31:** The Secretary of Defense should ensure all officers preparing to assume senior command positions at the grade of O-6 and above receive dedicated legal training that fully prepares them to perform the quasi-judicial authority and functions assigned to them under the UCMJ.

**Finding 31-1:** Legal training provided to senior commanders through resident and on-site Service JAG School hosted courses varies significantly among the Services. For example, the Army and Navy JAG Schools provide senior commanders with mandatory resident or on-site courses on legal issues. Formal Air Force legal training is less robust and is incorporated into group and wing commander courses hosted by Air University.

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569 See, e.g., NAVADMIN 181/13.

## X. STATEMENT OF SUBCOMMITTEE MEMBER ELIZABETH L. HILLMAN

I join the parts of the Role of the Commander Subcommittee Report that address the importance of broad-gauge efforts to reduce the incidence of rape and sexual assault. Such efforts include researching and implementing proven strategies to prevent assaults and enhance public confidence in the military justice system. I also concur with the Report's recommendation that widespread confusion about "restricted" reporting, an option available to victims of sexual assault who are active-duty service members, should be corrected with clarification and education. The recommendations that accompany those sections of the Report are likely to complement existing efforts and improve the military's response to sexual assault.<sup>1</sup>

I have already written, in a separate statement appended below, about why I believe requiring convening authorities to exercise prosecutorial discretion violates basic procedural fairness and undermines the legitimacy of military justice. By recommending that the authority to prosecute remain within the command structure, the Subcommittee rejects the premise that independent and impartial prosecutors should decide on the charges filed at courts-martial, as they do in U.S. state and federal criminal courts, in our allies' national military justice systems, and in international criminal courts.

I write now to explain why I decline to join most of the Subcommittee's final report. Commanders play a powerful and distinctive role in the armed forces, a role not fully acknowledged in the Subcommittee Report. The command structure of the armed forces enforces obedience, rewards sacrifice, and prioritizes the mission, each of which can discourage reporting of sexual assaults. Likewise, the distinctive demographics of the armed forces, which tilt toward youth, are 85% male, and until very recently included only those lesbian and gay service members who were willing to serve in fear of criminal prosecution and social ostracism, make military sexual assault different from sexual assault in civilian workplaces and institutions.<sup>2</sup> When the dust settles after this most recent round of criticism and reform, commanders will—again—be left to solve a set of problems that they cannot manage alone, however deep their commitment and integrity.

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1 In particular, I concur in Recommendations 4 through 12, 14, 21, 24, 27, and 30. See REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL, Abstract of Subcommittee Recommendations and Findings (May 2014) [hereinafter SUBCOMMITTEE REPORT].

2 OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR MILITARY COMMUNITY AND FAMILY POLICY, 2012 DEMOGRAPHICS: PROFILE OF THE MILITARY COMMUNITY 19, 36 (Exhibits 2.08. Gender of Active Duty Members, 2.36. Age of Active Duty Members), available at [http://www.militaryonesource.mil/12038/MOS/Reports/2012\\_Demographics\\_Report.pdf](http://www.militaryonesource.mil/12038/MOS/Reports/2012_Demographics_Report.pdf); Defense Manpower Data Center, "Active Duty Military Personnel by Service Rank/Grade: December 2013 (Women Only)" ("Table of Active Duty Females by Rank/Grade and Service"), at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>; see also DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, Vol. I, at 81-89 (May 2013) (Exhibit 18: Age of Victims in Completed Investigations of Unrestricted Reports, FY12; Exhibit 28: Age of Victims Making Restricted Reports, FY12; and Exhibit 21: Age of Subjects in Completed Investigations of Unrestricted Reports, FY12), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_ONE.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_ONE.pdf).

## ROLE OF THE COMMANDER SUBCOMMITTEE

History tells us that commanders do not always “drive cultural change in the military.”<sup>3</sup> Racial minorities, women, and lesbians and gay men entered the ranks of the military only after overcoming extreme resistance from military leaders and winning protracted civil rights battles. Attorneys like the late Robert L. Carter, a veteran, civil rights leader, and U.S. District Court judge, would be surprised at the assertion that racial integration was led, not resisted, by commanding officers. While working for the NAACP Legal Defense and Education Fund, Judge Carter argued *Burns v. Wilson*, a 1953 Supreme Court case rejecting the habeas corpus petitions of African American soldiers sentenced to death at court-martial for rape and murder. Military justice was marked by racial disparities long after President Truman’s 1948 order mandating equality of treatment for all races.<sup>4</sup>

When I was a first lieutenant in the Air Force in the spring of 1993, I listened to General Merrill A. McPeak, then the Air Force Chief of Staff, respond to a question about female pilots flying combat missions by stating that he was personally opposed to service women flying bombers or fighters but would reluctantly follow the law if it changed.<sup>5</sup> His comment implied that informal resistance to formal equality was acceptable, even expected, among Air Force leaders. Likewise, the actions of many commanding officers before, during, and after “don’t ask/don’t tell,” the legal regime that banned service by gays and lesbians who failed to hide their sexual orientation from 1993 until 2011, do not reveal a corps of senior leaders eager to embrace equal opportunity.<sup>6</sup> Social and cultural change within the U.S. armed forces is a complex historical phenomenon that has not been driven primarily by command.

The Subcommittee Report’s description of the measures that each branch of service takes to ensure commanders are qualified (referred to as “grooming”), and can be removed if necessary, does not resolve the problem created by placing excessive legal authority in the chain of command.<sup>7</sup> No matter how rigorous the selection and vetting process for command, it cannot guarantee unbiased, impartial commanders.<sup>8</sup> Giving commanders authority over criminal prosecution and an extensive “quasi-judicial” role, in addition to their many other mission-related responsibilities, exacerbates the impact of inevitable failures of command.<sup>9</sup>

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3 SUBCOMMITTEE REPORT, Part II, Section A.

4 *Burns v. Wilson*, 346 U.S. 137 (1953); see also JAMES E. WESTHEIDER, FIGHTING ON TWO FRONTS: AFRICAN AMERICANS AND THE VIETNAM WAR (1997); BERNARD C. NALTY, STRENGTH FOR THE FIGHT: A HISTORY OF BLACK AMERICANS IN THE MILITARY (1989); MORRIS J. MACGREGOR, INTEGRATION OF THE ARMED FORCES 1940-1965 (1981). Racism in military justice was a primary challenge of civil rights leaders throughout the 1950s, '60s, and '70s.

5 See Eric Schmitt, Women Ready to Fly for Navy, or Flee It, N.Y. Times (Apr. 23, 1993); see also Evelyn Monahan, A Few Good Women: America’s Military Women from World War I to the Wars in Iraq and Afghanistan (2010); The Women’s Research & Education Institute (WREI), “Women in the Military & Women Veterans,” at <http://www.wrei.org/WomeninMilitary.htm>.

6 AARON BELKIN, HOW WE WON: PROGRESSIVE LESSONS FROM THE REPEAL OF “DON’T ASK, DON’T TELL” (2011); RANDY SHILTS, CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY (1994).

7 SUBCOMMITTEE REPORT, Part VIII, Section A; see also *id.* at n.1 (collecting statutes requiring “exemplary conduct” of commanding officers).

8 Two examples in just the last few weeks reveal that screening and training is not enough to forestall conduct that makes high-level commanders seem entirely unprepared to adjudicate sexual assault cases fairly. See Craig Whitlock, *Disgraced Army General, Jeffrey A. Sinclair, Gets \$20,000 Fine, No Jail Time*, WASH. POST (Mar. 20, 2014) (reporting on sentence following conviction at court-martial for sex offenses of brigadier general who had been deemed an up-and-coming star), available at [http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b\\_story.html](http://www.washingtonpost.com/world/national-security/disgraced-army-general-jeffrey-a-sinclair-receives-fine-no-jail-time/2014/03/20/c555b650-b039-11e3-95e8-39bef8e9a48b_story.html); Craig Whitlock, *Navy Reassigns ex-Blue Angels Commander after Complaint He Allowed Sexual Harassment*, WASH. POST (Apr. 23, 2014) (reporting on complaint that former commander of elite naval aviation squadron and president of Tailhook Association created permissive environment in which pornography, lewd behavior, and hazing were common), available at [http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be42211e-cb0f-11e3-95f7-7ecdde72d2ea\\_story.html](http://www.washingtonpost.com/world/national-security/navy-investigates-ex-blue-angels-commander-after-complaint-he-allowed-sexual-harassment/2014/04/23/be42211e-cb0f-11e3-95f7-7ecdde72d2ea_story.html).

9 SUBCOMMITTEE REPORT, Part II, Section B.

## X. STATEMENT OF SUBCOMMITTEE MEMBER ELIZABETH L. HILLMAN

The Subcommittee Report narrates a history of modern military justice that elides the contested nature of that history and overstates the degree of consensus about the origins and progress of reform in military justice, and in military institutions overall.<sup>10</sup> The Subcommittee was not asked to write a history of military justice and heard almost no testimony about it.<sup>11</sup> Legal reform within the military justice system has frequently provoked resistance and backlash, as has social change.<sup>12</sup> The report's review of Supreme Court cases under the UCMJ omits key precedents<sup>13</sup> and dismisses as mere coincidence the fact that nearly every case it cites involves military sexual assault or domestic violence.<sup>14</sup> A selective history of military justice does not help to illuminate the impact of the military's command structure on rape and sexual assault in the contemporary armed forces.

Sexual assault is a different problem in the military than in civilian life in part because the coercive nature of command makes sexual exploitation both easier to commit and easier to hide. Service members are introduced to a culture of obedience and hierarchy from the start of their military service, a culture enforced by law and custom that defines their speech, their dress, their pay—even who can serve as a member of court-martial panel.<sup>15</sup> This deference to authority undermines the autonomy of service members, who often live and work in close proximity, creating more opportunity for sexual harassment and assault. Service members who wish to be “good soldiers” and support their commands may find it more difficult to resist pressure for unwanted sexual acts from peers, be less willing to come forward if their harassers or rapists are superior officers, and be disinclined to report if disclosure might embarrass or impair the effectiveness of their units.<sup>16</sup> The far-reaching legal authority of commanding officers, presented as a solution to military sexual assault in the Subcommittee Report, is also a problem, for commanders and victims alike. Fear of exercising unlawful command influence may deter commanders from making forceful statements about the wrongfulness of sexual harassment and assault. Deference to authority may make victims less likely to report superiors for misconduct and more likely to sacrifice their own well-being in favor of protecting the reputations of their peers and branches of service.

Yet the Subcommittee Report states that “sexual violence in the military is no different” than among civilians.<sup>17</sup> This simply cannot be true. Only service members can be tried for crimes if they fail to obey the order of

10 For a half-dozen of the many alternative views on this history, see, e.g., WILLIAM T. GENEROUS, SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE (1973); JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974); EUGENE R. FIDELL & DWIGHT H. SULLIVAN, EDs., EVOLVING MILITARY JUSTICE (2002); ANDREW J. BACEVICH, THE NEW MILITARISM: HOW AMERICANS ARE SEDUCED BY WAR (2005); 140:3 DAEDALUS (Summer 2011: The Military Issue); and THOMAS E. RICKS, THE GENERALS: AMERICAN MILITARY COMMAND FROM WORLD WAR II TO TODAY (2012).

11 Before the Subcommittee was formed, the RSP heard from Colonel (Retired) Fred Borch. See generally Transcript of RSP Public Meeting 187-221 (June 27, 2013).

12 See, e.g., JONATHAN LURIE, MILITARY JUSTICE IN AMERICA: THE U.S. COURT OF APPEALS FOR THE ARMED FORCES, 1775-1980 (2001); JONATHAN LURIE, PURSUING MILITARY JUSTICE: A HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, 1951-1980 (1992)..

13 See, e.g., *Reid v. Covert*, 345 U.S. 1 (1957), a hard-fought case in which the Air Force lost its effort to exert military jurisdiction over the dependent wife of a service member for a domestic murder committed overseas. For an alternate reading of service connection cases and Supreme Court review of military cases, see DIANE H. MAZUR, A MORE PERFECT MILITARY: HOW THE CONSTITUTION CAN MAKE OUR MILITARY STRONGER (2010).

14 Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 Pol. & Soc'y (2009) (explicitly addressing significance of so many court-martial appeals involving cases of intimate partner and sexual violence for evolution of military justice and capacity of military justice system to address sexual assault), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

15 10 U.S.C. § 825 (UCMJ art. 25).

16 DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012, Vol. II, Annex A, at 101-25 (May 2013), available at [http://www.sapr.mil/public/docs/reports/FY12\\_DoD\\_SAPRO\\_Annual\\_Report\\_on\\_Sexual\\_Assault-VOLUME\\_TWO.pdf](http://www.sapr.mil/public/docs/reports/FY12_DoD_SAPRO_Annual_Report_on_Sexual_Assault-VOLUME_TWO.pdf).

17 *Id.* at second sentence of Part IV.

a superior, skip a day of work, or speak out against a superior.<sup>18</sup> Only service members can be prosecuted for disobeying an order not to drink alcohol in the barracks if they report a sexual assault that occurs in the midst of such drinking.<sup>19</sup> Civilians who suffer a sexual assault can often leave behind a job, supervisor, or even apartment or house, while service members in comparable situations could face severe consequences for abandoning a post or military quarters. Civilians are rarely in situations as vulnerable to authority and abuse as are military recruits in training, or cadets at the service academies, both of whom have too often been the target of sexual assaults.<sup>20</sup> Prescriptions for reducing and responding to military sexual assault must not sidestep these relevant differences.

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- 18 See 10 U.S.C. §§ 892, 885, 889, (UCMJ arts. 92, 86, 89) (defining, respectively, offenses of failure to obey order or regulation, absence without leave, and disrespect toward superior commissioned officer); see also 10 U.S.C. § 891 (UCMJ art. 91) (defining offense of insubordinate conduct as including when any warrant officer or enlisted member "treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office").
  - 19 The impact of criminal liability for "collateral misconduct" is a major concern addressed by all three Subcommittees of the RSP. See SUBCOMMITTEE REPORT, Part VI, Section D; Part VII, Section B; see generally REPORT OF THE COMPARATIVE SYSTEMS SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014); REPORT OF THE VICTIM SERVICES SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL (May 2014).
  - 20 See U.S. AIR FORCE AIR EDUCATION AND TRAINING COMMAND, AETC COMMANDER'S REPORT TO THE SECRETARY OF THE AIR FORCE: REVIEW OF MAJOR GENERAL WOODWARD'S COMMANDER DIRECTED INVESTIGATION (Nov. 2012) (describing, *inter alia*, measures taken to hold commanders accountable following sexual assault investigation of military training instructors at Joint Base San Antonio-Lackland), available at <http://www.afpc.af.mil/shared/media/document/AFD-121114-029.pdf>; U.S. AIR FORCE, DEVELOPING AMERICA'S AIRMEN: A REVIEW OF AIR FORCE ENLISTED TRAINING (Aug. 2012) (report of General Woodward's commander directed investigation at Joint Base San Antonio-Lackland), currently available at [http://responsesystemspanel.whs.mil/public/docs/meetings/Sub\\_Committee/20131120\\_ROC/20\\_Woodward\\_CDIRReport.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/20_Woodward_CDIRReport.pdf); see also Fred L. Borch, *Military Law and the Treatment of Women Soldiers: Sexual Harassment and Fraternization in the US Army*, in GERARD J. DEGROOT AND CORINNA PENISTON-BIRD, EDS., *A SOLDIER AND A WOMAN: SEXUAL INTEGRATION IN THE MILITARY* (2001) (describing, *inter alia*, command response to 1996-97 training environment misconduct at Aberdeen Proving Ground). For DoD SAPRO's annual reports on sexual harassment and violence at the Military Service Academics, see <http://www.sapr.mil/index.php/annual-reports>; see also REPORT OF THE DEFENSE TASK FORCE ON SEXUAL HARASSMENT & VIOLENCE AT THE MILITARY SERVICE ACADEMIES (June 2005), available at [http://www.sapr.mil/public/docs/research/High\\_GPO\\_RRC\\_tx.pdf](http://www.sapr.mil/public/docs/research/High_GPO_RRC_tx.pdf); REPORT OF THE PANEL TO REVIEW SEXUAL MISCONDUCT ALLEGATIONS AT THE U.S. AIR FORCE ACADEMY (Sept. 2003), available at <http://www.defense.gov/news/Sep2003/d20030922usafareport.pdf>.

### SEPARATE STATEMENT DISSENTING FROM THE INTERIM REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE

January 30, 2014

I write separately to explain why I stand apart from my colleagues on the issue of whether convening authorities should retain prosecutorial discretion. I believe we should vest discretionary authority to prosecute rape and sexual assault in the same people on whom federal, state, and many respected military criminal justice systems rely: trained, experienced prosecutors.

For decades, military sexual assault scandals have been a regular source of national embarrassment.<sup>1</sup> Senior military officers testified repeatedly, and convincingly, before our Panel and Subcommittees about the imperative to “get to the left of the problem,” not to wait until the next incident to respond but instead make immediate changes to break the cycle of scandal, apology, response, and recurrence.<sup>2</sup> They, and many other witnesses, asserted that the only way to prevent military sexual assault is to attend to the “big picture” factors—cultural, social, demographic, environmental—that enable it to occur.<sup>3</sup> We heard no evidence that the military justice system is any worse than civilian jurisdictions at responding to rape and sexual assault.<sup>4</sup> We did, however, see proof that rape and sexual assault continue to occur at too high a frequency in the armed forces, despite distinctive elements of military service that should curb their prevalence. These elements include the elevation of honor and sacrifice above personal gain, the greater degree of surveillance in military life, the higher ethical standards that service members must embrace, and the military’s ability to select its members from among those who are eligible to serve.

Rape and sexual assault pose distinctive challenges in the U.S. military, which remains predominantly male and marked by imbalances of power among the individuals who serve.<sup>5</sup> We entrust our military with the legitimate use of force to support and defend our country and Constitution against all enemies, a duty it bears in part by drawing on a history of war and military successes in which sexual violence has unfortunately been commonplace.<sup>6</sup> Commanders must overcome this by leading a cultural shift toward greater respect for gender

1 See, e.g., U.S. COMMISSION ON CIV. RTS., SEXUAL ASSAULT IN THE MILITARY: 2013 STATUTORY ENFORCEMENT REP. 2 (Sept. 2013), available at [http://www.usccr.gov/pubs/09242013\\_Statutory\\_Enforcement\\_Report\\_Sexual\\_Assault\\_in\\_the\\_Military.pdf](http://www.usccr.gov/pubs/09242013_Statutory_Enforcement_Report_Sexual_Assault_in_the_Military.pdf); CENTER FOR AM. PROGRESS, TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY’S SEXUAL ASSAULT PROBLEM 7-10 (Nov. 2013), available at <http://www.americanprogress.org/wpccontent/uploads/2013/11/MilitarySexualAssaults.pdf>.

2 See, e.g., *Transcript of RSP Public Meeting* 34-35, 50 (Sept. 25, 2013) (testimony of Major General Steven Busby, U.S. Marine Corps).

3 See, e.g., *Transcript of RSP Public Meeting* 30-31 (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, Department of Defense Sexual Assault Prevention and Response Office, noting recent initiatives “aimed at advancing culture change, which we see as a necessary condition to reducing sexual assault in the military”); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 3 (Jan. 23, 2013), available at <http://docs.house.gov/meetings/AS/AS00/20130123/100231/HHRG-113-AS00-Wstate-WelshG-20130123.pdf> (describing recent training and personnel initiatives motivated by need for cultural change); *Transcript of RSP Public Meeting* 183-84 (Sept. 24, 2013) (testimony of Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command, describing policies implemented to effect behavioral change).

4 The report of the Comparative Systems Subcommittee will elaborate on these issues.

5 DEF. MIL. DATA CENTER, 2012 WORKPLACE AND GENDER RELATIONS SURVEY OF ACTIVE DUTY MEMBERS: TABULATIONS OF RESPONSES 18, available at [http://www.dod.mil/pubs/foi/Personnel\\_and\\_Personnel\\_Readiness/Personnel/WGRA1201\\_TabVolume.pdf](http://www.dod.mil/pubs/foi/Personnel_and_Personnel_Readiness/Personnel/WGRA1201_TabVolume.pdf).

6 Written Statement of Elizabeth L. Hillman to the U.S. Commission on Civil Rights at 5 (Jan. 11, 2013) (quoting Elizabeth L. Hillman, *Front and Center: Sexual Violence in U.S. Military Law*, 37 Pol. & Soc'y 101 (2009)), available at <http://www.eusccr.com/Hillman%20statement.pdf>.

## ROLE OF THE COMMANDER SUBCOMMITTEE

equality and legitimate avenues for sexual expression, away from a norm that celebrates only aggressive male sexuality. This shift is no slight change in course. It is a sea change, albeit one that is underway.<sup>7</sup>

If commanders remain focused on implementing this change, they will continue to improve the confidence of survivors of rape and sexual assault in the military's ability to respond. Survivors, and their families and communities, will be able to trust that assailants with stellar military records or mission-essential skills will not be protected from legitimate prosecution.<sup>8</sup> They will realize that reprisals from fellow service members are not an inevitable consequence of reporting a sexual assault. And all service members will know that attitudes that denigrate women and gay men will not be tolerated—both because they violate regulations and because they create conditions in which sexual assault is more likely.

Although commanders must lead the way in changing military culture, they are neither essential nor well-suited for their current role in the legal process of criminal prosecution. Command authority in military justice has already been reduced significantly over time.<sup>9</sup> It will be further limited through recently enacted changes.<sup>10</sup> Yet the Uniform Code of Military Justice continues to require that convening authorities exercise prosecutorial discretion. This mixture of roles, in which a convening authority must both protect the overall well-being of a unit and ensure that unit's mission is accomplished as well as decide whether a specific factual context warrants prosecution, creates a conflict that cuts in different directions, all unhealthy. For example, commanders who speak out assertively on the importance of prosecuting sexual assaults risk undermining the legitimacy of any later court-martial convictions by exerting unlawful command influence, "the mortal enemy of military justice."<sup>11</sup> Or consider, in light of the heightened attention now directed toward military sexual assault, defense counsel's well-founded concern that convening authorities under pressure to demonstrate high rates of prosecution

7 See, e.g., *Transcript of RSP Public Meeting* 31–32, 50 (Nov. 7, 2013) (testimony of Major General Patton, noting recent Service directives that commands with more than 50 members be assessed on command climate, including sexual assault prevention and response, within 120 days of assumption of command, and annually thereafter); *Transcript of Role of the Commander Subcommittee Meeting* 209–20 (Nov. 20, 2013) (testimony of Lieutenant General Howard Bromberg, U.S. Army, as to new requirements of reviews of command climate survey results and of sexual assault criteria on Officer Evaluation Reports); H.R. 3304, § 1721, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (requiring tracking of compliance of commanding officers in conducting organizational climate surveys); Written Statement of General Mark A. Welsh, III, Chief of Staff, U.S. Air Force, to House Armed Services Committee at 2 (Jan. 23, 2013) (discussing discipline of commanders at Joint Base San Antonio-Lackland following recent leadership failures). But see Craig Whitlock, *Behavior by Brass Vexes Military*, WASH. Post, Jan. 27, 2014, at A1.

8 The report of the Victim Services Subcommittee will help us assess the best ways to address these issues.

9 See, e.g., Press Release, "Secretary Panetta Remarks on Capitol Hill" (Apr. 17, 2012) (announcing elevation of convening authority in sexual assault cases), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013>; *Transcript of RSP Public Meeting* 194–97 (June 27, 2013) (testimony of testimony of Fred Borch, Regimental Historian, U.S. Army Judge Advocate General's Corps, describing judicialization of military justice system); *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) (extending prohibition of unlawful command influence of Article 37, UCMJ, to anyone acting with "mantle of command authority").

10 See, e.g., H.R. 3304, § 1702, 113th Congress: National Defense Authorization Act for Fiscal Year 2014 (2013) (precluding convening authorities from dismissing or modifying convictions for sexual assault offenses and requiring them to explain in writing any sentence modification); *id.* at § 1705 (requiring discharge or dismissal for certain sex offenses and trial for such offenses by general court-martial), *id.* at § 1708 (eliminating character and military service of accused as factor relevant to initial disposition of offenses), *id.* at § 1744 (requiring review of decisions of convening authority not to refer sexual assault charges to trial by court-martial contrary to recommendation of staff judge advocate).

11 *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); see also *Transcript of RSP Public Meeting* 294 (Nov. 8, 2013) (testimony of Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service) ("Increasingly, defense counsel must also confront and overcome instances of unlawful command influence in sexual assault cases. There is tremendous pressure on senior leaders to articulate zero tolerance policies and pass judgment on those merely accused of sexual assault. Even if command actions do not rise to the level of unlawful command influence, it contributes to an environment that unfairly prejudices an accused's right to a fair trial."); *id.* at 336–38 (testimony of Mr. Jack Zimmermann of Lavine, Zimmermann & Sampson, P.C., explaining how claims of unlawful command influence have arisen from recent training on sexual assault prevention and response).

## X. STATEMENT OF SUBCOMMITTEE MEMBER ELIZABETH L. HILLMAN

will order courts-martial to go forward regardless of the strength of the evidence.<sup>12</sup> Removing the convening authority from the charging process would address these concerns while freeing commanders to zero in on the changes in culture that are our best hope for sustainable improvement in sexual assault prevention and response.

The decision to prosecute is among the heaviest burdens we place on attorneys in public service; the ethics of the prosecutor are among the most powerful and most studied in the legal profession.<sup>13</sup> Whether there is sufficient evidence to support a criminal prosecution is a question of law and discretion. Senior judge advocates, licensed by the same authorities that license civilian attorneys and subject to the professional ethics codes of both civilian and military authorities, are every bit as capable of exercising that discretion as their civilian counterparts.

When some of our allies adopted legal reforms to replace convening authorities with experienced and trained prosecutors, opponents voiced concerns about the deterioration of command and disengagement from the problem of sexual assault that were very similar to those now raised by many U.S. military leaders.<sup>14</sup> Yet no country with independent prosecutors has reported any such dire consequences.<sup>15</sup> I see no reason to defer to predictions about the impact of this change over the pleas of survivors of sexual assault, many of whom consider an independent prosecutorial authority the cornerstone of any effective response to military sexual assault.<sup>16</sup> Likewise, U.S. service members who face courts-martial deserve no fewer safeguards of an impartial and independent tribunal than service members of other countries with whom they often serve.<sup>17</sup> The United Kingdom, Canada, Australia, and most other countries with well-regarded military justice systems have already ended command control of courts-martial to protect the rights of service members.<sup>18</sup> That goal is consistent

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12 See, e.g., *Transcript of RSP Public Meeting* 276-77 (Sept. 25, 2013) (testimony of Major General Vaughn Ary, U.S. Marine Corps); *id.* at 277-78 (testimony of Rear Admiral Frederick Kenney, U.S. Coast Guard).

13 See, e.g., *Transcript of RSP Public Meeting* 117-25 (Sept. 25, 2013) (testimony of senior staff judge advocates describing ethics rules to which staff judge advocates are bound and on which they are trained); see also Robert H. Jackson, *The Federal Prosecutor*, 31 AM. INST. CRIM. L. & CRIMINOLOGY 3 (1940).

14 See *Transcript of RSP Public Meeting* 41 (Sept. 24, 2013) (testimony of Lord Martin Thomas of Gresford, QC, describing opposition of British commanders prior to reforms); *id.* at 240-41 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service, describing sense of uncertainty prior to reforms among Australian commanders).

15 See *Transcript of RSP Public Meeting* 71-73 (Sept. 24, 2013) (testimony of Lord Thomas); *id.* at 73-74 (testimony of Professor Michel Drapeau); *id.* at 181-82 (testimony of Major General Blaise Cathcart, Judge Advocate General of Canadian Armed Forces); *id.* at 226-28, 236 (testimony of Air Commodore Cronan); *id.* at 253-55 (testimony of Commodore Andrei Spence, Naval Legal Services, Royal Navy, United Kingdom).

16 See, e.g., *Transcript of RSP Public Meeting* 19 (Nov. 8, 2013) (testimony of Mr. Brian K. Lewis, Protect Our Defenders) ("[P]ossibly the biggest hurdle facing survivors of military sexual trauma is the continued involvement of the chain of command in prosecuting these crimes."); *id.* at 52-54 (testimony of Ms. Sarah Plummer that "when you're raped by a fellow service member, it's like being raped by your brother and having your father decide the case"); see also *id.* at 44 (testimony of Ms. Ayana Harrell); *Transcript of RSP Public Meeting* 324 (Nov. 7, 2013) (testimony of Ms. Nancy Parrish, President, Protect Our Defenders); *id.* at 333-36, 407-08 (testimony of Mr. Greg Jacob, Policy Director, Service Women's Action Network); *Transcript of RSP Public Meeting* 346-50 (Sept. 25, 2013) (testimony of Ms. Miranda Petersen, Program and Policy Director, Protect Our Defenders).

17 *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997); see also *Cooper v. United Kingdom*, 39 Eur. Ct. H.R. 8 (2003); *Martin v. United Kingdom*, 44 Eur. Ct. H.R. 31 (2006); DEF. L. POL'Y BD., REP. OF THE SUBCOMM. ON MIL. J. IN COMBAT ZONES 187 ((separate statement of Board Member Eugene R. Fidell)).

18 See L. LIBR. OF CONG., MIL. J.: ADJUDICATION OF SEXUAL OFFENSES 4-5, 55-58 (July 2013); *Transcript of RSP Public Meeting* 38-42 (testimony of Lord Thomas); *id.* at 223 (testimony of Air Commodore Cronan); *id.* at 156-58 (testimony of Major General Cathcart), see also L. LIBR. OF CONG., *supra*, at 42-43 (noting that Israel adopted Military Justice Law in 1955, which vested prosecutorial discretion in independent Military Advocate General). Many other countries subject to the European Court of Human Rights have either

## ROLE OF THE COMMANDER SUBCOMMITTEE

with the procedural fairness that both victims and alleged perpetrators of rape and sexual assault deserve from U.S. military justice.

Our Panel and Subcommittees heard, again and again, that the sexual assault problem in the military has given service members reason to pause when young people turn to them for advice about whether they should join the U.S. armed forces.<sup>19</sup> That reluctance to allow our daughters and sons to embrace a life of service to our country is the real threat to U.S. military effectiveness at stake in this debate. An impartial and independent military justice system that operates beyond the grasp of command control would help restore faith that military service remains an honorable, viable choice for all.

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eliminated convening authorities or radically reduced military jurisdiction, much like countries subject to the Inter-American Commission on Human Rights (IACtHR), which has limited military jurisdiction to address human rights abuses. For but two very recent examples of this accelerating trend, see the IACtHR 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, "IACtHR Expresses Concern over Constitutional Reform in Colombia" (Jan. 4, 2013), available at [https://www.oas.org/en/iachr/media\\_center/PReleases/2013/004.asp](https://www.oas.org/en/iachr/media_center/PReleases/2013/004.asp); Amnesty International Public Statement, "Taiwan government must ensure the reform of military criminal procedure legislation lives up to its promise of greater accountability" (Jan. 13, 2014), available at <http://www.amnesty.org/en/library/asset/ASA38/001/2014/en/5c6a95be-d90c-4378-8a6c-d941c2a83cb4/asa380012014en.pdf>.

19 See, e.g., *Transcript of Role of the Commander Subcommittee Meeting* 41 (Jan. 8, 2014) (testimony of Rear Admiral (ret.) Marty Evans, U.S. Navy); *id.* at 71–76 (testimony of Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG and former Chief Counsel, U.S. Maritime Administration); *Transcript of RSP Public Meeting* 72–75 (Nov. 8, 2013) (testimony of Ms. Marti Ribeiro, former U.S. Air Force staff sergeant); *id.* at 348 (testimony of Mr. Zimmermann); compare with, *Transcript of RSP Public Meeting* 56 (Sept. 24, 2013) ("The fact that our system is predicated on the JAG making the decision in the context of minimizing command influence, I think, enables us as parents, at least in Israel, to sleep more soundly at night."); *id.* at 96–97 (testimony of Professor Drapeau, noting "increased sense of confidence that those who become victims of crimes, many of them our sons and daughters serving in uniform" have in Canadian military justice system after removal of convening authority from commanders); *id.* at 46 (testimony of Lord Thomas) ("[T]he public has the right to expect for their sons and daughters who enlist the same standards of fairness in the military system of justice as would be their entitlement in civilian life.").

# Appendix A: TERMS OF REFERENCE

These terms of reference establish the Secretary of Defense (SecDef) objectives for an independent subcommittee review of the role of the commander in the investigation, prosecution, and adjudication of adult sexual assault crimes. At SecDef direction, the Role of the Commander Subcommittee (“the Subcommittee”) has been established under the Response Systems to Adult Sexual Assault Crimes Panel (Response Systems Panel) to conduct this assessment.

**Mission Statement:** Assess the role and effectiveness of commanders at all levels in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120, Uniform Code of Military Justice (UCMJ)).

**Issue Statement:** Section 576(d)(1) of the FY 2013 National Defense Authorization Act provides that in conducting a systems review and assessment, the Response Systems Panel shall provide recommendations on how to improve the effectiveness of the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses, under 10 U.S.C. 920 (Article 120 of the UCMJ). This includes an assessment of the role of the commander in the investigation, prosecution, and adjudication of crimes involving adult sexual assault and related offenses. In addition, the Subcommittee should identify systems or methods for strengthening the effectiveness of military systems. Additionally, Section 1731 of the FY 2014 National Defense Authorization Act establishes additional tasks for the Response Systems Panel.

**Objectives and Scope:** The Subcommittee will address the following specific objectives.

- Examine the roles and effectiveness of commanders at all levels in the administration of the UCMJ and the investigation, prosecution, and adjudication of adult sexual assault crimes during the period of 2007 through 2011.
- Assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes, including the role of a commander under Article 60, UCMJ.
- Assess the strengths and weaknesses of current and proposed legislative initiatives to modify the current role of commanders in the administration of military justice and the investigation, prosecution, and adjudication of adult sexual assault crimes.
- An assessment of the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under the UCMJ would have on overall reporting and prosecution of sexual assault cases.
- An assessment of whether the Department of Defense should promulgate, and ensure the understanding of and compliance with, a formal statement of what accountability, rights, and responsibilities a member

## ROLE OF THE COMMANDER SUBCOMMITTEE

of the Armed Forces has with regard to matters of sexual assault prevention and response, as a means of addressing those issues within the Armed Forces. If the response systems panel recommends such a formal statement, the response systems panel shall provide key elements or principles that should be included in the formal statement.

The Subcommittee shall develop conclusions and recommendations on the above matters and report them to the Response Systems Panel.

### **Methodology:**

1. The Subcommittee assessment will be conducted in compliance with the Federal Advisory Committee Act (FACA).
2. The Subcommittee is authorized to access, consistent with law, documents and records from the Department of Defense and military departments, which the Subcommittee deems necessary, and DoD personnel the Subcommittee determines necessary to complete its task. Subcommittee participants may be required to execute a non-disclosure agreement, consistent with FACA.
3. The Subcommittee may conduct interviews as appropriate.
4. As appropriate, the Subcommittee may seek input from other sources with pertinent knowledge or experience.

### **Deliverable:**

The Subcommittee will complete its work and report to the Response Systems Panel in a public forum for full deliberation and discussion. The Response Systems Panel will then report to the Secretary of Defense.

### **Support:**

1. The DoD Office of the General Counsel and the Washington Headquarters Services will provide any necessary administrative and logistical support for the Subcommittee.
2. The DoD, through the DoD Office of the General Counsel, the Washington Headquarters Services, and the Office of the Under Secretary of Defense for Personnel and Readiness, will support the Subcommittee's review by providing personnel, policies, and procedures required to conduct a thorough review of civilian and military systems used to investigate, prosecute, and adjudicate adult sexual assault crimes.

## Appendix B: SUBCOMMITTEE MEMBERS AND STAFF

### HONORABLE BARBARA S. JONES, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (RETIRED)

Judge Jones is a partner at Zuckerman Spaeder, LLP (law firm). She served as a judge in the U.S. District Court for the Southern District of New York for 16 years, and heard a wide range of cases relating to accounting and securities fraud, antitrust, fraud and corruption involving city contracts and federal loan programs, labor racketeering and terrorism. In addition to her judicial service, she spent more than two decades as a prosecutor. Judge Jones was a special attorney of the United States Department of Justice (DOJ) Organized Crime & Racketeering, Criminal Division and the Manhattan Strike Force Against Organized Crime and Racketeering. Previously, Judge Jones served as an assistant U.S. Attorney, as chief of the General Crimes Unit and chief of the Organized Crime Unit in the Southern District of New York.

### FORMER REP. ELIZABETH HOLTZMAN

Rep. Holtzman is counsel with Herrick Feinstein, LLP, (law firm). Rep. Holtzman served for eight years as a U.S. Congresswoman (D-NY, 1973-81) and while in office she authored the Rape Privacy Act. She subsequently served for eight years as the Kings County, New York (Brooklyn) District Attorney (the 4th largest DA's office in the country) from 1981-89, where she helped change rape laws, improved standards and methods for prosecution, and developed programs to train police and medical personnel. Rep. Holtzman was also elected Comptroller of New York City, the only woman to be elected to this position. Rep. Holtzman graduated from Radcliffe College, magna cum laude, and received her law degree from Harvard Law School.

### VICE ADMIRAL JAMES HOUCK, U.S. NAVY (RETIRED)

Vice Admiral (Retired) Houck joined the Penn State University Dickinson School of Law faculty as Distinguished Scholar in Residence after retiring as the 41st Judge Advocate General (JAG) of the U.S. Navy. As the Judge Advocate General, Admiral Houck served as the principal military legal counsel to the Secretary of the Navy and Chief of Naval Operations and led more than 2,000 attorneys, enlisted legal staff, and civilian employees of the worldwide Navy JAG Corps. He also oversaw the Department of the Navy's military justice system.

### PROFESSOR ELIZABETH L. HILLMAN, HASTINGS LAW SCHOOL

Elizabeth Hillman is Professor of Law, University of California Hastings College of the Law. Her current research concerns the law and politics of aerial bombing and military sexual violence. Professor Hillman has published two books, *Military Justice Cases and Materials* (2d ed. 2012, LexisNexis, with Eugene R. Fidell and Dwight H. Sullivan) and *Defending America: Military Culture and the Cold War Court-Martial* (Princeton University Press, 2005), and many articles, including “Sexual Violence in State Militaries” in *Prosecuting International Sex Crimes* (Forum for International Criminal and Humanitarian Law, 2012). She has testified before Congress, served as an expert at trial, and commented frequently in the media about military law, history, and culture. Professor Hillman is president of the National Institute for Military Justice, a non-profit dedicated to promoting fairness in and public understanding of military justice worldwide. Professor Hillman attended Duke University on an Air Force ROTC scholarship, earned a degree in electrical engineering, and served as a space operations officer and orbital analyst in Cheyenne Mountain Air Force Base, Colorado Springs.

### MAJOR GENERAL JOHN D. ALtenburg, JR., U.S. ARMY (RETIRED)

Major General (Retired) Altenburg is counsel for Greenberg Traurig, LLP (law firm). Previously, General Altenburg served 28 years as a lawyer in the Army, where he represented the Army before state and local governments, in court in the United States and Germany and before Congressional committees on Military Justice. He served as the Deputy Judge Advocate General for the Department of the Army from 1997 to 2001, and was the principal legal advisor to senior national security leaders on Military Justice, including high profile sex assault cases. In December 2003, General Altenburg was named as the appointing authority for military commissions covering detainees at Guantanamo, an appointment he held until November 2006.

### GENERAL CARTER F. HAM, U.S. ARMY (RETIRED)

General (Retired) Ham served 37 years in the U.S. Army before he retired in June 2013. General Ham served in a variety of command positions throughout his distinguished military career, to include Commander, United States Africa Command; Commanding General, United States Army Europe and Seventh Army; Commanding General, 1st Infantry Division and Fort Riley; Commander, Multi-National Brigade Northwest, OPERATION IRAQI FREEDOM; Commander, Infantry Training Support Brigade (29th Infantry Regiment), United States

Army Infantry School; and Commander, 1st Battalion, 6th Infantry, 3d Infantry Division, United States Army Europe and Seventh Army, and OPERATION ABLE SENTRY, Macedonia.

### COLONEL LISA L. TURNER, U.S. AIR FORCE

Colonel Turner is currently assigned as Staff Judge Advocate, Headquarters Air Mobility Command (AMC), Scott AFB, IL. Colonel Turner has been a judge advocate in the U.S. Air Force for 23 years. Her previous assignments include Staff Judge Advocate for Headquarters Air Education and Training Command, Staff Judge Advocate for North American Aerospace Defense Command and United States Northern Command, Chief of The Judge Advocate General’s Action Group, Chief of the General Law Branch, Administrative Law Division and assignments as a circuit trial counsel, area defense counsel and as an instructor in the Military Justice Division of the Air Force JAG School.

### **PROFESSOR GEOFFREY CORN, SOUTH TEXAS COLLEGE OF LAW (LIEUTENANT COLONEL, U.S. ARMY (RETIREDE))**

Geoffrey Corn is Presidential Research Professor of Law at the South Texas College of Law. He has been a professor with the South Texas College of Law since 2005. Previously, Professor Corn served 20 years in the U.S. Army, including 12 years as a judge advocate. As a judge advocate, Lieutenant Colonel (Retired) Corn held assignments as a Legal Assistance Attorney, the Chief of Criminal Law and Senior Criminal Trial Attorney, Regional Defense Counsel, Professor of Law at the Army JAG School, and Chief of the International Law and Operations Divisions. After retiring from the Army, he served as Special Assistant to the Judge Advocate General for Law of War Matters and Chief of the Law of War Branch. Professor Corn has authored a number of books and articles in the areas of armed conflict, military law, and the law of war. He's also served as an expert consultant and witness in military cases and testified before the Senate Armed Service Committee and Senate Judiciary Committee.

### **JOYE E. FROST, DIRECTOR OF THE OFFICE FOR VICTIMS OF CRIME, DEPARTMENT OF JUSTICE**

Ms. Joye E. Frost was appointed as the Director of the Office for Victims of Crime (OVC) on June 14, 2013. During her previous tenure as OVC's Acting Director and Principal Deputy Director, she launched the Vision 21: Transforming Victim Services initiative to expand the reach and impact of the victim assistance field. She was instrumental in the development of OVC's Sexual Assault Nurse Examiner and Sexual Assault Response Team Training and Technical Assistance initiatives and spearheaded a number of OVC projects to identify and serve victims of crime with disabilities. She also implemented and oversees a discretionary grant program to fund comprehensive services to victims of human trafficking. Ms. Frost began her career as a Child Protective Services caseworker in South Texas and worked in the victim assistance, healthcare, and disability advocacy fields for more than 35 years in the United States and Europe. During this time she spent several years working at both the community and headquarters level for the Department of Army.

### **SUBCOMMITTEE STAFF**

Lieutenant Colonel Kyle Green, U.S. Air Force – Supervising Attorney

Mr. Doug Nelson – Attorney

Major Ranae Doser-Pascual, U.S. Air Force – Attorney

Ms. Joanne Gordon – Attorney

Ms. Laurel Prucha Moran – Graphic Designer

# Appendix C:

# GLOSSARY OF ACRONYMS AND TERMS

## ACRONYMS:

<b>CAAF</b>	Court of Appeals for the Armed Forces	<b>DoDI</b>	Department of Defense Instruction
<b>CAPE</b>	Cost Assessment and Program Evaluation	<b>DTM</b>	Directive-Type Memorandum
<b>CDC</b>	Centers for Disease Control and Prevention	<b>DTF-SAMS</b>	Defense Task Force on Sexual Assault in the Military Services
<b>CMA</b>	Court of Military Appeals	<b>FY</b>	fiscal year
<b>DACOWITS</b>	Defense Advisory Committee on Women in the Services	<b>GCMCA</b>	general court-martial convening authority
<b>DEOCS</b>	Defense Equal Opportunity Climate Survey	<b>IDF</b>	Israeli Defense Forces
<b>DEOMI</b>	Defense Equal Opportunity Management Institute	<b>JAG</b>	judge advocate general
<b>DRRI</b>	Defense Race Relations Institute	<b>JSC</b>	Joint Service Committee on Military Justice
<b>DSAID</b>	Defense Sexual Assault Incident Database	<b>MARADMIN</b>	Marine Corps Administrative Message
<b>DMDC</b>	Defense Manpower Data Center	<b>MCIO</b>	military criminal investigative organization
<b>DoD</b>	Department of Defense	<b>MCM</b>	Manual for Courts-Martial
<b>DoDD</b>	Department of Defense Directive	<b>MJIA</b>	Military Justice Improvement Act of 2013
		<b>MVP</b>	Mentors in Violence Prevention

## ROLE OF THE COMMANDER SUBCOMMITTEE

<b>MRE</b>	Military Rules of Evidence	<b>SCMCA</b>	summary court-martial convening authority
<b>NAVADMIN</b>	Navy Administrative Message	<b>SHARP</b>	Sexual Harassment and Assault Response and Prevention
<b>NCIPC</b>	National Center for Injury Prevention and Control	<b>SJA</b>	staff judge advocate
<b>NCMR</b>	Navy Court of Military Review	<b>SOFA</b>	status-of-forces agreement
<b>NCO</b>	noncommissioned officer	<b>SPCMCA</b>	special court-martial convening authority
<b>NDAA</b>	National Defense Authorization Act	<b>STOP Act</b>	Sexual Assault Training Oversight and Prevention Act
<b>NJS</b>	Naval Justice School	<b>SVC</b>	special victims' counsel
<b>NSVRC</b>	National Sexual Violence Resource Center	<b>SWAN</b>	Service Women's Action Network
<b>PME</b>	professional military education	<b>TJAGLCS</b>	The [Army] Judge Advocate General's Legal Center and School
<b>POD</b>	Protect Our Defenders		
<b>RAINN</b>	Rape, Abuse and Incest National Network	<b>UCI</b>	unlawful command influence
<b>RCM</b>	Rule for Courts-Martial	<b>UCMJ</b>	Uniform Code of Military Justice
<b>RFI</b>	request for information	<b>UK</b>	United Kingdom
<b>RoC</b>	Role of the Commander	<b>USC</b>	United States Code
<b>RSP</b>	Response Systems to Adult Sexual Assault Crimes Panel	<b>USCCR</b>	United States Commission on Civil Rights
<b>SAPR</b>	sexual assault prevention and response	<b>VA</b>	victim advocate
<b>SAPRO</b>	Sexual Assault Prevention and Response Office	<b>VPA</b>	Victims Protection Act of 2014
<b>SARC</b>	sexual assault response coordinator	<b>WGRA</b>	Workplace and Gender Relations Survey of Active Duty Members
<b>SASC</b>	Senate Armed Services Committee		

### TERMS:<sup>1</sup>

**Accessions training:** Training that a Service member receives upon initial entry into military service through basic military training.

**Armed Forces of the United States:** A term used to denote collectively all components of the Army, Marine Corps, Navy, Air Force, and Coast Guard (when mobilized under Title 10, United States Code, to augment the Navy).

**Base:** An area or locality containing installations which provide logistic or other support.

**Chain of command:** The succession of commanding officers from a superior to a subordinate through which command is exercised.

**Command:** (1) The authority that a commander in the armed forces lawfully exercises over subordinates by virtue of rank or assignment; (2) an order given by a commander; that is, the will of the commander expressed for the purpose of bringing about a particular action; or (3) a unit (or units), an organization, or an area under the command of one individual.

**Commander:** A commissioned officer or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a DoD organization or prescribed territorial area.

**Convening authority:** Unless otherwise limited, general or special courts-martial may be convened by persons occupying positions designated in Article 22(a) or Article 23(a) of the UCMJ, respectively, and by any commander designated by the Secretary concerned or empowered by the President. The power to convene courts-martial may not be delegated. The authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions. See Rule for Courts-Martial 504(b) and discussion.

**Flag officer:** An officer of the Navy or Coast Guard serving in or having the grade of admiral, vice admiral, rear admiral, or commodore.

**General officer:** An officer of the Army, Air Force, or Marine Corps serving in or having the grade of general, lieutenant general, major general, or brigadier general.

**Grade:** A step or degree, in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

**Healthcare provider:** Those individuals who are employed or assigned as healthcare professionals, or are credentialed to provide healthcare services at a military treatment facility, or who provide such care at a deployed location or otherwise in an official capacity.

**Installation:** A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard,

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<sup>1</sup> Unless otherwise noted, term definitions are taken from 10 U.S.C. § 101 and 10 U.S.C. § 801; MANUAL FOR COURTS-MARTIAL (2012; DoD JOINT PUBLICATION 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS (Nov. 8, 2010, AMENDED THROUGH MAR. 15, 2014) AND OTHER GOVERNING DoD DIRECTIVE-TYPE MEMORANDA, DIRECTIVES, AND INSTRUCTIONS.

## ROLE OF THE COMMANDER SUBCOMMITTEE

including any leased facility. It does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense, or Department of Homeland Security in the case of the Coast Guard.

**Judge advocate:** An officer of the Judge Advocate General's Corps of the Army, Air Force, Marine Corps, Navy, and the United States Coast Guard who is designated as a judge advocate.

**Judge Advocates General:** Severally, the Judge Advocates General of the Army, Navy, and Air Force, and, except when the Coast Guard is operating as a service in the Navy, an official designated to serve as Judge Advocate General of the Coast Guard by the Secretary of Homeland Security.

**Law enforcement:** Includes all DoD law enforcement units, security forces, and military criminal investigative organizations.

**Military criminal investigative organization (MCIO):** U.S. Army Criminal Investigative Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

**Military Department:** One of the departments within the Department of Defense created by the National Security Act of 1947, which are the Department of the Army, the Department of the Navy, and the Department of the Air Force.

**Military judge:** The presiding officer of a general or special court-martial detailed in accordance with Article 26 of the UCMJ to the court-martial to which charges in a case have been referred for trial.

**Preferral:** Comparable to a civilian indictment, preferral is the formal act of signing and swearing allegations of offenses against a person who is subject to the UCMJ. Preferred charges and specifications must be signed under oath before a commissioned officer of the Armed Forces authorized to administer oaths. See Rule for Courts-Martial 307.

**Rank:** The order of precedence among members of the Armed Forces.

**Referral:** The order of a convening authority that charges against an accused will be tried by a specified court-martial. Referral requires three elements: (1) a convening authority who is authorized to convene the court-martial and not disqualified, (2) preferred charges which have been received by the convening authority for disposition, and (3) a court-martial convened by that convening authority or a predecessor. See Rule for Court-Martial 601(a) and discussion.

**Reprisal:** Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, or any other act of retaliation, against a Service member for making, preparing, or receiving a communication.

**Restricted reporting:** Reporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an official investigation. The victim's report to specified individuals will not be reported to law enforcement or to the command to initiate the official investigative process unless the victim consents or an established exception applied. Restricted reporting applies to Service members and their military dependents 18 years of age or older.

## APPENDIX C: GLOSSARY OF ACRONYMS AND TERMS

**Re-victimization:** A pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse of a child. The latter pattern is particularly notable in cases of sexual abuse.

**Service Secretaries:** The Secretary of the Army, with respect to matters concerning the Army; the Secretary of the Navy, with respect to matters concerning the Navy, Marine Corps, and the Coast Guard when it is operating as a service in the Navy; the Secretary of the Air Force, with respect to matters concerning the Air Force; The Secretary of the Army, with respect to matters concerning the Army; The Secretary of Homeland Security, with respect to matters concerning the Coast Guard, when it is not operating as a service in the Navy.

**Sexual assault prevention and response (SAPR) program:** A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault.

**Sexual Assault Prevention and Response Office (DoD SAPRO):** Serves as the DoD's single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the Inspectors General, respectively.

**SAPR victim advocate (VA):** A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. Provides liaison assistance with other organizations on victim care matters and reports directly to the SARC when performing victim advocate duties.

**Sexual assault response coordinator (SARC):** The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

**Service:** A branch of the Armed Forces of the United States, established by act of Congress, which are: the Army, Marine Corps, Navy, Air Force, and Coast Guard.

**Special victim capabilities:** A distinct, recognizable group of appropriately skilled professionals, consisting of specially trained and selected MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel who work collaboratively to investigate allegations of adult sexual assault, domestic violence involving sexual assault, and/or aggravated assault with grievous bodily harm, and child abuse involving child sexual assault and/or aggravated assault with grievous bodily harm; and provide support for victims of these offenses.

**Staff judge advocate (SJA):** A judge advocate so designated in the Army, Air Force, or Marine Corps, and the principal legal advisor of a Navy, Coast Guard, or joint force command who is a judge advocate.

**Status-of-forces agreement:** A bilateral or multilateral agreement that defines the legal position of a visiting military force deployed in the territory of a friendly state.

**Subordinate command:** A command consisting of the commander and all those individuals, units, detachments, organizations, or installations that have been placed under the command by the authority establishing the subordinate command.

## ROLE OF THE COMMANDER SUBCOMMITTEE

**Unit:** Any military element whose structure is prescribed by competent authority or an organization title of a subdivision of a group in a task force.

**Unrestricted reporting:** A process that a Service member uses to disclose, without requesting confidentiality or restricted reporting, that he or she is the victim of a sexual assault. Under these circumstances, the victim's report may be used to initiate the official investigative process.

## Appendix D:

# PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

### JUNE 27, 2013

#### Public Meeting of the RSP

#### U.S. District Court for the District of Columbia, Washington, D.C.

- Dr. Lynn Addington, Associate Professor, American University Department of Justice, Law, & Society
- Ms. Delilah Rumburg, Pennsylvania Coalition Against Rape
- Major General Gary S. Patton, Director, DoD Sexual Assault Prevention and Response Office (SAPRO)
- Dr. Nathan Galbreath, Senior Executive Advisor, DoD SAPRO.
- Mr. Fred Borch, Army JAG Corps Regimental Historian
- Captain Robert Crow, Joint Service Committee Representative

### AUG. 1, 2013

#### Preparatory Session of the RSP

#### One Liberty Center, Arlington, VA

- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force Sexual Assault Prevention & Response (SAPR) Office
- Ms. Carolyn Collins, Director, Army Sexual Harassment/Assault Response & Prevention (SHARP) Office
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Colonel Don Christiansen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Brian Thompson, Deputy Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Jay Morse, Chief, Army Trial Counsel Assistance Program
- Major Jaclyn Grieser, Army Special Victim Prosecutor
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program
- Lieutenant Colonel Derek Brostek, Branch Head, U.S. Marine Corps Military Justice Branch
- Mr. Guy Surian, Deputy G-3 for Investigative Operations & Intelligence, U.S. Army Criminal Investigation Command
- Special Agent Kevin Poorman, Associate Director for Criminal Investigations, Headquarters, Air Force Office of Special Investigations

## ROLE OF THE COMMANDER SUBCOMMITTEE

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

- Special Agent Maureen Evans, Division Chief, Family & Sexual Violence, Naval Criminal Investigative Service
- Mr. Marty Martinez, U.S. Coast Guard Investigative Service (CGIS) Assistant Director
- Special Agent Beverly Vogel, CGIS Sex Crimes Program Manager
- Professor Margaret Garvin, Executive Director, National Crime Victim Law Institute, Lewis & Clark Law School, Portland, Oregon

### AUG. 5, 2013

#### **Preparatory Session of the RSP**

#### **One Liberty Center, Arlington, VA**

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Brigadier (Retired) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army (telephonic)
- Major General William Mayville, Jr., U.S. Army
- Colonel Dan Brookhart, U.S. Army
- Colonel Jeannie Leavitt, U.S. Air Force
- Lieutenant Colonel Debra Luker, U.S. Air Force
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral William Baumgartner, U.S. Coast Guard
- Captain P.J. McGuire, U.S. Coast Guard
- Air Commodore Cronan, Director General, Australia Defence Force Legal Service (telephonic)

### AUG. 6, 2013

#### **Preparatory Session of the RSP**

#### **One Liberty Center, Arlington, VA**

- Lieutenant Colonel Kelly McGovern, Joint Service Committee Subcommittee on Sexual Assault (JSC-SAS)
- Dr. David Lisak, Professor, University of Massachusetts-Boston (telephonic)
- Dr. Cassia Spohn, Professor, Arizona State University School of Criminology and Criminal Justice
- Dr. Jim Lynch, former Director of the Bureau of Justice Statistics and current Chair, Department of Criminology and Criminal Justice, University of Maryland

## APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

### SEPT. 24, 2013 Public Meeting of the RSP

#### **U.S. District Court for the District of Columbia, Washington, D.C.**

- Professor Geoffrey Corn, South Texas College of Law
- Professor Chris Behan, Southern Illinois University School of Law
- Professor Michel Drapeau, University of Ottawa
- Professor Eugene Fidell, Yale Law School (telephonic)
- Professor Victor Hansen, New England School of Law
- Professor Rachel VanLandingham, Stetson University College of Law
- Lord Martin Thomas of Gresford QC, Chair, Association of Military Advocates (UK)
- Professor Amos Guiora, University of Utah College of Law
- Major General Blaise Cathcart, Judge Advocate General of the Canadian Armed Forces
- Major General Steve Noonan, Deputy Commander, Canadian Joint Operations Command
- Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service
- Commodore Andrei Spence, Commodore Naval Legal Services, Royal Navy, United Kingdom
- Brigadier (Ret.) Anthony Paphiti, former Brigadier Prosecutions, Army Prosecuting Authority, British Army
- Senator Kirsten Gillibrand (New York)
- Senator Claire McCaskill (Missouri)

### SEPT. 25, 2013 Public Meeting of the RSP

#### **U.S. District Court for the District of Columbia, Washington, D.C.**

- Lieutenant General Michael Linnington, U.S. Army
- Colonel Corey Bradley, U.S. Army
- Rear Admiral Dixon Smith, U.S. Navy
- Captain David Harrison, U.S. Navy
- Commander Frank Hutchison, U.S. Navy
- General Edward Rice, U.S. Air Force
- Colonel Polly S. Kenny, U.S. Air Force
- Major General Steven Busby, U.S. Marine Corps
- Lieutenant Colonel Kevin Harris, U.S. Marine Corps
- Rear Admiral Thomas Ostebo, U.S. Coast Guard
- Commander William Dwyer, U.S. Coast Guard
- Brigadier General Richard C. Gross, Legal Counsel to the Chairman of the Joint Chiefs of Staff
- Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army
- Vice Admiral Nanette M. DeRenzi, Judge Advocate General, U.S. Navy
- Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force
- Major General Vaughn A. Ary, Staff Judge Advocate to the Commandant of the Marine Corps
- Rear Admiral Frederick J. Kenney, Judge Advocate General and Chief Counsel, U.S. Coast Guard

## ROLE OF THE COMMANDER SUBCOMMITTEE

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

### OCT. 23, 2013 Role of the Commander Subcommittee Meeting

#### One Liberty Center, Arlington, VA

- Colonel Alan Metzler, Deputy Chief, DoD SAPRO
- Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO
- Dr. Elise Van Winkle, Branch Chief of Research, Defense Manpower Data Center

### NOV. 7, 2013 Public Meeting of the RSP

#### U.S. District Court for the District of Columbia, Washington, D.C.

- Major General Gary S. Patton, Director, DoD SAPRO
- Ms. Bette Stebbins Inch, Senior Victim Assistance Advisor, DoD SAPRO
- Major General Margaret Woodward, Director, Air Force SAPR Office
- Rear Admiral Maura Dollymore, Director of Health, Safety and Work-Life, U.S. Coast Guard
- Ms. Shawn Wren, SAPR Program Manager, U.S. Coast Guard
- Rear Admiral Sean Buck, Director, Navy 21st Century Sailor Office
- Brigadier General Russell Sanborn, Director, Marine & Family Programs
- Dr. Christine Altendorf, Director, U.S. Army Sexual Harassment/ Assault Response & Prevention Office
- Master Sergeant Carol Chapman, SHARP Program Manager, 7th Infantry Division, U.S. Army
- Ms. Christa Thompson, Victim Witness Liaison, Fort Carson, Colorado
- Dr. Kimberly Dickman, Sexual Assault Response Coordinator, National Capitol Region, U.S. Air Force
- Master Sergeant Stacia Rountree, Victim Advocate, National Capitol Region, U.S. Air Force
- Ms. Liz Blanc, U.S. Navy Sexual Assault Response Coordinator, National Capitol Region
- Ms. Torie Camp, Deputy Director, Texas Association Against Sex Assault
- Ms. Gail Reid, Director of Victim Advocacy Services, Baltimore, Maryland
- Ms. Autumn Jones, Director, Victim/Witness Program, Arlington County & City of Falls Church, Virginia
- Ms. Ashley Ivey, Victim Advocate Coordinator, Athens, Georgia
- Ms. Nancy Parrish, President, Protect our Defenders
- Ms. Miranda Peterson, Program and Policy Director, Protect our Defenders
- Mr. Greg Jacob, Policy Director, Service Women's Action Network
- Mr. Scott Berkowitz, President, Rape, Assault, and Incest Network
- Dr. Will Marling, Executive Director, National Organization for Victim Assistance
- Ms. Donna Adams (Public Comment)

## APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

### NOV. 8, 2013

#### **Public Meeting of the RSP**

##### **U.S. District Court for the District of Columbia, Washington, D.C.**

- Mr. Brian Lewis
- Ms. BriGette McCoy
- Ms. Ayana Harrell
- Ms. Sarah Plummer
- Ms. Marti Ribeiro
- Command Sergeant Major Julie Guerra, U.S. Army
- Colonel James McKee, Special Victims' Advocate Program, U.S. Army
- Colonel Carol Joyce, Officer in Charge, Victims' Legal Counsel Organization, U.S. Marine Corps
- Captain Karen Fischer-Anderson, Chief of Staff, Victims' Legal Counsel, U.S. Navy
- Captain Sloan Tyler, Director, Office of Special Victims' Counsel, U.S. Coast Guard
- Colonel Dawn Hankins, Chief, Special Victims' Counsel Division, U.S. Air Force
- Mr. Chris Mallios, Attorney Advisor for AEquitas, Washington, D.C.
- Ms. Theo Stamos, Commonwealth Attorney, Arlington, Virginia
- Ms. Marjory Fisher, Chief, Special Victims Unit, Queens, New York
- Ms. Keli Luther, Deputy County Attorney, Maricopa County, Arizona
- Mr. Mike Andrews, Managing Attorney, D.C. Crime Victims Resource Center
- Colonel Peter Cullen, Chief, U.S. Army Trial Defense Service
- Colonel Joseph Perlak, Chief Defense Counsel, U.S. Marine Corps, Defense Services Organization
- Captain Charles Purnell, US. Navy Defense Service Office
- Colonel Dan Higgins, Chief, Trial Defense Division, U.S. Air Force
- Commander Ted Fowles, Deputy, Office of Legal and Defense Services, U.S. Coast Guard
- Mr. David Court of Court and Carpenter, Stuttgart, Germany
- Mr. Jack Zimmermann of Lavine, Zimmermann and Sampson, P.C., Houston, Texas
- Ms. Bridget Wilson, Attorney, San Diego, California

### NOV. 13, 2013

#### **Role of the Commander Subcommittee Meeting**

##### **One Liberty Center, Arlington, VA**

- Brigadier General Charles Pede, U.S. Army
- Senator Claire McCaskill (Missouri)

## ROLE OF THE COMMANDER SUBCOMMITTEE

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

### NOV. 20, 2013 Role of the Commander Subcommittee Meeting

#### One Liberty Center, Arlington, VA

- Professor Eugene Fidell, Yale Law School (*telephonic*)
- Mr. James Love, Acting Director, Military Equal Opportunity & DEOMI Liaison, DoD Office of Diversity Management & Equal Opportunity
- Dr. Dan McDonald, Defense Equal Opportunity Management Institute
- Lieutenant Colonel Kay Emerson, U.S. Army, Office of Diversity & Leadership (MEO)
- Mr. George Bradshaw, U.S. Navy, 21st Century Sailor Office (MEO)
- Colonel T.V. Johnson, U.S. Marine Corps, Diversity & Equal Opportunity Office
- Master Gunnery Sergeant Lester Poole, U.S. Marine Corps, Diversity & Equal Opportunity Office
- Mr. Cyrus Salazar, U.S. Air Force Equal Opportunity Program
- Mr. James Ellison, U.S. Coast Guard, Civil Rights Directorate
- Lieutenant General Howard Bromberg, U.S. Army, Deputy Chief of Staff, G1
- Captain Steve Deal, Deputy Director, U.S. Navy 21st Century Sailor Division
- Colonel Robin Gallant, Commanding Officer, U.S. Marine Corps, Headquarters & Services Battalion
- Brigadier General Gina Gross, U.S. Air Force, Director of Force Management Policy, AF/A1
- Rear Admiral Daniel Neptun, U.S. Coast Guard, Assistant Commandant for Human Resources

### DEC. 10, 2013

#### Site Visit

#### Role of the Commander Subcommittee

#### Fort Hood, TX

- General Courts-Martial Convening Authorities
- Special Courts-Martial Convening Authorities and Subordinate Commanders
- Senior Enlisted Leaders
- Defense Counsel

### DEC. 11, 2013

#### Public Meeting of the RSP

#### University of Texas – Austin, Austin, TX

- Mr. Russ Strand, Chief, Behavioral Sciences Education and Training Division, U.S. Army Military Police School
- Major Ryan Oakley, U.S. Air Force, Deputy Director, Office of Legal Policy, Office of the Under Secretary of Defense (Personnel & Readiness)
- Dr. Cara J. Krulewitch, Director, Women's Health, Medical Ethics and Patient Advocacy Clinical and Policy Programs, Office of the Assistant Secretary of Defense (Health Affairs)
- Captain Jason Brown, Military Justice Branch, Judge Advocate Division, U.S. Marine Corps
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force

## APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

- Colonel Michael Mulligan, U.S. Army, Chief, Criminal Law Division, Office of The Judge Advocate General
- Mr. Darrell Gilliard, Deputy Assistant Director, Naval Criminal Investigative Service
- Mr. Neal Marzloff, Special Agent in Charge, Central Region, U.S. Coast Guard Criminal Investigative Service
- Mr. Kevin Poorman, Associate Director for Criminal Investigations, U.S. Air Force Office of Special Investigation
- Mr. Guy Surian, Deputy G-3, Investigative Operations and Intelligence, U.S. Army Criminal Investigation Command
- Deputy Chief Kirk Albanese, Los Angeles Police Department, Chief of Detectives, Detective Bureau
- Sergeant Liz Donegan, Austin Police Department, Sex Offender Apprehension and Registration Unit
- Deputy Chief Corey Falls, Ashland (OR) Police Department, Deputy Chief of Police
- Sergeant Jason Staniszewski, Austin Police Department, Sex Crimes Unit
- Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations
- Dr. Noël Busch-Armendariz, Professor, School of Social Work at The University of Texas at Austin, and Associate Dean of Research
- Dr. Kim Lonsway, Director of Research for End Violence Against Women International
- Major Melissa Brown, Texas National Guard (Public Comment)
- Mr. Daniel Ross, Attorney, Chairman of the Advisory Committee, Institute on Domestic Violence and Sexual Assault (Public Comment)

### DEC. 12, 2013

#### **Public Meeting of the RSP**

#### **University of Texas – Austin, Austin, TX**

- Martha Bashford, Chief, Sex Crimes Unit, New York County District Attorney's Office
- Lane Borg, Executive Director, Metropolitan Public Defenders, Portland, Oregon
- Captain Jason Brown, Military Justice Branch (JAM), Judge Advocate Division, Headquarters U.S. Marine Corps
- Colonel Don Christensen, Chief, Government Trial and Appellate Counsel Division, U.S. Air Force
- Lieutenant Colonel Erik Coyne, Special Counsel to The Judge Advocate General, U.S. Air Force
- Captain Robert Crow, Director, Criminal Law Division (Code 20), U.S. Navy
- Kelly Higashi, Assistant United States Attorney, Chief, Sex Offense and Domestic Violence Section, U.S. Attorney's Office, District of Columbia
- Laurie Rose Kepros, Director of Sexual Litigation, Colorado Office of the State Public Defender
- Commander Don King, Director, Defense Counsel Assistance Program, U.S. Navy
- Lieutenant Colonel Fansu Ku, Chief, Defense Counsel Assistance Program, Army Trial Defense Service, U.S. Army
- Lieutenant Colonel Mike Lewis, Chief, Military Justice Division, U.S. Air Force

## ROLE OF THE COMMANDER SUBCOMMITTEE

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

- Janet Mansfield, Attorney, Sexual Assault Policy, Office of The Judge Advocate General, U.S. Army
- Captain Stephen McCleary, Chief, Office of Legal Policy and Program Development, U.S. Coast Guard
- Bill Montgomery, Maricopa County Attorney, Maricopa County, Arizona
- Lieutenant Colonel Jay Morse, Chief, U.S. Army Trial Counsel Assistance Program
- Colonel Michael Mulligan, Chief, Criminal Law Division, Office of The Judge Advocate General, U.S. Army
- Anne Munch, Owner, Anne Munch Consulting, Inc.
- Amy Muth, Attorney-at-Law, The Law Office of Amy Muth
- Wendy Patrick, Deputy District Attorney, Sex Crimes and Stalking Division, San Diego County District Attorney's Office
- Lieutenant Colonel Julie Pitvorec, Chief Senior Defense Counsel, U.S. Air Force
- Barry G. Porter, Attorney & Statewide Trainer, New Mexico Public Defender Department
- Commander Aaron Rugh, Director, Navy Trial Counsel Assistance Program, U.S. Navy
- Major Mark Sameit, Branch Head, Trial Counsel Assistance Program, U.S. Marine Corps
- Captain Scott (Russ) Shinn, Officer-in-Charge, Defense Counsel Assistance Program, Marine Corps Defense Services Organization, U.S. Marine Corps
- Dr. Cassia Spohn, Foundation Professor and Director of Graduate Programs, School of Criminology and Criminal Justice, Arizona State University
- James Whitehead, Supervising Attorney, Trial Division, Public Defender Service for the District of Columbia
- Lieutenant Colonel Devin Winklosky, U.S. Marine Corps, Vice Chair and Professor, Criminal Law Department, The U.S. Army Judge Advocate General's Legal Center and School

**DEC. 13, 2013**

### Site Visit

#### Role of the Commander Subcommittee

#### Joint Base San Antonio - Lackland, TX

- Basic Military Training Commanders and Training Instructors
- Basic Military Training Trainees
- Special Courts-Martial Convening Authorities and Subordinate Commanders
- Senior Enlisted Leaders
- Defense Counsel

## APPENDIX D: PRESENTATIONS BEFORE THE SUBCOMMITTEE AND RESPONSE SYSTEMS PANEL

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

### JAN. 8, 2014

#### **Role of the Commander Subcommittee Meeting**

##### **One Liberty Center, Arlington, VA**

- Lieutenant General (Retired) Claudia Kennedy, U.S. Army (*telephonic*)
- Major General (Retired) Martha Rainville, U.S. Air Force
- Brigadier General (Retired) Loree Sutton, U.S. Army
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Rear Admiral (Retired) Marty Evans, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps
- Captain (Retired) Lory Manning, U.S. Navy
- Honorable Patrick Murphy, former congressman and U.S. Army JAG
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration
- General (Retired) Fred Franks, U.S. Army (*telephonic*)
- General (Retired) Roger Brady, U.S. Air Force (*telephonic*)
- Lieutenant General (Retired) Mike Gould, U.S. Air Force
- Lieutenant General (Retired) Tom Metz, U.S. Army
- Lieutenant General (Retired) John Sattler, U.S. Marine Corps
- Vice Admiral (Retired) Scott Van Buskirk, U.S. Navy
- Major General (Retired) K.C. McClain, U.S. Air Force (*telephonic*)
- Major General (Retired) Mary Kay Hertog, U.S. Air Force (*telephonic*)

### JAN 30, 2014

#### **Public Meeting of the RSP**

##### **The George Washington University Law School, Washington, D.C.**

- Major General (Retired) Martha Rainville, U.S. Air Force (*telephonic*)
- Brigadier General (Retired) Pat Foote, U.S. Army
- Rear Admiral (Retired) Marty Evans, U.S. Navy (*telephonic*)
- Rear Admiral (Retired) Harold Robinson, U.S. Navy
- Captain (Retired) Lory Manning, U.S. Navy
- Colonel (Retired) Paul McHale, U.S. Marine Corps (*telephonic*)
- Ms. K. Denise Rucker Krepp, former U.S. Coast Guard JAG & former Chief Counsel, U.S. Maritime Administration
- General (Retired) Ann Dunwoody, U.S. Army
- General (Retired) Roger Brady, U.S. Air Force
- Vice Admiral (Retired) Mike Vitale, U.S. Navy (*telephonic*)
- Lieutenant General (Retired) James Campbell, U.S. Army
- Lieutenant General (Retired) Ralph Jodice II, U.S. Air Force (*telephonic*)
- Rear Admiral (Retired) William Baumgartner, U.S. Coast Guard

## ROLE OF THE COMMANDER SUBCOMMITTEE

*Agendas, transcripts, and materials for all RSP and subcommittee meetings available at <http://responsesystemspanel.whs.mil/>*

### FEB. 12, 2014 Role of the Commander Subcommittee Meeting

One Liberty Center, Arlington, VA

- Dr. Andra Tharp, Center for Disease Control and Prevention (*telephonic*)
- Dr. Kathleen Basile, Center for Disease Control and Prevention (*telephonic*)
- Dr. Sarah DeGue, Center for Disease Control and Prevention (*telephonic*)
- Ms. Beth Reimels, Center for Disease Control and Prevention (*telephonic*)
- Ms. Kelly Ziemann, Education and Prevention Coordinator, Iowa Coalition Against Sexual Assault
- Mr. Benje Douglas, Project Manager, National Sexual Violence Resource Center
- Dr. Victoria Banyard, Co-director, Prevention Innovations and Professor of Psychology, University of New Hampshire
- Dr. Sharyn Potter, Co-director, Prevention Innovations and Associate Professor of Sociology, University of New Hampshire
- Dr. Jackson Katz, Co-founder, Mentors in Violence Prevention Program (*telephonic*)
- Colonel Alan Metzler, Deputy Director, DoD SAPRO
- Colonel Litonya Wilson, Chief of Prevention, DoD SAPRO
- Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO
- Colonel Karen Gibson, U.S. Army
- Colonel David Maxwell, U.S. Marine Corps
- Colonel Trent Edwards, U.S. Air Force
- Captain Steven Andersen, U.S. Coast Guard
- Captain Peter Nette, U.S. Navy
- Command Sergeant Major Pamela Williams, U.S. Army
- Sergeant Major Mark Byrd, U.S. Marine Corps
- Command Master Chief Marilyn Kennard, U.S. Navy
- Senior Master Sergeant Patricia Granan, U.S. Air Force

### MAR. 12, 2014 Role of the Commander Subcommittee Meeting

One Liberty Center, Arlington, VA

- Colonel (Retired) Denise K. Vowell, Former Chief Trial Judge of the Army
- Mr. Robert Reed, former DoD Assoc. Dep. General Counsel (Military Justice and Personnel Policy)

# Appendix E: SOURCES CONSULTED

## 1. U.S. CONSTITUTION

## 2. LEGISLATIVE SOURCES

### a. Enacted Statutes

10 U.S.C. § 654 (repealed Dec. 22, 2010) (“Don’t Ask, Don’t Tell”)

Consolidated Appropriations Act for Fiscal Year 2014, Pub. L. No. 113-76, 128 Stat. 5 (2014)

National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011)

National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632 (2013)

National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013)

Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2012)

### b. Proposed Statutes

Military Justice Improvement Act of 2013, S. 967, 113th Congress (2013); S. 1197, § 552, amend. no. 2099 (2013); S. 1752, 113th Cong. (2013)

Sexual Assault Training Oversight and Prevention Act, H.R. 3435, 112th Cong. (2011); H.R. 3435 (2013)

Victims Protection Act of 2014, S. 1917, 113th Cong. (2014)

### c. Reports of Congress

House Report No. 81-491 (1949), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/report\\_01.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf)

Report of Hearings by the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate (1963), available at [www.loc.gov/rr/frd/Military\\_Law/pdf/const-rights-mil-pers.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/const-rights-mil-pers.pdf)

Joint Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary and a Special Subcommittee of the Committee on Armed Services, United States Senate, Appendix A, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MJ\\_hearings-1966.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MJ_hearings-1966.pdf)

House Report No. 98-549 (1983), available at [www.loc.gov/rr/frd/Military\\_Law/pdf/HR-98-549.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/HR-98-549.pdf)

Senate Report 98-53 (1983), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/SR-98-53.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/SR-98-53.pdf)

### 3. JUDICIAL DECISIONS

#### a. Supreme Court

*Heath v. Alabama*, 474 U.S. 82 (1985)  
*Middendorf v. Henry*, 425 U.S. 25 (1976)  
*O'Callahan v. Parker*, 395 U.S. 258 (1969)  
*Parker v. Levy*, 417 U.S. 733 (1974)  
*Relford v. Commandant*, 401 U.S. 355 (1971)  
*Solorio v. United States*, 483 U.S. 435 (1987)  
*Weiss v. United States*, 510 U.S. 163 (1994)

#### b. Court of Appeals for the Armed Forces

*United States v. Alexander*, 63 M.J. 269 (CAAF 2006)  
*United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008)  
*United States v. Everson*, 41 C.M.R. 70, 71 (C.M.A. 1969)  
*United States v. Delarosa*, 67 M.J. 318 (C.A.A.F. 2009)  
*United States v. Lewis*, 63 M.J. 405 (C.A.A.F. 2006)  
*United States v. Roland*, 50 M.J. 66 (C.A.A.F. 1999)  
*United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013)  
*United States v. Stombaugh*, 40 M.J. 208 (C.A.A.F. 1994)  
*United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986)  
Service Courts of Criminal Appeals  
*United States v. Ruggiero*, 1 M.J. 1089 (N.C.M.R. 1977)  
*United States v. White*, 1 M.J. 1048, 1051-52 (N.C.M.R. 1976)

### 4. RULES AND REGULATIONS

#### a. Congress

Senate Rule XXII, available at <http://www.rules.senate.gov/public/index.cfm?p=RuleXXII>

#### b. Executive Order

Manual for Courts-Martial, United States (1951), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1951.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1951.pdf)  
Manual for Courts-Martial, United States (1969), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1969.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1969.pdf)  
Manual for Courts-Martial, United States (1984), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1984.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1984.pdf)  
Manual for Courts-Martial, United States (2012), available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf)

## APPENDIX E: SOURCES CONSULTED

### c. Department of Defense

Department of Defense, Directive 1350.2, Department of Defense Military Equal Opportunity (MEO) Program (Nov. 21, 2003), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/135002p.pdf>

Department of Defense, Directive 6495.01, Sexual Assault Prevention and Response (SAPR) Program (Jan. 23, 2012 with Change 1 effective Apr. 30, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649501p.pdf>

Department of Defense, Form 2873, Military Protective Order (July 2004), *available at* <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2873.pdf>

Department of Defense, Instruction 6495.02, Sexual Assault Prevention and Response (SAPR) Program Procedures (Mar. 28, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/649502p.pdf>

Department of Defense, Instruction 5505.03, Initiation of Investigations by Defense Criminal Investigative Organizations (Mar. 24, 2011), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550503p.pdf>

Department of Defense, Instruction 5505.18, Investigation of Adult Sexual Assault in the Department of Defense (May 1, 2013), *available at* <http://www.dtic.mil/whs/directives/corres/pdf/550518p.pdf>

### d. Services

Department of the Army, Regulation 27-26, Rules of Professional Conduct for Lawyers (May 1, 1992), *available at* [http://www.apd.army.mil/pdffiles/r27\\_26.pdf](http://www.apd.army.mil/pdffiles/r27_26.pdf)

Department of the Army, Regulation 190-45, Law Enforcement Reporting (Mar. 30, 2007), *available at* [http://www.apd.army.mil/pdffiles/r190\\_45.pdf](http://www.apd.army.mil/pdffiles/r190_45.pdf)

Department of the Air Force, Air Force Instruction 51-201, Administration of Military Justice (June 6, 2013), *available at* [http://static.e-publishing.af.mil/production/1/af\\_ja/publication/afi51-201/afi51-201.pdf](http://static.e-publishing.af.mil/production/1/af_ja/publication/afi51-201/afi51-201.pdf)

Department of the Navy, Judge Advocate General Instruction 5803.1D, Professional Conduct of Attorneys Practicing under the Cognizance and Supervision of The Judge Advocate General (May 1, 2012), *available at* [http://www.jag.navy.mil/library/instructions/JAGINST\\_5803-1D.pdf](http://www.jag.navy.mil/library/instructions/JAGINST_5803-1D.pdf)

## 5. MEETINGS AND HEARINGS<sup>1</sup>

### a. Public Meetings of the Response Systems Panel

Transcript of RSP Public Meeting (June 27, 2013)

Transcript of RSP Public Meeting (Sept. 24, 2013)

Transcript of RSP Public Meeting (Sept. 25, 2013)

Transcript of RSP Public Meeting (Nov. 7, 2013)

Transcript of RSP Public Meeting (Nov. 8, 2013)

Transcript of RSP Public Meeting (Dec. 11, 2013)

Transcript of RSP Public Meeting (Dec. 12, 2013)

<sup>1</sup> Except where indicated, the materials pertaining to the meetings of the Response Systems Panel and its Subcommittees are currently available at <http://responsesystemspanel.whs.mil/index.php/meetings>.

## ROLE OF THE COMMANDER SUBCOMMITTEE

Transcript of RSP Public Meeting (Jan. 30, 2014)

PowerPoint Presentation of DoD SAPRO, "Sexual Assault Prevention and Response Program" (June 27, 2013)

Written Statement of Protect Our Defenders to RSP (Sept. 17, 2013)

Lisa M. Schenck, "Fact Sheet on Australian Military Justice" (Sept. 18, 2013)

Written Statement of Professor Christopher Behan, Southern Illinois University School of Law (Sept. 21, 2013)

Written Statement of Major General Vaughn A. Ary, U.S. Marine Corps (Sept. 25, 2013)

Written Statement of Lieutenant General Flora D. Darpino, U.S. Army (undated)

Written Statement of Brigadier General Richard Gross, U.S. Army (Sept. 25, 2013)

Written Statement of Lieutenant General Richard C. Harding, U.S. Air Force (Sept. 25, 2013)

Written Statement of Rear Admiral Frederick J. Kenney, U.S. Coast Guard (Sept 25, 2013)

Written Submission of Brigadier (ret.) Anthony Paphiti, British Army, "UK Military Prosecutions for Sexual Offences" (undated), available at [http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/uk-mj-sys/02\\_UK\\_Mil\\_Proc\\_Sexual\\_Offenses.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/uk-mj-sys/02_UK_Mil_Proc_Sexual_Offenses.pdf)

Letter with Enclosures from Lieutenant General Flora D. Darpino, U.S. Army, to RSP (Nov. 6, 2013)

PowerPoint Presentation of DoD SAPRO, "DoD Sexual Assault Prevention and Response Metrics" (Nov. 7, 2013)

Written Statements Submitted by Protect Our Defenders (undated)

Written Statement of Brigadier General (ret.) Evelyn P. Foote, U.S. Army (Jan 30, 2014)

### b. Meetings of the RSP 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 Role of the Commander Subcommittee Meeting (Nov. 20, 2013)

Transcript of Role of the Commander Subcommittee Meeting (Jan. 8, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Feb. 12, 2014)

Transcript of Comparative Systems Subcommittee Meeting (Feb. 25, 2014)

Transcript of Role of the Commander Subcommittee Meeting (Mar. 12, 2014)

PowerPoint Presentation of DoD SAPRO (Oct. 23, 2013)

PowerPoint Presentation of Andra Teten Tharp, "Preventing Sexual Violence Perpetration" (Feb. 12, 2014)

PowerPoint Presentation of DoD SAPRO, "Prevention Strategy Update" (Feb. 12, 2014)

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" (Feb. 13, 2014) (summarizing for Role of the Commander Subcommittee 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)

## APPENDIX E: SOURCES CONSULTED

### c. Other Hearings

Transcript of Briefing on Sexual Assault in the Military, U.S. Commission on Civil Rights (Jan. 11, 2013), available at [http://www.usccr.gov/calendar/trnscrip/Transcript\\_01-11-13.pdf](http://www.usccr.gov/calendar/trnscrip/Transcript_01-11-13.pdf)

Transcript of Hearing to Receive Testimony on Sexual Assaults in the Military, Personnel Subcommittee of the Senate Armed Services Committee (Mar. 13, 2013), available at <http://www.armed-services.senate.gov/download/2013/03/13/hearing-031313>

Transcript of Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee (June 4, 2013), available at <http://www.armed-services.senate.gov/download/2013/06/04/hearing-060413>

Written Statement of General Martin E. Dempsey, Chairman, Joint Chiefs of Staff, to Armed Services Committee, U.S. Senate (June 4, 2013), available at <http://www.armed-services.senate.gov/download/2013/06/04/martin-dempsey-testimony-060413>

Written Statement of General Raymond Odierno, U.S. Army, to Armed Services Committee, U.S. Senate (June 4, 2013), available at <http://www.armed-services.senate.gov/download/2013/06/04/raymond-odierno-testimony-060413>

Quarterly Meeting Minutes of Defense Advisory Committee on Women in the Services, available at <http://dacomits.defense.gov/Portals/48/Documents/Reports/2013/Minutes/DACOWITS%20Business%20Meeting%20Minutes%20September%202013%20Final.pdf>

## 6. OFFICIAL POLICY STATEMENTS

### a. President

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>

### b. Department of Defense

Department of Defense, Directive-Type Memorandum 11-063, Expedited Transfer of Military Service Members Who File Unrestricted Reports of Sexual Assault (Dec. 16, 2011), available at <http://www.afpc.af.mil/shared/media/document/AFD-130416-051.pdf>

Department of Defense, Directive-Type Memorandum 14-002, The Establishment of Special Victim Capability (SVC) Within the Military Criminal Investigative Organizations (Feb. 11, 2014), available at <http://www.dtic.mil/whs/directives/corres/pdf/DTM-14-002.pdf>

Department of Defense, Sexual Assault Prevention and Response Strategic Plan (Apr. 30, 2013), available at [http://www.sapr.mil/public/docs/reports/SecDef\\_SAPR\\_Memo\\_Strategy\\_Atch\\_06052013.pdf](http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Atch_06052013.pdf)

Joint Chiefs of Staff, “Strategic Direction to the Joint Force on Sexual Assault Prevention and Response” (May 7, 2012), available at [http://www.jcs.mil/content/files/2012-05/050812085404\\_Joint\\_Strategic\\_Direction\\_on\\_Sexual\\_Assault\\_\(7\\_May\\_12\).pdf](http://www.jcs.mil/content/files/2012-05/050812085404_Joint_Strategic_Direction_on_Sexual_Assault_(7_May_12).pdf)

Patrick McGann and Paul Schewe, The Department of Defense Sexual Assault Prevention Strategy: Creating a National Benchmark Program (Sept. 30, 2008), reprinted in DoD Response to Request for Information 31 at 000506, currently available at <http://responsesystemspanel.whs.mil/index.php/rfis>

## ROLE OF THE COMMANDER SUBCOMMITTEE

Secretary of Defense, Memorandum re Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases (Apr. 20, 2012), available at [http://www.dod.gov/dodgc/images/withhold\\_authority.pdf](http://www.dod.gov/dodgc/images/withhold_authority.pdf)

Secretary of Defense, Memorandum re 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](http://www.sapr.mil/public/docs/news/EVALUATION_OF_TRAINING.pdf)

Secretary of Defense, Memorandum re Sexual Assault Prevention and Response (May 6, 2013), available at [http://www.sapr.mil/public/docs/reports/SecDef\\_SAPR\\_Memo\\_Strategy\\_Attch\\_06052013.pdf](http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Attch_06052013.pdf)

Secretary of Defense, Memorandum re Sexual Assault Prevention and Response Stand-down (May 17, 2013), reprinted in DoD Response to Request for Information 81 at 002144, currently available at <http://responsesystemspanel.whs.mil/index.php/rfis>

Secretary of Defense, Memorandum re Sexual Assault Prevention and Response (Aug. 14, 2013), available at [http://www.sapr.mil/public/docs/news/SECDEF\\_Memo\\_SAPR\\_Initiatives\\_20130814.pdf](http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf)

Under Secretary of Defense for Personnel and Readiness, Memorandum re Command Climate Assessments (July 25, 2013), reprinted in DoD Response to Request for Information 31 at 000760, currently available at <http://responsesystemspanel.whs.mil/index.php/rfis>

### c. Services

Acting Secretary of the Air Force, Memorandum to the Secretary of Defense re 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](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08a_AF_EnhancingCdrAccountability.pdf)

Secretary of the Army, Memorandum to the Secretary of Defense re Sexual Assault Prevention and Response (SAPR) – Enhanced Commander Accountability (Nov. 1, 2013), currently available at [http://responsesystemspanel.whs.mil/public/docs/meetings/Sub\\_Committee/20131120\\_ROC/08b\\_Army\\_EnhancingCdrAccountability.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08b_Army_EnhancingCdrAccountability.pdf)

Army Directive 2013-29, Army Command Climate Assessments (Dec. 23, 2013), available at [http://armypubs.army.mil/epubs/pdf/ad2013\\_29.pdf](http://armypubs.army.mil/epubs/pdf/ad2013_29.pdf)

Deputy Commandant for Manpower and Reserve Affairs, U.S. Marine Corps, Memorandum to the Secretary of the Navy on Enhancing Commander Accountability (Sept. 19, 2013), currently available at [http://responsesystemspanel.whs.mil/public/docs/meetings/Sub\\_Committee/20131120\\_ROC/08d\\_USMC\\_EnhancingCdrAccountability.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08d_USMC_EnhancingCdrAccountability.pdf)

Marine Corps Administrative Message (MARADMIN) 464/13, Command Climate Assessments (Sept. 17, 2013), available at <http://www.marines.mil/News/Messages/MessagesDisplay/tabcid/13286/Article/150139/command-climate-assessments.aspx>

Navy Administrative Message (NAVADMIN) 181/13, Implementation of Navy Sexual Assault Prevention and Response Program Initiatives (July 2013), available at <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2013/NAV13181.txt>

Navy Administrative Message (NAVADMIN) 216/13, Navy Performance Evaluation Changes (Aug. 2013), available at <http://www.public.navy.mil/bupers-npc/reference/messages/Documents/NAVADMINS/NAV2013/NAV13216.txt>

Navy Personnel Command, “Command Climate Assessment Process,” available at [http://www.public.navy.mil/bupers-npc/support/21st\\_Century\\_Sailor/equal\\_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx](http://www.public.navy.mil/bupers-npc/support/21st_Century_Sailor/equal_opportunity/Pages/COMMANDCLIMATEASSESSMENT.aspx)

## APPENDIX E: SOURCES CONSULTED

Secretary of the Navy, Memorandum to the Secretary of Defense re Report on Enhancing Commander Accountability (Oct. 28, 2013), available at [http://responsesystemspanel.whs.mil/public/docs/meetings/Sub\\_Committee/20131120\\_ROC/08c\\_DON\\_EnhancingCdrAccountability.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131120_ROC/08c_DON_EnhancingCdrAccountability.pdf)

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**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL  
ROLE OF THE COMMANDER SUBCOMMITTEE**  
875 N. RANDOLPH STREET  
ARLINGTON, VA 22203-1995

November 6, 2013

**MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL**

**SUBJECT:** Review of Allied Military Justice Systems and Reporting Trends for Sexual Assault Crimes

A Term of Reference established for this Subcommittee by the Secretary of Defense is to "assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes. . ." One focus of the Subcommittee's work has been the authority assigned to designated senior commanders to refer criminal offenses for trial by courts-martial. A specific focus of our inquiry is assessing whether removing the commander as convening authority will increase the confidence of sexual assault victims in the military justice system and thereby increase reporting of sexual assault offenses, which are underreported when compared to reporting statistics for other serious crimes.

To examine the impact on reporting of sexual assault crimes in the militaries of our Allies, the Subcommittee reviewed extensive materials regarding the justice systems for military personnel and sexual assault reporting in other nations. The Subcommittee reviewed presentations to the Response Systems-Panel by experts on Allied military justice systems and senior military representatives from Australia, Canada, Israel, and the United Kingdom. These representatives and experts provided overviews of their current military justice systems, described the evolution of their systems and the reasons that the systems were changed, provided statistics and information about sexual assault reporting and sexual assault response, and provided their opinions as to what if any effect the structure of their military justice systems had on sexual assault reporting. The Subcommittee also reviewed background materials provided by presenters and outside reports and hearing presentations referencing foreign military justice systems.

This information was provided to the Role of the Commander Subcommittee for consideration. On October 23, 2013, members of the Subcommittee met to review and discuss the materials and testimony on Allied systems. The following represents the findings and assessments of the Subcommittee regarding the information and materials reviewed:

**Overview:**

The changes our Allies have made to their military justice systems have occurred at different times and none of them was made in order to improve sexual assault reporting or prosecution.<sup>1</sup> Israel adopted the Military Justice Law in 1955, which vested prosecutorial discretion in an Independent Military Advocate General, and the adjudication system for

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<sup>1</sup> *Public Session, Response Systems to Adult Sexual Assault Crimes Panel* 152 (Sept. 24, 2013); *Id.* at 181 (testimony of Major General Blaise Cathcart, Judge Advocate General, Canadian Armed Forces); *Id.* at 244-45 (testimony of Commodore Andrei Spence, Commodore, Naval Legal Services and Senior Legal Officer, British Royal Navy); *Id.* at 238 (testimony of Air Commodore Paul Cronan, Director General, Australian Defence Force Legal Service).

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members of the Israel Defense Forces (IDF) has remained largely the same since that date.<sup>2</sup> Canada removed the chain of command from the prosecutorial decision for serious criminal offenses and created a director of military prosecutions through the 1999 amendments to the National Defence Act.<sup>3</sup> Changes to the Canadian military justice system were made subsequent to fundamental changes in the Canadian Charter of Rights and Freedoms which necessitated these changes and reflected general societal concern for the rights of the accused.<sup>4</sup> In 2006, the Australian Parliament enacted legislation to establish the Director of Military Prosecutions as the convening authority to convene courts-martial under the Defence Force Discipline Act (DFDA).<sup>5</sup> This legislation was also enacted out of concern that the public perceived the system as unfair to defendants.<sup>6</sup> In the United Kingdom, the Armed Forces Act of 2006 became effective on November 1, 2009, thereby removing authority for prosecution of serious offenses from the chain of command and placing such authority in a new, independent Director of Service Prosecutions.<sup>7</sup> These changes were also made out of a concern for the rights of defendants raised both within the United Kingdom and before the European Court of Human Rights – the rulings of which the United Kingdom is bound by treaty to follow.<sup>8</sup>

### Sexual Assault Reporting, Investigation, and Prosecution Statistics:

Allied military partners provided statistics for the reporting, investigation, and prosecution of sexual assault crimes within their military services. The nature of the offenses described within the reported statistics varies by country based on the systems available for tracking sexual assault data and the specific statutory offenses encompassed within each country's definition of sexual assault. For example, sexual assault under the DFDA in Australia refers only to rape and attempted rape,<sup>9</sup> while sexual offense reporting data provided by the IDF includes the offenses of rape and attempted rape, indecent assault, physical and/or verbal sexual harassment, and peeping.<sup>10</sup> Likewise, the timeframes for reported information also varied. Data from Canada was provided for 2007 to 2010,<sup>11</sup> while the United Kingdom provided data from 2005 to 2012.<sup>12</sup> The variations in tracking methods, offenses reflected, and reporting periods make comparisons of the data of different countries difficult.

<sup>2</sup> L. LIBR. OF CONG., MILITARY JUSTICE: ADJUDICATION OF SEXUAL OFFENSES, 42-43 (July 2013).

<sup>3</sup> *Public Session*, *supra* note 1, at 158 (statement of Major General Cathcart).

<sup>4</sup> *Id.* at 156-57.

<sup>5</sup> L. LIBR. OF CONG., *supra* note 2, at 4-5.

<sup>6</sup> *Public Session*, *supra* note 1, at 223 (testimony of Air Commodore Cronan).

<sup>7</sup> L. LIBR. OF CONG., *supra* note 2, at 55, 58 (citing Armed Forces Act 2006, c. 52, § 364).

<sup>8</sup> *Public Session*, *supra* note 1, at 38-42 (statement of Lord Martin Thomas of Gresford QC); *see also* Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997).

<sup>9</sup> *Public Session*, *supra* note 1, at 216 (statement of Air Commodore Cronan).

<sup>10</sup> Email from Col. Eli Bar-On to COL Patricia Ham, Staff Director, Response Systems Panel, Statistical Tables relating to Sexual Assault within the IDF: 2007 – 2012 (Aug. 11, 2013) (on file with the Response Systems Panel).

<sup>11</sup> CANADIAN FORCES PROVOST MARSHAL 2010 ANNUAL REPORT 8 (2010); ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER OF NATIONAL DEFENCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE CANADIAN FORCES, A REVIEW FROM 1 APRIL 2007 TO 31 MARCH 2008 at 132 (2008); ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER OF NATIONAL DEFENCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE CANADIAN FORCES, A REVIEW FROM 1 APRIL 2008 TO 31 MARCH 2009 at 130-31 (2009); ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL TO THE MINISTER OF NATIONAL DEFENCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE CANADIAN FORCES, A REVIEW FROM 1 APRIL 2009 TO 31 MARCH 2010 at 100-01.

<sup>12</sup> Letter from Deputy Chief of Defence Staff (Personnel) Secretariat, Investigations into Sex Offences 2005-2010 (Oct. 12, 2013) (on file with the Response Systems Panel); Letter from Brigadier (ret.) Anthony Paphiti, Updated Stats in Response to Dean Schenck's Fact Sheet (Sept. 19, 2013) (on file with the Response Systems Panel).

However, it is possible to consider general tracking and reporting trends within each country and to assess the framework established by each nation's military organization for sexual assault reporting and response.

Effect of System Changes on Sexual Assault Reporting:

Current and former military officials from our Allied partners were asked to assess whether the structural changes that removed the commander from the prosecution of cases, implemented in their military justice systems, had a connection to reporting trends for sexual assault offenses. None of the representatives made this connection.<sup>13</sup>

The Deputy Military Advocate General for the IDF noted an increase in sexual assault complaints in the IDF between 2007 and 2011<sup>14</sup> but attributed no specific reason for the increase.<sup>15</sup> Rather, he noted that it could represent an increase in the number of offenses or could be a result of campaigns by service authorities to raise awareness on the issue.<sup>16</sup> The Judge Advocate General of the Canadian Armed Forces found no discernible trend in data between 2005 and 2010.<sup>17</sup> The Canadians were unable to present statistics addressing whether the change in the military justice system affected sex crime reporting.<sup>18</sup> The Commodore of Naval Legal Services for Britain's Royal Navy assessed that recent structural changes to the military justice system in the United Kingdom had "no discernible" effect on the reporting of sexual assault offenses.<sup>19</sup> The Director General, Australian Defence Force Legal Service, noted that Australian reforms were not targeted at sexual assault offenses in particular, and he noted no significant trend for reporting statistics after the 2003 and 2006 reforms.<sup>20</sup> He acknowledged, however, that the Australian Defence Force estimates that between 2008 and 2011, 80% of

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<sup>13</sup> Additional assessment by the Legal Counsel to the Chairman of the Joint Chiefs of Staff further reinforces the perspectives of the Allied military officials who provided information to the Response Systems Panel. In his discussions with legal advisors from the United Kingdom, Canada, Australia, New Zealand, the Netherlands, and Germany, he learned that none of the nations changed their military justice systems in response to sexual assault prosecution or reporting. Further, none could correlate system changes to increased or decreased sexual assault reporting, and there was no statistical or anecdotal evidence that removing commanders from the charging decision had any effect on victims' willingness to report crimes. *Public Session, supra* note 1, at 207-09 (statement of Brigadier General Richard Gross, Legal Advisor to the Chairman of the Joint Chiefs of Staff).

<sup>14</sup> Professor Amos Guiora, a former judge advocate in the IDF, also commented on this increase in sexual assault reporting in a letter to the SASC in advance of its June hearing. This letter stated in part: "There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers' confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the 'chain of command.'" Letter from Prof. Amos Guiora, Professor, Univ. of Utah, to Senate Armed Services Committee (undated) (on file with the Response Systems Panel).

<sup>15</sup> Email from Col. Eli Bar-On, *supra* note 10.

<sup>16</sup> *Id.*

<sup>17</sup> *Public Session, supra* note 1, at 163-64 (testimony of Major General Cathcart).

<sup>18</sup> *Id.* at 181-82 (testimony of Major General Cathcart).

<sup>19</sup> *Id.* at 282-83 (testimony of Commodore Andrei Spence).

<sup>20</sup> *Id.* at 238-39 (statement of Air Commodore Cronan).

sexual assaults in their armed forces were unreported even though, by that time, sex offenses had been removed from the criminal jurisdiction of their defense forces.<sup>21</sup>

Conclusion:

The Subcommittee has completed its examination of the military justice systems of Israel, the United Kingdom, Australia, and Canada from the point of view of determining the impact of the role of the commander on the reporting of sexual assaults. We make no suggestions or recommendations to the panel at this point as to whether the commander should or should not be removed as the convening authority for sexual assaults and other serious crimes in our military justice system. We do find that none of the military justice systems of our Allies was changed or set up to deal with the problem of sexual assault and none of them can attribute any changes in the reporting of sexual assault as a result of changing the role of the commander. In other words, we have seen no indication that the removal of the commander from the decision making process has resulted in an increase in reporting and there is nothing in the experiences of our foreign Allies that suggests adopting their systems as a model will have any impact on the reporting of sexual assaults.



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Chair  
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<sup>21</sup> Lisa M. Schenck, Fact Sheet on Australian Military Justice 4-5 (Sept. 18, 2013) (unpublished submission, on file with the Response Systems Panel).

## APPENDIX G: INITIAL CONVENING AUTHORITY ASSESSMENT



**RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL  
ROLE OF THE COMMANDER SUBCOMMITTEE  
875 N. RANDOLPH STREET  
ARLINGTON, VA 22203-1995**

January 29, 2014

**MEMORANDUM FOR MEMBERS OF THE RESPONSE SYSTEMS PANEL**

**SUBJECT:** Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial

The Role of the Commander Subcommittee is conducting a comprehensive review of the role of the commander in the military justice system. The Subcommittee has focused particular attention thus far on the question of whether senior commanders serving as convening authorities should retain the authority to refer sexual assaults offenses to court-martial.

Based on all information considered to this point, a strong majority of Subcommittee members agrees the evidence does not support a conclusion that removing authority to convene courts-martial from senior commanders will reduce the incidence of sexual assault or increase reporting of sexual assaults in the Armed Forces. Nor does the evidence indicate it will improve the quality of investigations and prosecutions or increase the conviction rate in these cases. Further, the evidence does not support a conclusion that removing such authority will increase confidence among victims of sexual assault about the fairness of the military justice system or reduce their concerns about possible reprisal for making reports of sexual assault. As a result, the Subcommittee's assessment at this time is that the authority vested in senior commanders to convene courts-martial under the Uniform Code of Military Justice (UCMJ) for sexual assault offenses should not be changed. In reaching this conclusion, the Subcommittee makes the following findings:

1. Criticism of the military justice system often confuses the term "commander" with the person authorized to convene courts-martial for serious violations of the UCMJ. These are not the same thing.
2. Under current law and practice, the authority to refer a sexual assault allegation for trial by court-martial is reserved to a level of commander who will normally be removed from any personal knowledge of the accused or victim. If a convening authority has an interest in a particular case other than an official interest, the convening authority is required to recuse himself or herself.
3. Senior commanders vested with convening authority do not face an inherent conflict of interest when they convene courts-martial for sexual assault offenses allegedly committed by members of their command. As with leaders of all organizations, commanders often must make decisions that may negatively impact individual members of the organization when those decisions are in the best interest of the organization.
4. There is no evidentiary basis at this time supporting a conclusion that removing senior commanders as convening authority will reduce the incidence of sexual assault or increase sexual assault reporting.
5. Sexual assault victims currently have numerous channels outside the chain of command to report incidents of sexual assault, and they are not required to report to anyone in their

## ROLE OF THE COMMANDER SUBCOMMITTEE

organization or any member of their chain of command. These alternative reporting channels are well and broadly publicized throughout the military. Military personnel in the United States may always call civilian authorities, healthcare professionals, or other civilian agencies to report a sexual assault.

6. Under current law and practice, sexual assault allegations must be referred to, and investigated by, military criminal investigative organizations that are independent of the chain of command. No commander or convening authority may refuse to forward an allegation or impede an investigation. Any attempt to do so would constitute a dereliction of duty or obstruction of justice, in violation of the UCMJ.
7. Under current law and practice, the authority to resolve sexual assault allegations is limited to senior commanders who must receive advice from judge advocates before determining appropriate resolution.
8. None of the military justice systems employed by our Allies was changed or set up to deal with the problem of sexual assault, and the evidence does not indicate that the removal of the commander from the decision making process in non-U.S. military justice systems has affected the reporting of sexual assaults. In fact, despite fundamental changes to their military justice systems, including eliminating the role of the convening authority and placing prosecution decisions with independent military or civilian entities, our Allies still face many of the same issues in preventing and responding to sexual assaults as the United States military.
9. It is not clear what impact removing convening authority from senior commanders would have on the military justice process or what consequences would result to organization discipline or operational capability and effectiveness.
10. Congress has recently enacted significant reforms addressing sexual assault in the military, and the Department of Defense has implemented numerous changes to policies and programs to improve oversight and response. These reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.
11. Prosecution of sexual misconduct contributes to the overall effort to address this problem. Commanders must play a central role in preventing sexual assault by establishing command climates that ensure subordinates are trained in and embrace their moral and legal obligations, and by emphasizing the role of accountability at all levels of the organization.

The full report of the Subcommittee will provide additional information and analysis on this issue, but the following represents our initial assessment.



Barbara S. Jones  
Chair  
Role of the Commander Subcommittee

1. Subcommittee Assessment
2. Separate Statement of Subcommittee Member Elizabeth L. Hillman

### **ROLE OF THE COMMANDER SUBCOMMITTEE**

#### **Initial Assessment of Whether Senior Commanders Should Retain Authority to Refer Cases of Sexual Assault to Courts-Martial**

##### **I. ASSESSMENT SUMMARY**

The issue of sexual assault crimes in the U.S. military has been the subject of significant public, legislative, and administrative scrutiny. Some individuals and groups assert commanders should lose the authority to convene courts-martial for sexual assault offenses. Accordingly, they propose amending the Uniform Code of Military Justice (UCMJ) to strip convening authority from commanders and vest authority in legal officers whose function will be independent of the military command in which the alleged misconduct occurs. Others contend senior military commanders are essential to resolving the pernicious issues of sexual assault in military organizations and divesting senior commanders of their role as courts-martial convening authorities will dilute their capacity to lead and impair their ability to maintain good order and discipline, resulting in damage to the efficiency and effectiveness of the Armed Forces.

Over the past three years, Congress made significant changes to the UCMJ and enacted substantial mandates on the Department of Defense (DoD) to address the issue of sexual assault in the military. Additionally, DoD implemented considerable changes to its processes and systems for preventing, assessing, and responding to sexual assault crimes. Reporting of alleged sexual assaults, including assaults that occurred before the person entered the military, significantly increased during Fiscal Year 2013, suggesting increased confidence of sexual assault victims in the sympathetic and effective response they could receive from the military.

###### **a. Responsibility of the Subcommittee**

Section 576 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) directed the Secretary of Defense to establish the Response Systems to Adult Sexual Assault Crimes Panel (RSP) “to conduct an independent review and assessment of the systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses under section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), for the purpose of developing recommendations regarding how to improve the effectiveness of such systems.”<sup>1</sup> In order to assist the RSP in accomplishing, in twelve months, the many areas Congress directed it to assess, the RSP Chair directed the establishment of three subcommittees—Role of the Commander, Comparative Systems, and Victim Services.

On September 23, 2013, the Secretary of Defense established the RSP subcommittees and appointed nine members to the Role of the Commander Subcommittee, including four members of the RSP. The Secretary of Defense established three objectives for the Role of the Commander Subcommittee (Subcommittee), including a requirement to “assess the roles and effectiveness of commanders at all levels in preventing sexual assault and responding to reports of adult sexual assault crimes.” The National Defense Authorization Act for Fiscal Year 2014 (FY14 NDAA) adds the requirement to assess “the impact, if any, that removing from the chain of command any disposition authority regarding charges preferred under . . . the Uniform Code of Military Justice would have on overall reporting and prosecution of sexual assault cases.”<sup>2</sup>

<sup>1</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 576(a)(1), 126 Stat. 1632 (2013).

<sup>2</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1731(a)(1)(A), 127 Stat. 672 (2013).

### b. Methodology of Subcommittee Review

Since June 2013, RSP and Subcommittee members have held and attended 16 days of hearings—including public meetings, subcommittee meetings, preparatory sessions, and site visits—with more than 170 different presenters. Presenters included surviving sexual assault victims; current and former commanders (both active duty and retired); current, former, or retired military justice practitioners; military and civilian criminal investigators; civilian prosecutors, defense counsel, and victims' counsel; sexual assault victim advocacy groups; military and civilian victim advocates; military sexual assault response coordinators (SARCs); Judge Advocates General from each of the Services; a variety of academicians, including social science professors, law professors, statisticians, criminologists, and behavioral health professionals; medical professionals, including sexual assault nurse examiners and emergency physicians; first responders; chaplains; and currently serving United States Senators.

In addition, the Subcommittee considered publicly available information and documents and materials provided to the RSP, including government reports, transcripts of hearing testimony, policy memoranda, official correspondence, statistical data, training aids and videos, and planning documents. The RSP sent specific requests for information (RFIs) to DoD and each of the Services. The RFIs focused on the role of the commander, comparing military and civilian investigative and prosecution systems, and victim services. To date, DoD and the Services have submitted more than 400 pages of narrative responses and more than 750 attached documents. The RSP also sent letters to eighteen victim advocacy organizations around the country soliciting input from those organizations to assist the Panel in its review. Advocacy organizations providing information to the RSP have included those working specifically in military sexual assault, including: Protect Our Defenders; Service Women's Action Network; Rape, Abuse, and Incest National Network; the National Organization for Victim Assistance; and the National Alliance to End Sexual Violence.

## II. THE ROLES OF COMMANDERS AND CONVENING AUTHORITIES

### a. Commander Authority and Responsibility

The term “commander” has a unique and specific meaning within military organizations. It indicates a position of seniority, authority, and responsibility within a particular military organization. By definition, the Rules for Courts-Martial distinguish “commander” from “convening authority,” and the two roles, while overlapping, are not interchangeable.<sup>3</sup> Military officers at all ranks and experience levels may serve in command positions.

The commander serves as the head of a military organization and is primarily responsible for ensuring mission readiness, to include the maintenance of good order and discipline within a unit. The importance of the commander’s disciplinary responsibility is reflected in the preamble to the Manual for Courts-Martial: “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.”<sup>4</sup>

The importance of the commander’s role in maintaining good order and discipline in military organizations has also been reflected in times of cultural change in the Armed Forces. Historically, commanders have proved essential in leading the organizational response during periods of military cultural transition, especially since enactment of the UCMJ. Beginning with racial integration and continuing toward greater inclusion of women and, most recently, the repeal of

<sup>3</sup> See MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 103(5) and R.C.M. 103(6) (2012) [hereinafter MCM].

<sup>4</sup> MCM, *supra* note 3, pt. I, ¶3.

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“Don’t Ask, Don’t Tell,”<sup>5</sup> the Services relied on commanders to set the appropriate tone and effect change among subordinates under their command.<sup>6</sup>

A number of retired officers and senior commanders told the Subcommittee about their own experiences that demonstrated the importance of the chain of command<sup>7</sup> in achieving change in the attitudes and behaviors of service members.<sup>8</sup> As Senator Carl Levin, Chair of the Senate Armed Services Committee, observed, the chain of command has been “[t]he key to cultural change in the military.”<sup>9</sup> Stated directly, commanders—the leaders of military organizations—set and enforce standards and drive cultural change in the military.<sup>10</sup>

### b. Distinction between Commanders and Convening Authorities

While all commanders have disciplinary responsibility for subordinates, the authority under the UCMJ to convene courts-martial is legally distinct from command authority. Convening authority for general, special, and summary courts-martial is established by Articles 22, 23, and 24 of the UCMJ, respectively.<sup>11</sup> Under these articles, convening authority is a specific, statutory authority that attaches to individual officers serving in certain positions and designations.

Since 1775, the power to convene courts-martial has been vested in U.S. commanders as a necessary tool for maintaining discipline in commands. In fact, until the UCMJ was adopted in 1950, commanders enjoyed virtually unfettered discretion in determining whether to try soldiers and sailors by court-martial.<sup>12</sup> The UCMJ vested commanders with the authority to convene courts-martial, but a number of important restrictions in the new code served as checks on this authority.<sup>13</sup> Enactment of the UCMJ, as well as its significant amendments in 1968 and 1983,

<sup>5</sup> 10 U.S.C. § 654 (repealed Dec. 22, 2010).

<sup>6</sup> *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* 12 (June 4, 2013) (testimony of General Raymond T. Odierno, Chief of Staff, U.S. Army); *Transcript of RSP Public Meeting 214* (Sept. 25, 2013) (testimony of Lieutenant General Flora D. Darpino, The Judge Advocate General, U.S. Army) (“Past progress and institutional change, whether racial or gender integration, or, more recently, Don’t Ask, Don’t Tell, have been successful because of the focus and authority of commanders, not because of lawyers. And so it should be in addressing sexual assault.”).

<sup>7</sup> While often used as an all-encompassing term for military superiors, the term “chain of command” refers only to a distinct organizational chain of commanders, from superior to subordinate, who hold the authority to execute the responsibilities of command over an individual. Supervisory or “technical chains” are not part of a service member’s chain of command, and they lack the responsibility and authority unique to military commanders and chains of command.

<sup>8</sup> *Transcript of RSP Role of the Commander Subcommittee Meeting 40* (Jan. 8, 2014) (testimony of Rear Admiral (Retired) Harold L. Robinson, U.S. Navy) (noting that he had “witnessed the chain of command’s ability to effect change in the military culture on racial discrimination”); *accord id.* at 299-301 (testimony of Lieutenant General (Retired) John F. Sattler, U.S. Marine Corps); *see also Transcript of RSP Role of the Commander Subcommittee Meeting 115-17* (Nov. 20, 2013) (testimony of Mr. James Love, Acting Director for Military Equal Opportunity, Department of Defense Office of Diversity Management and Equal Opportunity) (describing significance of military leaders in achieving cultural and climate change in race relations).

<sup>9</sup> *Oversight Hearing to Receive Testimony on Pending Legislation Regarding Sexual Assaults in the Military Before the Senate Armed Services Committee* 4 (June 4, 2013).

<sup>10</sup> See, e.g., *Transcript of RSP Public Meeting 213* (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino) (“It is education, prevention, training, and commitment to a culture change that will make the difference. All of these areas are led by commanders, not lawyers.”).

<sup>11</sup> 10 U.S.C. §§ 822-824 (UCMJ arts. 22-24).

<sup>12</sup> *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).

<sup>13</sup> For example, the UCMJ prohibited convening authorities from preferring charges until they are first examined for legal sufficiency by his staff judge advocate, *see* 10 U.S.C. § 834 (UCMJ art. 34(a)); the staff judge advocate was authorized to directly communicate with the staff judge advocate of a superior or subordinate command, or with The Judge Advocate General, *see* 10 U.S.C. § 806(b) (UCMJ art. 6(b)); and convening authorities, as well as all commanding officers, were prohibited from unlawfully influencing the law officer, counsel, and panel members of courts-martial, *see* 10 U.S.C. § 837 (UCMJ art. 37).

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reflects a continual effort by Congress, in response to the experience of the military justice system in practice, to enhance the balance between the needs for command discipline and a system that dispenses justice fairly. For its part, the Supreme Court has largely left undisturbed—and periodically endorsed—the commander-centered framework of the UCMJ.<sup>14</sup>

With limited statutory exceptions,<sup>15</sup> convening authorities must be commanders. However, not all commanders are convening authorities. An officer in command does not become a convening authority until he or she is selected for a specific command or level of command meeting the statutory requirement. Stated simply, while nearly all convening authorities are commanders, few commanders possess the authority to convene special courts-martial, and fewer still possess the authority to convene general courts-martial.

Officers serving in positions with special courts-martial convening authority (SPCMCA) or general courts-martial convening authority (GCMCA) are senior officers with considerable years of service and experience. A senior officer assuming a command position with convening authority also receives military justice training in pre-command courses, as well as specific legal training conducted by judge advocate instructors.<sup>16</sup> In addition to requisite training, each Service allocates dedicated judge advocate support to senior commanders with convening authority.

An officer will not typically serve in a command position with SPCMCA until he or she is promoted to the grade of O-6 (i.e., colonel or Navy/Coast Guard captain). Officers serving as SPCMCAs generally have at least 20 years of service and have been selected for this level of command through a rigorous and highly competitive Service-level process. An officer's leadership ability, career service record, and previous performance in lower levels of command are central to selection for command positions at the grade of O-6 and above.

Officers serving as GCMCAs have long records of service, with distinguished performance and substantial command experience. In general, an officer serving as a GCMCA has also “had 25 years of experience in a quasi-judicial role, either reviewing misconduct and referring it to the commander who has the authority or [taking] corrective actions on his own with the powers that he or she has.”<sup>17</sup> GCMCAs are normally two-star flag officers and higher.

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The law officer was replaced in 1968, when Congress created the office of military judge and greatly enhanced his judicial powers. *See Transcript of RSP Public Meeting 194-96* (June 27, 2013) (testimony of Mr. Borch) (discussing Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335).

<sup>14</sup> In *Relford v. Commandant*, 401 U.S. 355, 367 (1971), for example, the Supreme Court “stress[ed] . . . [t]he responsibility of the military commander for maintenance of order in his command.” Although the High Court in *O’Callahan v. Parker*, 395 U.S. 258, 272-73 (1969), had held that court-martial jurisdiction does not exist unless the charged offense is “service-connected,” less than two years later in *Relford* the Court upheld court-martial jurisdiction over a soldier’s on-base rapes of a military dependent and a fellow service member’s relative. *See Relford*, 401 U.S. at 367 (emphasizing “[t]he impact and adverse effect that a crime committed against a person or property on a military base . . . has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission”). The Court ultimately overruled *O’Callahan* in *Solorio v. United States*, 483 U.S. 435 (1987), in which it held that the mere military status of an accused is sufficient to support court-martial jurisdiction. *See id.* at 447 (noting that “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military”); *see also Transcript of RSP Public Meeting 198-200* (June 27, 2013) (testimony of Mr. Borch).

<sup>15</sup> The only convening authorities who are not military commanders are the President, the Secretary of Defense, and Service Secretaries. *See* 10 U.S.C. § 822(a)(1, 2, and 4) (UCMJ art. 22(a)(1, 2, and 4)).

<sup>16</sup> Army commanders selected for SPCMCA positions attend Senior Officer Legal Orientation; Air Force Commanders receive legal training at the Wing Commanders Course; Navy Executive Officers, Commanders, and Officers in Charge, as well as Marine Corps Commanders, attend the Senior Officer Course. *See* DoD and Service responses to Request for Information 1(c), dated Nov. 21, 2013.

<sup>17</sup> *Transcript of RSP Public Meeting 270-71* (Sept. 25, 2013) (testimony of Lieutenant General Flora Darpino).

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The following chart illustrates the total number of active duty personnel and commanders in each Service compared to the small number of SPCMCAs and even smaller number of GCMCAs:<sup>18</sup>

	Active Duty Personnel	Commanders	SPCMCAs	SPCMCAs who convened	GCMCAs who convened
				1 or more court-martial in FY13	1 or more court-martial in FY13
Army	528,527	7,000 (approx.)	424	Not tracked	85
Navy	323,251	1,422	1,080	94	200
Marine Corps	194,561	2,182	451	106	50
Air Force	329,452	3,943	97	70	58
Coast Guard	40,962	677	350	12	18
					9

### **III. ARGUMENTS FOR REMOVAL OF CONVENING AUTHORITY FROM COMMANDERS**

The Subcommittee considered proposals and supporting materials advocating the removal of prosecutorial discretion from commanders for sexual assault crimes and other felony-level offenses. Many proponents for change asserted that the current role played by commanders as convening authorities discourages service members from reporting sexual assaults and fosters apprehension among victims about retaliation and retribution. In addition to personal retaliation from friends and family, advocates for removing convening authority from commanders asserted victims have experienced, and in the future will experience, professional retaliation from their chain of command, including administrative consequences and discipline for collateral misconduct.

Proponents for change also asserted the U.S. military justice system lacks fairness and objectivity. They argued the existing system engenders inherent conflicts of interest that may cloud the judgment of commanders and impair the objectivity and credibility of their prosecutorial decision-making. Most notably, they highlighted what they believe is a risk that commanders will be improperly influenced in discipline decisions, either by the desire to protect well-known or valuable subordinates or to avoid addressing criminal allegations that could “reflect poorly on the command climate” or “affect the commander’s career.”<sup>19</sup> Further, they expressed concern that commanders may be unduly influenced<sup>20</sup> to pursue unwarranted prosecutions because of perceived pressure from higher levels of command. A convening system of judge advocates independent of the chain of command, they believe, would eliminate these inherent conflicts of interest, remove any perceptions of undue command influence, and mitigate concerns about prosecutorial objectivity and impartiality.

Advocates also stressed the need for more system transparency, where allegations cannot be disregarded without thorough, independent, and full consideration. Some asserted that unlike an independent legal officer, commanders are not properly trained or prepared to make informed

<sup>18</sup> Active duty personnel figures reflect Nov. 2013 data. Defense Manpower Data Center, Service Totals – current month, DMDC Military Personnel Reports, available at <https://www.dmdc.osd.mil/appj/dwp/reports.do?category=reports&subCat=milActDutReg>. Commander and convening authority data provided by Services in response to RSP Request for Information (Jan. 14, 2014) (on file with RSP). The number of Coast Guard commanders includes 272 senior enlisted personnel who serve in officer-in-charge positions.

<sup>19</sup> Transcript of Role of the Commander Subcommittee Meeting 52 (Jan. 8, 2014) (testimony of Colonel (Retired) Paul McHale, U.S. Marine Corps, former Assistant Secretary of Defense and U.S. Representative).

<sup>20</sup> See MCM, *supra* note 3, R.C.M. 104(a)(2) (“No person subject to the code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority’s judicial acts.”) (emphasis added).

judgments in criminal matters, particularly those involving complex felony-level offenses. Proponents of change also said removing commanders from military justice roles would remove an unwanted or unnecessary burden, allowing them to focus on the warfighting function of accomplishing their primary missions with little or no dilution of their authority to foster a healthy command climate.

Some proponents of change referenced military justice systems of Allied nations, where convening authority formerly analogous to that vested in U.S. commanders has been shifted from commanders to legal officers. These examples were cited to indicate that similar change in the U.S. system will not harm good order and discipline and will improve system confidence among sexual assault victims and increase reporting of sexual assault offenses.<sup>21</sup>

Many proponents described the significant expectations of victims and survivors and the optimism they express that change will build trust with victims. A retired Army general officer called the proposed shift from commanders to legal officers at the core of the Military Justice Improvement Act “a proxy for what might have made it different in their situation.”<sup>22</sup> At a November RSP public meeting, the Panel received accounts, in person and through written public comment, from survivors who support removing disposition authority for sexual assault cases from the chain of command.<sup>23</sup>

#### **IV. ARGUMENTS FOR COMMANDERS TO RETAIN CONVENING AUTHORITY**

In contrast, the Subcommittee also considered proposals and supporting materials from those who believe divesting military commanders of their existing convening authority role is both unjustified and counter-productive. A consistent theme among these proponents is that UCMJ authority is essential and integral to the leadership authority, responsibility, and function of those in command. This authority is, according to these proponents, integral to the command function of setting and enforcing standards by holding accountable those who fail to meet standards, which in turn contributes to good order and discipline in their organizations necessary for the Armed Forces to accomplish its mission. Removing convening authority from senior commanders, supporters of retaining that authority assert, would not only limit the ability of commanders to address sexual

<sup>21</sup> Professor Amos Guiora, a former judge advocate in the Israel Defense Forces, commented on an increase in sexual assault reporting in Israel between 2007 and 2011 in a June letter to the Senate Armed Services Committee. This letter stated in part: “There is little doubt that recent high profile prosecutions have significantly enhanced the trust Israel Defense Forces [IDF] soldiers feel in reporting instances of sexual assaults and harassment. A recent report reflecting an 80% increase in complaints filed with respect to sexual assault and harassment suggests an increase in soldiers’ confidence that their complaints will be forcefully dealt with. The cause for this is, arguably, two-fold: the requirement imposed on commanders to immediately report all instances of sexual assault and harassment and the forceful prosecution policy implemented by JAG officers who are not in the ‘chain of command.’” Letter from Professor Amos Guiora, S.J. Quinney College of Law, Univ. of Utah, to S. Armed Services Comm. (undated), currently available at [http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/Guiora/Prof\\_Guiora\\_Statement\\_to\\_Senate\\_Armed%20\\_Services\\_Committee.pdf](http://responsesystemspanel.whs.mil/Public/docs/meetings/20130924/materials/academic-panel/Guiora/Prof_Guiora_Statement_to_Senate_Armed%20_Services_Committee.pdf). The Deputy Military Advocate General for the IDF, Colonel Eli Bar-On, noted an increase in sexual assault complaints in the IDF between 2007 and 2011 but attributed no specific reason for the increased reporting. While IDF reports increased, sexual offense indictments declined each year between 2007 and 2011, and Colonel Bar-On observed that many reported incidents do not warrant a criminal indictment and are referred to disciplinary adjudication. Email from Colonel Eli Bar-On to Colonel Patricia Ham, Staff Director, RSP, *Statistical Tables Relating to Sexual Assault Within the IDF: 2007 – 2012* (Aug. 11, 2013), currently available at [http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/israel-mj-sys/01\\_Email\\_To\\_RSP\\_from\\_COL\\_Eli\\_Bar\\_On\\_Israeli\\_Defence\\_Forces.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/20130924/materials/allied-forces-mil-justice/israel-mj-sys/01_Email_To_RSP_from_COL_Eli_Bar_On_Israeli_Defence_Forces.pdf).

<sup>22</sup> Transcript of RSP Role of the Commander Subcommittee Meeting 147 (Jan. 8, 2014) (testimony of Brigadier General (Retired) Loree Sutton, U.S. Army).

<sup>23</sup> Transcript of RSP Public Meeting 7-75 (Nov. 8, 2013); *id.* at 19-20 (testimony of BL); *id.* at 44 (testimony of AH); *id.* at 54 (testimony of SP); see also Public Comment from HP and TY provided by Protect Our Defenders, currently available at <http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08/fm-nov-16>.

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assault issues in their organizations effectively, it would fundamentally impair operational readiness and effectiveness in military organizations.

Numerous presenters emphasized the overall size, larger caseload, and transportability of the U.S. military justice system, which is controlled by commanders and deployable to any location where U.S. Forces operate. Commanders expressed their belief that the U.S. system is more effective than the systems of those Allied nations that have removed convening authority from commanders. U.S. commanders stated that those Allied systems were “inefficient, costly, and less effective” for “dealing with these unique cases.”<sup>24</sup> Moreover, the Legal Counsel to the Chairman of the Joint Chiefs of Staff said legal advisors from Allied nations where the commander was removed from military justice decisions could not correlate system changes to increased or decreased sexual assault reporting. He indicated, as this Subcommittee and the RSP have already concluded, there was no statistical or anecdotal evidence among U.S. Allies that removing commanders from the charging decision had any effect on victims’ willingness to report crimes.<sup>25</sup>

Those recommending commanders retain convening authority also highlighted the importance and nature of the relationship between a convening authority and his or her staff judge advocate, the senior legal counsel to command. Presenters described a high level of confidence and communication between commanders and their legal advisors. Senior commanders described seeking and receiving unvarnished legal advice when making military justice decisions. Legal advisors indicated they felt comfortable and well trained to provide independent advice, and noted their authority under Article 6 of the UCMJ, to take an issue up the chain of command where necessary to ensure the right decision for the organization, an authority they said they had exercised in certain cases. These witnesses also expressed a belief that the close and common interaction with the legal advisor in relation to military justice issues enhanced the commander/legal advisor relationship, thereby strengthening the staff judge advocate’s advice across a broad spectrum of topics other than military justice, including operational, contract and fiscal, environmental, and international law.

Senior command and legal officials from the Services said any proposals for change to the U.S. military justice system must be considered carefully in the context of changes already made and functionality of the overall system. Presenters described recent reporting and prosecution increases that have resulted from substantial legal and policy changes and DoD initiatives. They warned against implementing systemic change before there is adequate time to assess the effects of current initiatives, and in the absence of any evidence that change would achieve the objectives those advocating removal of convening authority seek.

Finally, the Subcommittee considered views of some survivors of sexual assault who did not advocate removing the commander from the process and from those who expressed satisfaction at the manner in which their cases were handled in the military justice system.<sup>26</sup>

<sup>24</sup> Transcript of RSP Public Meeting 11 (Sept. 25, 2013) (testimony of Lieutenant General Michael Linnington, U.S. Army).

<sup>25</sup> Id. at 207-09 (testimony of Brigadier General Richard Gross, U.S. Army).

<sup>26</sup> Transcript of RSP Public Meeting 411-22 (Nov. 7, 2013) (public comment of DA); Transcript of RSP Public Meeting 8-17 (Nov. 8, 2013) (testimony of Command Sergeant Major JG, U.S. Army); Transcript of RSP Public Meeting, 496-505 (Dec. 11, 2013) (testimony of Major MB, Texas National Guard); Letter with Enclosures from Lieutenant General Flora Darpino to Judge Jones and RSP (Nov. 6, 2013), currently available at <http://responsesystemspanel.whs.mil/index.php/meetings/meetings-panel-sessions/20131107-08/fn-nov-16>.

## V. REPORTING AND RESPONSE TO SEXUAL ASSAULT ALLEGATIONS

Crimes of sexual violence are a national concern, and efforts to improve sexual assault prevention and response in the military are influenced by many of the same factors and barriers that exist throughout American society. Studies indicate that the risk for “contact sexual violence” for women in the military is comparable to the risk for women in the civilian sector.<sup>27</sup> Sexual assault, however, is chronically underreported in both the military and the civilian sector when compared to reporting rates for other forms of violent crime.<sup>28</sup> As a result, significant effort within DoD and the Services has been focused on increasing sexual assault reporting, because “every report that comes forward is one where a victim can receive the appropriate care and . . . a bridge to accountability where offenders can be held appropriately accountable.”<sup>29</sup>

### a. Reporting Channels for Victims of Sexual Assault

When a service member believes he or she has been sexually assaulted, there are numerous options available for reporting the assault. A victim is never required to report the offense to his or her commander or any other military commander, and the commander does not investigate the report or decide whether it merits investigation.

This protection of a victim’s interests is reflected in DoD policy providing that sexual assault victims may choose to make a restricted or unrestricted report of the incident. In fact, DoD implemented restricted reporting “before [the option] was even an item of discussion” in civilian jurisdictions.<sup>30</sup> A restricted report remains confidential and will not result in notification of law enforcement or the victim’s chain of command.<sup>31</sup> Restricted reports allow victims to report an assault confidentially in order to obtain the support of healthcare treatment and services of a Sexual Assault Response Coordinator (SARC) or Sexual Assault Prevention and Response Victim Advocate (SAPR VA) without being forced to initiate a criminal investigation. This option is intended to maximize the provision of support for such victims without requiring them to choose between obtaining support or retaining their privacy.

Only SARCs, SAPR VAs, and healthcare personnel are authorized to accept restricted reports.<sup>32</sup> A SARC or SAPR VA is required to report the fact of the assault to the installation

<sup>27</sup> Transcript of RSP Public Meeting 124-26 (June 27, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD Sexual Assault Prevention and Response Office (SAPRO)) (citing 2010 National Intimate Partner and Sexual Violence Survey conducted by Center for Disease Control and Prevention in 2013); see also slide 60 of accompanying presentation. Contact sexual violence is defined as oral, anal, vaginal penetration or sexual contact without consent.

<sup>28</sup> Studies indicate 65 percent of sexual assault crimes are not reported to law enforcement or other authorities, with similar reporting rates in the civilian sector and the military among females. Transcript of RSP Public Meeting 26 (June 27, 2013) (testimony of Dr. Lynn Addington, Associate Professor, Department of Justice, Law, & Society, American University) (citing statistics from National Crime Victimization Survey and 2012 Workplace and Gender Relations Survey of Active Duty Personnel). Studies of military victims who reported their victimization indicate they did so because it was the right thing to do, to seek closure, or to protect themselves or others. In contrast, the most common reason cited by those who did not report was that they did not want anyone to know, felt uncomfortable making a report, or thought the report would not be kept confidential. Transcript of RSP Role of the Commander Subcommittee Meeting 59-60 (Oct. 23, 2013) (testimony of Dr. Galbreath); see also slides 8 and 9 of accompanying presentation.

<sup>29</sup> Transcript of RSP Public Meeting 108-09 (June 27, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

<sup>30</sup> Transcript of RSP Public Meeting 421-22 (Dec. 11, 2013) (testimony of Ms. Joanne Archambault, Executive Director of End Violence Against Women International and President and Training Director for Sexual Assault Training and Investigations).

<sup>31</sup> U.S. DEP’T OF DEF. INSTR. [hereinafter DODI] 6495.02, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM PROCEDURES enclosure 4, ¶ 1.b (Mar. 28, 2013).

<sup>32</sup> Id.; see also Military Rape Crisis Center, <http://militaryrapecrisiscenter.org/for-active-duty/reporting-option/>.

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commander,<sup>33</sup> but the report will not contain personally identifiable information and may not be used for investigative purposes.<sup>34</sup> Accordingly, the victim's identity remains confidential in a restricted report.<sup>35</sup> If a victim makes a report to someone not authorized to accept restricted reports—for example, someone in the chain of command or a law enforcement officer—an investigation may ensue, as all officials are required to report the alleged sex crime to the command and an investigative agency.<sup>36</sup>

Victims can make unrestricted reports of sexual assault to SARCs, SAPR VAs, and healthcare personnel, as well as chaplains,<sup>37</sup> judge advocates, and military or civilian law enforcement personnel.<sup>38</sup> Victims may also report an assault to a supervisor or their chain of command, but they are not required to do so. Unrestricted reports of sexual assault will result in investigation of the allegation. Military personnel in the United States may always call civilian law enforcement or other civilian agencies to report a sexual assault if they are not comfortable notifying military authorities.

The following chart depicts the different reporting options available within DoD to victims of sexual assault:

Unrestricted Reporting Options	Restricted Reporting Options <sup>39</sup>
<ul style="list-style-type: none"><li>Sexual Assault Response Coordinators (SARCs)</li><li>Victim Advocates (VAs)</li><li>Health Care Professionals or Personnel</li><li><i>Chaplains</i></li><li><i>Legal Personnel</i></li><li><i>Chain of Command</i><sup>41</sup></li><li><i>Law Enforcement – Military Police or Military Criminal Investigative Organizations</i></li></ul>	<ul style="list-style-type: none"><li>Sexual Assault Response Coordinators (SARCs)</li><li>Victim Advocates (VAs)</li><li>Health Care Professionals or Personnel</li><li><i>Chaplains</i><sup>40</sup></li><li><i>Legal Assistance Attorneys</i></li></ul>

Reporting options are well and broadly publicized throughout the military. DoD policy requires that all military personnel must receive tailored sexual assault prevention and response training upon initial entry to the military, annually, during professional military education and

<sup>33</sup> 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.

<sup>34</sup> DoDI 6495.02 encl. 4, ¶ 1.b.

<sup>35</sup> *Id.*

<sup>36</sup> DoDI 5505.18, INVESTIGATION OF ADULT SEXUAL ASSAULT IN THE DEPARTMENT OF DEFENSE (May 1, 2013). See *infra* note 39.

<sup>37</sup> If a report is made in the course of otherwise privileged communications, chaplains are not required to disclose they have received a report of a sexual assault. DoDI 6495.02 encl. 4, ¶ 1.b(3).

<sup>38</sup> Chaplains and legal assistance attorneys have protected communications with victims, but they do not take reports. See *id.*

<sup>39</sup> See also DoDI 6495.02 encl. 4, ¶ 1.e(1) ("A victim's communication with another person (e.g., roommate, friend, family member) does not, in and of itself, prevent the victim from later electing to make a Restricted Report. Restricted Reporting is confidential, not anonymous, reporting. However, if the person to whom the victim confided the information (e.g., roommate, friend, family member) is in the victim's officer and non-commissioned officer chain of command or DoD law enforcement, there can be no Restricted Report.").

<sup>40</sup> Only the SARC, SAPR VA and healthcare personnel are designated as authorized to accept a restricted report. Victim outcry to chaplains and legal assistance attorneys is considered confidential, and does not result in an unrestricted report. DoDI 6495.02 encl. 4, ¶ 1.b(3).

<sup>41</sup> Members of the chain of command and supervisory chain do not intake reports. Supervisors and leaders are trained to immediately contact their servicing SARC or VA, who will advise the victim of available services and options.

leadership development training, before and after deployments, and prior to filling a command position.<sup>42</sup> 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.<sup>43</sup>

### b. Investigation and Disposition of Sexual Assault Allegations

DoD policy mandates that investigations of unrestricted reports of sexual assault will be conducted by specially trained investigators from the military criminal investigative organizations (MCIOs), not the victim's immediate commander or chain of command. All unrestricted reports of sexual assault must be immediately reported to an MCIO, regardless of the severity of the crime alleged.<sup>44</sup> A commander of a victim or alleged offender may not ignore a complaint or judge its veracity.<sup>45</sup> MCIOs are assigned to an independent chain of command from the accused and his or her SPCMCA and must independently report all sexual assault accusations to the Service Secretaries and Chiefs of Staff.<sup>46</sup>

MCIOs must initiate investigations for all offenses of adult sexual assault of which they become aware that occur within their jurisdiction, regardless of the severity of the allegation. The lead MCIO investigator must be a trained special victim investigator for all investigations of unrestricted sexual assault reports.<sup>47</sup> Investigators must ensure a SARC is notified as soon as possible to ensure system accountability and access to services for the victim.<sup>48</sup>

Allegations of sexual assault by a service member are often subject to investigation and prosecution by more than one jurisdiction, depending on the location of the alleged crime. Civilian law enforcement must be informed if the reported crime occurred in an area with concurrent Federal (military) and civilian criminal jurisdiction and may accept investigative responsibility if the MCIO declines, or the investigation may be worked jointly by the MCIO and the civilian agency.<sup>49</sup> 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.<sup>50</sup>

DoD policy also establishes the minimum level of command that may resolve an allegation of sexual assault. The first SPCMCA in the grade of O-6 or above in the chain of command of the

<sup>42</sup> DoDI 6495.02 encl. 10, ¶ 3. Training must be specific to a service member's grade and commensurate with his or her level of responsibility. *Id.* at ¶ 2.d.

<sup>43</sup> *Id.* at ¶ 2.d(6, 11).

<sup>44</sup> DoDI 5505.18. Section 1742 of the FY14 NDAA codifies this requirement.

<sup>45</sup> 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.

<sup>46</sup> Transcript of RSP Public Meeting 222-23 (June 27, 2013) (testimony of Captain Robert Crow, U.S. Navy, Joint Service Committee Representative).

<sup>47</sup> DoDI 5505.18 encl. 2, ¶ 6.

<sup>48</sup> *Id.* at encl. 2, ¶ 1.

<sup>49</sup> *Id.* at ¶ 3.c(3).

<sup>50</sup> *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.

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accused serves as the “initial disposition authority” for all sexual assault allegations.<sup>51</sup> Senior commanders with initial disposition authority often have no personal knowledge of either the accused or the victim.

When an investigation is complete, the initial disposition authority reviews the results of the investigation in consultation with a judge advocate and determines the appropriate disposition of the case.<sup>52</sup> If a court-martial is warranted, charges alleging the offense(s) are preferred against the accused.<sup>53</sup> For any offense committed after June 24, 2014, the FY14 NDAA amends Article 18 of the UCMJ, to restrict jurisdiction for sexual assault offenses to general courts-martial.<sup>54</sup> In other words, if an offense warrants trial by court-martial, the case cannot be referred to a special court-martial. Instead, the offense may only be referred to a general court-martial. If a judge advocate disagrees with the SPCMCA’s disposition decision, that judge advocate may bring the issue to the attention of a higher authority.<sup>55</sup>

When charges are preferred for a sexual offense and forwarded to the GCMCA with a recommendation that the case be tried by general court-martial, the GCMCA must comply with prerequisite requirements prior to referring the case to trial. The GCMCA must ensure a thorough and impartial investigation was conducted in accordance with Article 32 of the UCMJ,<sup>56</sup> and he or she must refer the charges to his or her staff judge advocate for advice and consideration.<sup>57</sup>

A staff judge advocate is a senior military attorney who serves as the principal legal advisor of a command.<sup>58</sup> Staff judge advocates to GCMCAs are typically in the grade of O-5 or O-6.<sup>59</sup> Before the convening authority may refer charges to a general court-martial, the staff judge advocate must provide, in writing, his or her own personal legal opinion expressing whether the charges state an offense, there is probable cause to believe an offense was committed and the accused committed it, and there is jurisdiction over the person and offense; and a recommendation as to the disposition of the offenses.<sup>60</sup> Once the staff judge advocate has provided written advice and a disposition

<sup>51</sup> DoDI 6495.02 encl. 5, ¶ 7.b (referring to Secretary of Defense Memorandum, “Withholding Initial Disposition Authority Under the Uniform Code of Military Justice in Certain Sexual Assault Cases” (Apr. 20, 2012) (hereinafter SecDef Withhold Memo), available at [http://www.dod.gov/dodgc/images/withhold\\_authority.pdf](http://www.dod.gov/dodgc/images/withhold_authority.pdf).

<sup>52</sup> SecDef Withhold Memo; see also *Transcript of RSP Public Meeting 210-11* (June 27, 2013) (testimony of Mr. Borch that “commanders do not make decisions in a vacuum . . . and their [j]udge [a]dvocates are involved at every step of the way”). Disposition may include no action, non-judicial punishment, administrative action such as administrative separation from the service, referral to a summary or special court-martial, or directing a pretrial investigation pursuant to Article 32 of the UCMJ, if the disposition authority determines a general court-martial may be warranted. See MCM, *supra* note 3, R.C.M. 306.

<sup>53</sup> Any person subject to the UCMJ, including a service member who has been the victim of a sexual assault, may prefer charges. MCM, *supra* note 3, R.C.M. 307(a). Often, however, charges are preferred by unit-level commanders.

<sup>54</sup> As such, the SPCMCA will not have jurisdiction to refer any sexual assault offense to special court-martial, and any allegation warranting trial must be forwarded to the GCMCA for referral.

<sup>55</sup> See 10 U.S.C. § 806(b) (UCMJ art. 6(b)); see also *Transcript of RSP Public Meeting 239* (Sept. 25, 2013) (testimony of Lieutenant General Richard C. Harding, The Judge Advocate General, U.S. Air Force); *id.* at 271-72 (testimony of Flora D. Darpino, The Judge Advocate General, U.S. Army).

<sup>56</sup> 10 U.S.C. § 832; MCM, *supra* note 3, R.C.M. 405. The FY14 NDAA mandated substantial changes to Article 32 investigations, which will take effect on December 27, 2014.

<sup>57</sup> 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 3, R.C.M. 406.

<sup>58</sup> MCM, *supra* note 3, R.C.M. 103(17).

<sup>59</sup> See *Transcript of RSP Public Meeting 244* (June 27, 2013) (testimony of Captain Crow).

<sup>60</sup> 10 U.S.C. § 834 (UCMJ art. 34); MCM, *supra* note 3, R.C.M. 406. Article 34 of the UCMJ, requires only written SJA advice for referral to general courts-martial, but written advice may be provided to the convening authority in referrals to lesser courts-martial as well.

recommendation, the GCMCA may decide whether to refer the case to court-martial or send it to a lesser forum for adjudication.

To ensure more rigorous scrutiny of the decision to or not to refer charges for court martial, Section 1744 of the FY14 NDAA newly requires review of any decision not to refer charges of sex-related offenses to trial by court-martial. If the staff judge advocate recommends charges be referred to trial by court-martial and the convening authority decides not refer the charges, the convening authority must forward the case file to the Service Secretary for review. If the staff judge advocate recommends that charges not be referred to trial by court-martial and the convening authority concurs, the convening authority must forward the case file to a superior commander authorized to exercise general court-martial convening authority for review.<sup>61</sup>

Information presented to the Subcommittee indicates that convening authorities and staff judge advocates agree on the appropriate disposition of an allegation in the overwhelming majority of cases, but, a staff judge advocate's recommendation is not binding on the convening authority's decision. The convening authority may refer charges to court-martial, contrary to the staff judge advocate's recommendation, or he or she may otherwise dispose of charges contrary to the staff judge advocate's recommendation to proceed to trial.<sup>62</sup> The staff judge advocate may communicate directly with the staff judge advocate of the superior commander or with The Judge Advocate General of their Service if he or she disagrees with the convening authority's decision.<sup>63</sup> Superior convening authorities also have authority to withdraw a decision from a subordinate commander and make their own determination on appropriate action.

### **VI. ADDITIONAL LEGISLATIVE AND POLICY CHANGES**

#### **a. National Defense Authorization Acts for Fiscal Year 2012, 2013 and 2014**

Increased scrutiny over the U.S. military's handling of sexual assault cases has been the impetus for numerous statutory changes to the role of the commander in sexual assault cases.

Section 582 of the National Defense Authorization Act for Fiscal Year 2012 included a provision requiring commanding officers to consider applications for change of station or unit transfer for members on active duty who are the victim of a sexual assault or a related offense.<sup>64</sup> This law codified the expedited transfer policy implemented by the Department of Defense in December 2011.<sup>65</sup> Notably, from policy implementation through the end of calendar year 2012, commanders approved 334 of 336 transfer requests.<sup>66</sup>

<sup>61</sup> National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 [hereinafter FY14 NDAA], § 1744(c),(d), 127 Stat. 672 (2013).

<sup>62</sup> A review of criminal cases between 1 January 2010 and 23 April 2013 showed that Air Force commanders and their staff judge advocates agreed on appropriate disposition in more than 99 percent of cases where the staff judge advocate recommended trial by court-martial. *Written Statement of Lieutenant General Richard C. Harding to the RSP* (Sept. 25, 2013). Retired officers who held GCMCA testified they had never personally disagreed or heard of a case where a GCMCA disagreed with a staff judge advocate's recommendation to refer charges to court-martial. *Transcript of RSP Role of the Commander Subcommittee Meeting* 278-79 (Jan. 8, 2014).

<sup>63</sup> See 10 U.S.C. § 806 (UCMJ art. 6).

<sup>64</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 582, 125 Stat. 1298 (2011).

<sup>65</sup> U.S. DEP'T OF DEF. DIRECTIVE-TYPE MEMORANDUM 11-063, EXPEDITED TRANSFER OF MILITARY SERVICE MEMBERS WHO FILE UNRESTRICTED REPORTS OF SEXUAL ASSAULT (Dec. 16, 2011), available at <http://www.afpc.af.mil/shared/media/document/AFD-130416-051.pdf>.

<sup>66</sup> U.S. Dep't of Def., DoD Sexual Assault Prevention and Response Initiatives as of April 2013, available at <http://www.defense.gov/news/DoDSexualAssaultPreventionandResponseInitiatives.pdf>.

Section 574 of the National Defense Authorization Act for Fiscal Year 2013 (FY13 NDAA) addressed the role of commanders by requiring sexual assault prevention and response training for new or prospective commanders at all levels of command.<sup>67</sup> Section 578 of the FY13 NDAA directed the Secretary of Defense to develop a policy to require general or flag officer review of circumstances and grounds for the proposed involuntary separation of any member of the Armed Forces who: made an unrestricted report of sexual assault; within one year after making the unrestricted report, is recommended for involuntary separation from the Armed Forces; and requests the review on the grounds that the member believes the recommendation for involuntary separation was initiated in retaliation for making the report.<sup>68</sup>

Most recently, the FY14 NDAA modified Article 60 of the UCMJ, to preclude convening authorities from dismissing or modifying findings of a court-martial for sexual assault and rape offenses under Article 120, forcible sodomy offenses under Article 125, and attempts to commit such offenses under Article 80 of the UCMJ.<sup>69</sup> If a convening authority modifies the sentence of a court-martial, he or she must prepare a written explanation, which is made part of the trial record. Additionally, the convening authority may not reduce a sentence to less than a mandatory minimum, except on the recommendation of trial counsel due to the substantial assistance of the accused in the investigation or prosecution of another person who has committed an offense.<sup>70</sup> A number of other provisions in the FY14 NDAA also impact the role of the commander and courts-martial for sexual assault offenses.<sup>71</sup>

### b. DoD Policies and Initiatives

In addition to statutory mandates, the Secretary of Defense has issued a number of policy changes affecting commanders' roles and responsibilities in sexual assault cases. Most notably, on April 20, 2012, the Secretary of Defense elevated the initial disposition authority for sexual assault offenses to a command level that is distanced from the accused and/or accuser and away from the local unit level.<sup>72</sup> The policy withdraws initial disposition authority for sexual assault and rape offenses under Article 120, forcible sodomy offenses under Article 125, and attempts to commit such offenses under Article 80 of the UCMJ, from all commanders who do not possess at least special court-martial convening authority and who are not in the grade of O-6 or higher.<sup>73</sup> The policy places responsibility on the initial disposition authority to determine whether court-martial, nonjudicial punishment, or adverse administrative action is appropriate, and it mandates consultation with a judge advocate prior to initial disposition decisions.<sup>74</sup>

In addition to elevating initial disposition authority, the Secretary of Defense announced new initiatives on April 17, 2012, to include: the establishment of a special victim's unit within each Service; a requirement that commanders conduct annual organization climate assessments; and

<sup>67</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 574, 126 Stat. 1632 (2013).

<sup>68</sup> *Id.* at § 578.

<sup>69</sup> FY14 NDAA, *supra* note 61, at § 1702(b).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at §§ 1702, 1705, 1708, 1713, 1721, 1742, 1744, 1751.

<sup>72</sup> Press Release, Sec'y of Def. Leon E. Panetta (Apr. 17, 2012), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5013>.

<sup>73</sup> SecDef Withhold Memo, *supra* note 51.

<sup>74</sup> *Id.*

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enhanced training programs for sexual assault prevention, including training for new military commanders in handling sexual assault matters.<sup>75</sup>

On September 25, 2012, DoD announced expanded sexual assault prevention efforts. The Secretary of Defense directed the Services to develop training core competencies and methods of assessment, requiring each service to: provide a two-hour block of instruction dedicated to Sexual Assault Prevention and Response (SAPR) training in all pre-command and senior enlisted leader training courses; provide commanders a SAPR “quick reference” program and information guide; assess commanders’ and senior enlisted leaders’ understanding and mastery of key SAPR concepts; and develop and implement refresher training for sustainment of SAPR skills and knowledge.<sup>76</sup> The initiative requires enhanced SAPR training for commanders and senior enlisted leaders.<sup>77</sup>

In March 2013, the Secretary of Defense directed a review of Article 60 of the UCMJ.<sup>78</sup> Following the review, Secretary Hagel directed the Office of General Counsel “to prepare legislation for Congress to amend Article 60 . . . [to] eliminate[e] the discretion for a convening authority to change the findings of a court-martial, except for certain minor offenses” and to “requir[e] the convening authority to explain in writing any changes made to court-martial sentences, as well as any changes to findings involving minor offenses.”<sup>79</sup>

Two months later, on May 7, 2013, the Secretary of Defense directed the Services to implement the 2013 DoD Sexual Assault Prevention and Response Strategic Plan; and announced eight additional measures to address sexual assault in the military. Two of the measures that directly impact commanders include developing methods to hold military commanders accountable for command climate and requiring commanders to receive copies of their subordinate commanders’ annual command climate surveys.<sup>80</sup>

Three months later, on August 14, 2013, the Secretary of Defense ordered seven additional measures addressing sexual assault in the military. The two most sweeping initiatives required each service to create special counsel programs for sexual assault victims, and required JAG officers to preside at all Article 32 investigations for sexual assault-related charges.<sup>81</sup>

On December 20, 2013, the Secretary of Defense issued a statement underscoring the Department’s commitment to eliminating sexual assault in the military. He commended the

<sup>75</sup> Press Release, *supra* note 72; see also U.S. Dep’t of Def., Initiatives to Combat Sexual Assault in the Military (undated), available at <http://www.defense.gov/news/DoDSexualAssault.pdf>.

<sup>76</sup> 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](http://www.sapr.mil/public/docs/news/Evaluation_of_Training.pdf).

<sup>77</sup> *Id.*

<sup>78</sup> Press Release, Secretary Chuck Hagel (Apr. 8, 2013), available at <http://www.defense.gov/releases/release.aspx?releaseid=15917>.

<sup>79</sup> *Id.* The FY14 NDAA codifies this requirement. See FY14 NDAA § 1702(b).

<sup>80</sup> U.S. Dep’t of Def., Department of Defense Press Briefing with Secretary Hagel and Maj. Gen. Patton on the Department of Defense Sexual Assault Prevention and Response Strategy From the Pentagon (May 7, 2013), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=5233>; see also U.S. Dep’t of Def., Memorandum from the Secretary of Defense on Sexual Assault Prevention and Response (May 6, 2013), available at [http://www.sapr.mil/public/docs/reports/SecDef\\_SAPR\\_Memo\\_Strategy\\_Attch\\_06052013.pdf](http://www.sapr.mil/public/docs/reports/SecDef_SAPR_Memo_Strategy_Attch_06052013.pdf).

<sup>81</sup> 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](http://www.sapr.mil/public/docs/news/SECDEF_Memo_SAPR_Initiatives_20130814.pdf).

President and leaders in Congress for the initiatives included in the FY14 NDAA, and affirmed DoD's commitment to effectively implement those initiatives.<sup>82</sup>

### c. Proposed Additional Legislative Changes to Convening Authority

In addition to provisions enacted through the National Defense Authorization Acts addressing the issue of sexual assault in the military, some lawmakers believe that the military justice system requires more fundamental change, such as modifying or restricting the convening authority vested in certain senior military commanders.<sup>83</sup>

Representative Jackie Speier (D-CA) introduced the Sexual Assault Training Oversight and Prevention Act (the STOP Act) on November 16, 2011, and again on April 17, 2013.<sup>84</sup> This proposal sought to remove disposition authority for only sex-related offenses from existing convening authorities and place disposition authority for such offenses under the jurisdiction of an autonomous Sexual Assault Oversight and Response Office comprised of civilian and military personnel.<sup>85</sup> While the STOP Act was not incorporated into law, the bill was supported by 148 co-sponsors during the 113th Congress.<sup>86</sup>

Expanding the STOP Act, the Military Justice Improvement Act of 2013 (MJIA), first introduced by Senator Kirsten Gillibrand (D-NY) on May 16, 2013, would divest convening authority from commanders for most serious crimes, not just sexual assault crimes.<sup>87</sup> On November 18, 2013, Senator Gillibrand filed an amendment to the pending defense authorization bill. The amendment modified some aspects of her earlier bill but retained the bill's features modifying convening authority for most serious crimes.<sup>88</sup> On November 20, 2013, Senator Gillibrand filed a stand-alone version of this amendment, which is currently pending in the Senate.<sup>89</sup> Her amendment was not adopted as part of the FY14 NDAA.

Senator Claire McCaskill (D-MO), in contrast to Representative Speier and Senator Gillibrand, views the commander as central to the military justice process. On January 14, 2014, Senator McCaskill filed the Victims Protection Act of 2014, which seeks to address the challenge of sexual assault through additional enhancements to the sexual assault prevention and response activities of the Armed Forces.<sup>90</sup> The bill does not alter the role of the commander in referring sexual assault cases for prosecution.

<sup>82</sup> U.S. Dep't of Def., Statement by Secretary of Defense Chuck Hagel on Sexual Assault Prevention and Response (Dec. 20, 2013), available at [http://www.defense.gov/home/features/messages/secdef\\_hagel.aspx](http://www.defense.gov/home/features/messages/secdef_hagel.aspx).

<sup>83</sup> See H.R. 3435, 112th Cong., Sexual Assault Training Oversight and Prevention Act (2011); H.R. 1593, 113th Cong., Sexual Assault Training Oversight and Prevention Act (2013); S. 967, 113th Cong., Military Justice Improvement Act of 2013 (2013); S. 1197, § 552, amend. no. 2099 (2013); S. 1752, 113th Cong., Military Justice Improvement Act of 2013 (2013).

<sup>84</sup> H.R. 3435, 112th Cong. (2011); H.R. 1593, 113th Cong. (2013).

<sup>85</sup> *Id.*

<sup>86</sup> H.R. 1593, 113th Cong. (2013).

<sup>87</sup> S. 967, 113th Cong. (2013).

<sup>88</sup> S. 1197, § 552, amend. no. 2099 (2013).

<sup>89</sup> S. 1752, 113th Cong. (2013).

<sup>90</sup> S. 1917, 113th Cong., Victims Protection Act of 2014 (2014).

### VII. RECENT SEXUAL ASSAULT REPORTING AND PROSECUTION TRENDS

The DoD Sexual Assault Prevention and Response Office (SAPRO) oversees DoD policy for the SAPR program and is responsible for oversight activities assessing SAPR program effectiveness. Pursuant to reporting requirements levied by Congress, DoD SAPRO maintains statistical data by fiscal year on restricted and unrestricted reports of sexual assault.

In Fiscal Year 2012 (FY12), DoD SAPRO reported the Services received 3,374 reports of sexual assault involving Service members as either victims or subjects.<sup>91</sup> This number includes both restricted and unrestricted reports. The number of reports received in FY12 increased by 6 percent from Fiscal Year 2011 (FY11), and FY12 represented the highest number of reports received since DoD began tracking reports in 2004.<sup>92</sup> FY12 reports increased for every Service,<sup>93</sup> and the number of service members making reports of sexual assault increased by 8 percent from FY11 and 33 percent compared to Fiscal Year 2007 (FY07).<sup>94</sup> Unrestricted reporting increased by 5 percent in FY12, and restricted reporting increased by 8 percent.<sup>95</sup> Restricted report conversions to unrestricted reports increased from 14.1 percent in FY11 to 16.8 percent in FY12.<sup>96</sup>

In FY12, courts-martial charges were preferred in 68 percent of cases under military jurisdiction where sexual assault allegations were substantiated by investigation, up from 30 percent in FY07.<sup>97</sup> Cases resolved through nonjudicial punishment dropped from 34 percent to 18 percent over the same year comparison, and 157 of the 158 cases resolved in FY12 through nonjudicial punishment were for non-penetrating crimes.<sup>98</sup> According to DoD SAPRO, the differences in case resolution data from FY07 to FY12 indicate a “large change in how commanders are choosing to address the sexual assault charges brought to them by criminal investigators.”<sup>99</sup>

### VIII. INITIAL ASSESSMENT CONCLUSIONS

The Subcommittee heard many perspectives and reviewed considerable information about the commander’s role in the military justice system as the prosecutorial disposition authority for sexual assault allegations. Proponents advocating for system change and those defending the UCMJ’s current convening authority framework offered differing opinions about what consequences would result from such change. The Subcommittee did not find, however, clear evidence of what

<sup>91</sup> DEPARTMENT OF DEFENSE ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY, FISCAL YEAR 2012 at 57 (May 3, 2013) [hereinafter FY12 SAPRO REPORT]. DoD SAPRO’s sexual assault reporting data does not necessarily reflect the number of sexual assaults that occurred in a fiscal year, since a report may be made at any time.

<sup>92</sup> *Id.* at 57-58. At the November 7, 2013, RSP public meeting, the DoD SAPRO Director provided initial estimates of Fiscal Year 2013 (FY13) reporting statistics. Preliminary data indicated receipt of more than 4,600 reports in FY13, a 46-percent increase over FY12. *Transcript of RSP Public Meeting 37-38* (Nov. 7, 2013) (testimony of Major General Gary S. Patton, Director, DoD SAPRO).

<sup>93</sup> *Transcript of RSP Role of the Commander Subcommittee Meeting 174-75* (Oct. 23, 2013) (testimony of Dr. Nate Galbreath, Senior Executive Advisor, DoD SAPRO); *see also* slide 6 of accompanying presentation, currently available at [http://responsesystemspanel.whs.mil/public/docs/meetings/Sub\\_Committee/20131023\\_ROC/03\\_DoD\\_SAPR\\_Ovrvw\\_20131023.pdf](http://responsesystemspanel.whs.mil/public/docs/meetings/Sub_Committee/20131023_ROC/03_DoD_SAPR_Ovrvw_20131023.pdf).

<sup>94</sup> FY12 SAPRO REPORT, *supra* note 91, at 59.

<sup>95</sup> *Id.* at 58.

<sup>96</sup> *Transcript of RSP Role of the Commander Subcommittee Meeting 166* (Oct. 23, 2013) (testimony of Dr. Galbreath); *see also* slide 6 of accompanying presentation.

<sup>97</sup> *Id.* at 177-78; *see also* slide 20 of accompanying presentation. Substantiated allegations also included lesser offenses that were resolved through nonjudicial punishment, other administrative actions, or administrative discharge.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 178.

## APPENDIX G: INITIAL CONVENING AUTHORITY ASSESSMENT

consequences, positive or negative, would result from substantially changing the UCMJ's convening authority framework. Accordingly, the Subcommittee believes caution is warranted, and systemic change may not be advisable if recent and current efforts produce meaningful improvements.

The suggestion by some that vesting convening decisions for courts-martial with prosecutors instead of senior commanders will better address the problem of sexual assault is problematic. A presenter at a September RSP public meeting observed that it "assumes too much, that somehow a prosecutor is always going to be better at this than commanders."<sup>100</sup> Civilian jurisdictions face underreporting challenges that are similar to the military, and it is not clear that the criminal justice response in civilian jurisdictions, where prosecutorial decisions are supervised by elected or appointed lawyers, is more effective. A recent White House report, describing the civilian sector, notes that "[a]cross all demographics, rapists and sex offenders are too often not made to pay for their crimes, and remain free to assault again. Arrest rates are low and meritorious cases are still being dropped—many times because law enforcement officers and prosecutors are not fully trained on the nature of these crimes or how best to investigate and prosecute them."<sup>101</sup>

The White House report also highlighted low prosecution rates in the civilian sector and prosecution decisions that contradicted the desires of sexual assault survivors.<sup>102</sup> 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."<sup>103</sup> Other factors outside the intrinsic merits of the case, such as budget, staffing, or time constraints, also may influence charging decisions for prosecutors. In short, arguments about the advantage of prosecutors over commanders with respect to convening authority are not consistent with information from the civilian sector.

Congress recently enacted significant reforms to address sexual assault in the military, and the Department of Defense implemented numerous changes to policies and programs to improve oversight and response. Preliminary indicators, demonstrated in recent reporting and prosecution trends, appear encouraging, but these reforms and changes have not yet been fully evaluated to assess their impact on sexual assault reporting or prosecution.

Irrespective of changes to senior commander authority in the military justice system, commanders and leaders at all levels must continue their focused efforts to prevent incidents of sexual assault and respond appropriately to incidents when they occur. Military commanders are essential to creating and enforcing appropriate command climates, and senior leaders are responsible for ensuring all commanders effectively accomplish this fundamental responsibility. The full report of the Subcommittee will provide additional information and analysis on this issue.

<sup>100</sup> *Transcript of RSP Public Meeting* 90 (Sept. 24, 2013) (testimony of Professor Victor Hansen, New England School of Law).

<sup>101</sup> THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 5 (Jan. 2014).

<sup>102</sup> *Id.* at 17 ("One study indicated that two-thirds of survivors have had their legal cases dismissed, and more than 80% of the time, this contradicted her desire to prosecute. According to another study of 526 cases in two large cities where sexual assault arrests were made, only about half were prosecuted.").

<sup>103</sup> *Id.*

## **Appendix G**

DEFENSE ADVISORY COMMITTEE  
ON INVESTIGATION,  
PROSECUTION, AND DEFENSE  
OF SEXUAL ASSAULT  
IN THE ARMED FORCES



THIRD ANNUAL REPORT  
March 2019



# Defense Advisory Committee

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Dr. Cassia C. Spohn

Ms. Meghan A. Tokash

The Honorable Reggie B. Walton

### *In Memoriam*

Dean Keith M. Harrison

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Mr. Dwight H. Sullivan



# **Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces**



**THIRD ANNUAL REPORT**

**March 2019**





**THE DEFENSE ADVISORY COMMITTEE ON  
INVESTIGATION, PROSECUTION, AND DEFENSE OF  
SEXUAL ASSAULT IN THE ARMED FORCES**

March 26, 2019

The Honorable James Inhofe  
Chairman  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Adam Smith  
Chairman  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Jack Reed  
Ranking Member  
Committee on Armed Services  
United States Senate  
Washington, DC 20510

The Honorable Mac Thornberry  
Ranking Member  
Committee on Armed Services  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Patrick M. Shanahan  
Acting Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

Dear Chairmen, Ranking Members, and Mr. Secretary:

We are pleased to submit the third annual report of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (“2019 Annual Report”) in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291). This report details the Committee’s activities over the past year related to the investigation, prosecution, and defense of sexual assault crimes in the military.

Since the submission of its March 2018 Annual Report, the Committee has held six public meetings during which it heard from 21 presenters and three members of the public on topics including sexual assault data collection and management, sexual assault investigation practices, and the effects of sexual assault investigations on accused Service members and victims. In addition, the Committee’s three working groups held 13 preparatory sessions during which members heard testimony from more than 50 presenters, including military prosecutors, defense counsel, investigators, victims’ counsel, program managers, victim services personnel, and an assistant United States Attorney.

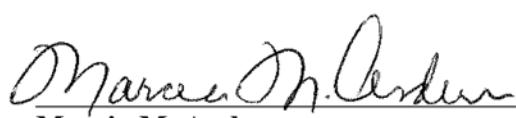
In this report, the Committee provides detailed sexual assault case adjudication data and analysis for fiscal years 2015 to 2017 and makes 32 findings and 14 recommendations related to the following: commander decisions with respect to penetrative sexual assault complaints; documentation of command disposition decisions; fingerprint collection and submission processes for federal criminal history reporting; sexual assault data collection and management

in accordance with the new Article 140a of the Uniform Code of Military Justice; and the Department's expedited transfer policy for victims of sexual assault. Most notably, on the basis of a first-of-its-kind review of a random sample of 164 penetrative sexual assault investigations closed in fiscal year 2017, the Committee found that military commanders' decisions whether to prefer charges or not to prefer charges in penetrative sexual assault cases were reasonable in the overwhelming majority (95%) of cases reviewed.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's response to sexual misconduct within its ranks.

Respectfully submitted,

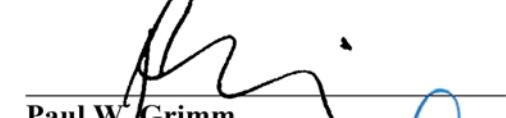
  
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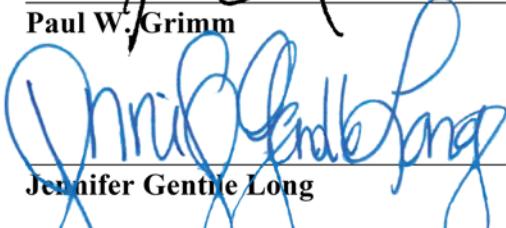
  
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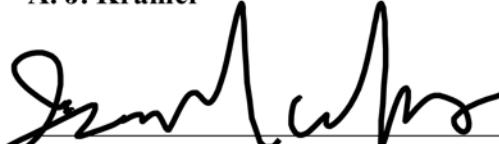
  
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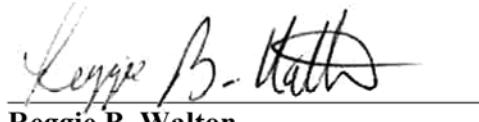
  
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DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION,  
AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

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## EXECUTIVE SUMMARY

In section 546 of the National Defense Authorization Act for Fiscal Year 2015, enacted on December 23, 2014, Congress directed the Secretary of Defense to establish the sixth congressionally mandated task force on sexual assault in the military since 2003: the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD).<sup>1</sup> Its authorizing legislation charges the Committee to execute three tasks over its five-year term:<sup>2</sup>

1. To advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces;
2. To review, on an ongoing basis, cases involving allegations of sexual misconduct for purposes of providing advice to the Secretary of Defense; and
3. To submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives no later than March 30 of each year.

This is the third annual report of the DAC-IPAD: it describes the Committee's activities and the topics examined over the previous 12 months. The Committee held six public meetings between April 2018 and February 2019 during which it heard from 21 presenters, including three members of the public, on topics such as sexual assault data collection and management, sexual assault investigation practices, and the effects of sexual assault investigations on victims and accused Service members. In addition, the Committee's three working groups held 13 preparatory sessions during which members heard testimony from more than 50 presenters, including military prosecutors, defense counsel, investigators, victims' counsel, program managers, victim services personnel, and an assistant United States Attorney on topics including sexual assault investigation practices, the Department of Defense (DoD) expedited transfer policy, and sexual assault prosecution standards in the military and civilian jurisdictions.

The first chapter of this report discusses the Committee's initial findings and recommendations based on the Case Review Working Group's (CRWG) review and analysis of investigative case files. Since beginning the reviews in February 2018, the working group members have reviewed investigative case files for 164 individual penetrative sexual assault investigations randomly selected from more than 2,000 cases closed in fiscal year 2017 in which a Service member was accused of committing a penetrative sexual assault against an adult victim. Through the members' review of these 164 investigative case files and testimony received from judge advocates, investigators, and other subject matter experts, the Committee analyzed several topics, including the reasonableness of commanders' disposition decisions in cases involving penetrative sexual assault complaints, victim participation in the military justice process, investigator discretion, documentation of command disposition decisions, unfounded determinations, and subject fingerprint collection and submission to federal criminal databases. Based on the 164 case reviews, the Committee finds that commanders' decisions whether to prefer charges in penetrative sexual assault cases are reasonable in an overwhelming majority of cases. The Committee also finds that the investigative case files—and more specifically, the documentation of command disposition decisions within them—vary widely across the Services, are frequently incomplete, and often

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 [hereinafter FY15 NDAA], § 546, 128 Stat. 3374 (2014).

<sup>2</sup> *Id.*

contain inaccurate or conflicting information with respect to case outcomes. This finding is highlighted by the Committee not only because it makes reviewing and analyzing the investigative case files more difficult, but also because it has implications for current and former Service members about whom erroneous information may be contained in federal criminal history databases that are routinely accessed by law enforcement, employers, and others. In next year's annual report, the Committee will be able to provide more comprehensive findings based on the working group's review of more than 2,000 cases closed in fiscal year 2017 (FY17).

The second chapter of this report describes the Committee's annual collection and analysis of military case adjudication statistical data for adult-victim sexual assault cases in which charges were preferred for penetrative or contact sexual assault offenses and in which final action on the case is complete.<sup>3</sup> The Committee has collected and recorded case documents including charge sheets, Article 32 reports, and Results of Trial forms for a total of 658 cases completed in fiscal year 2017, 768 cases completed in fiscal year 2016, and 780 cases completed in fiscal year 2015. This chapter and a detailed appendix provide case characteristics, disposition outcomes, and adjudication outcomes for these cases, including sex, Service branch, and pay grade of the subject; relationship of the victim to the subject; nature of the charges; forum; and case outcome. This chapter also includes a multivariate statistical analysis prepared by a professional criminologist that identifies patterns in the three-year data.

In Chapter 3, the Committee examines the new military criminal data collection and management standardization requirements enacted as part of the Military Justice Act of 2016. This act established a new Article 140a of the Uniform Code of Military Justice (UCMJ), which directs the Secretary of Defense to prescribe uniform standards and criteria across the Services for collection and analysis of military justice data and records by January 1, 2019. Having experienced some of the challenges resulting from the Services' inconsistent terminology and documentation regarding sexual assault case processing, the sexual assault advisory panel that preceded the DAC-IPAD—the Judicial Proceedings Panel (JPP)—developed a first-of-its-kind military sexual assault database, following the U.S. Sentencing Commission's methodology of centrally collecting and managing case documents to ensure the accuracy and reliability of reported data. The DAC-IPAD adopted and has continued the JPP's data collection efforts for sexual assault cases in the military for the past three years. Based on this experience, the Committee makes four recommendations—previously submitted to the Secretary of Defense in a letter dated September 13, 2018—emphasizing that the uniform standards and criteria developed to implement Article 140a, UCMJ, should reflect the following best practices: (1) all case data should be collected only from standardized source documents produced in the normal course of the military justice process; (2) document collection should be centralized within one organization in DoD; (3) a single electronic database should be developed for the storage and analysis of the standardized source documents; and (4) one independent team of trained professionals whose full-time job is to enter the data should be responsible for the data entry process. DoD provided a response to the Committee's letter on January 23, 2019. Citing concerns about the personnel and fiscal demands of a single system and the risk of failure, the senior deputy general counsel stated that a single system would not be considered at this time, but noted that the Department may reconsider the Committee's proposals in the future.

The fourth chapter of the report describes the Committee's examination of the DoD expedited transfer policy for victims of sexual assault. Over the course of the past year, the Policy Working Group (PWG) has continued to study and deliberate on the six specific expedited transfer-related issues identified in the DAC-IPAD's March

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<sup>3</sup> For purposes of the DAC-IPAD's case review and data collection, the term "sexual assault" includes the following offenses under the Uniform Code of Military Justice: rape (Article 120(a)), sexual assault (Article 120(b)), aggravated sexual contact (Article 120(c)), abusive sexual contact (Article 120(d)), forcible sodomy (Article 125), and attempts of these offenses (Article 80).

2018 report, as well as one additional issue. In this report the Committee makes five recommendations related to expedited transfers. Among these is a recommendation to extend the expedited transfer option to Service members who make restricted reports, if certain requirements are met. The Committee also recommends that the Secretary of Defense study the possibility of allowing victims who have lost the ability to make a restricted report to request that further disclosure or investigation be restricted or terminated, with appropriate safeguards to ensure that victims are not pressured to do so and that there is not an overriding law enforcement need to continue the investigation. A victim may lose the ability to make a restricted report if a third party or the victim discloses the incident to someone in the chain of command without knowing that this triggers the opening of a criminal investigation. The Committee also recommends that sexual assault victims be given an option to attend a transitional care program at a medical facility, Wounded Warrior facility, or other facility to allow them sufficient time and resources to heal from the trauma of a sexual assault when needed. In addition, in order for the Services to continue to monitor the effectiveness of the expedited transfer policy, the Committee recommends that the Services track and report specified data elements related to expedited transfers.

Chapter 5 provides the Committee's initial observations in response to a provision in the National Defense Authorization Act for Fiscal Year 2019 (FY19 NDAA) that requires the Secretary of Defense, "acting through" the DAC-IPAD, to prepare and submit biennial reports to Congress detailing the number of instances in which an individual who reports an incident of sexual assault is either investigated for or receives adverse action as a result of misconduct he or she engaged in that is collateral to the investigation of the sex offense. In this chapter the Committee notes its uncertainty about what its role in the study should be, given the unclear statutory language and the absence of additional guidance from DoD. In light of a statutory due date for the first report of September 2019, the Committee also expresses concern that it currently does not have the resources necessary to undertake such a study. As initial suggested guidance for the study, the Committee proposes parameters for the study and highlights that it is currently recording instances of victim collateral misconduct in its review of fiscal year 2017 investigative case files to the extent that reviewers are able to discern such misconduct. The Committee members and staff plan to collaborate with the Services and DoD in the coming months to determine how they can most effectively assist in the study and report to Congress.

Finally, Chapter 6 provides background on three recommendations made by the JPP to the DAC-IPAD for continued study and assessment upon the JPP's termination. These recommendations relate to Articles 32, 33, and 34 of the UCMJ and involve the preliminary hearing process, command disposition guidance, and staff judge advocate advice to convening authorities, respectively. The JPP also recommended that the DAC-IPAD continue the JPP case adjudication data collection effort, which it has already done, as described in Chapter 2.

The DAC-IPAD members would like to express their sincere gratitude to the engaging, enthusiastic, and knowledgeable Service members and civilian presenters who shared their experiences and perspectives with the Committee over this past year, as well as the diligent Service representatives who attended meetings, guided information requests through their Services, and provided excellent support to the Committee. All imparted their wisdom, experience, and pride in service with great professionalism and grace.

The Committee wishes to dedicate this report to the late Keith Harrison, a beloved member of the DAC-IPAD and the Associate Dean and Professor of Law at Savannah Law School. Dean Harrison was a dear friend, colleague, leader, father, and husband, with a distinguished career of over 30 years in legal education as both a teacher and an administrator. He was especially proud of his service as a judge advocate in the U.S. Coast Guard before beginning his academic career. Dean Harrison's kindness, wisdom, and contagious enthusiasm will be deeply missed by all.

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION,  
AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

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# SUMMARY OF DAC-IPAD FINDINGS, RECOMMENDATIONS, AND ASSESSMENTS<sup>4</sup>

## Command Disposition of Penetrative Sexual Assault Complaints

- **Finding 12:** Based on the review of 164 military investigative cases, the DAC-IPAD finds that commanders' dispositions of penetrative sexual assault complaints are reasonable in 95% of cases.

## Investigator Discretion

- **Finding 13:** Military investigators testified that they feel obligated to perform the same series of investigative tasks regardless of the facts of a particular case and that they have little discretion to determine which specific investigative actions would provide the most value.
- **Initial Assessment:** The Committee will continue to monitor this issue.

## Documentation of Command Disposition Decisions

**DAC-IPAD Recommendation 5:** In developing a uniform command action form in accordance with section 535 of the FY19 NDAA, the Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should establish a standard set of options for documenting command disposition decisions and require the rationale for those decisions, including declinations to take action.

The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should ensure that the standard set of options for documenting command disposition decisions is based on recognized legal and investigatory terminology and standards that are uniformly defined across the Services and accurately reflect command action source documents.

**DAC-IPAD Recommendation 6:** The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should require that judge advocates or civilian attorneys employed by the Services in a similar capacity provide advice to commanders in completing command disposition/action reports in order to make certain that the documentation of that decision is accurate and complete.

- **Finding 14:** Accurate and uniform documentation of a commander's disposition decision, the reason for the decision, and any disciplinary action taken for violations of the Uniform Code of Military Justice

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<sup>4</sup> DAC-IPAD Findings 1–11 and Recommendations 1–4 are included in the DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES ANNUAL REPORT 3–5 (Mar. 2018) [hereinafter DAC-IPAD 2018 ANNUAL REPORT], available at [https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD\\_Report\\_02\\_Final\\_20180330\\_Web\\_Amended.pdf](https://dacipad.whs.mil/images/Public/08-Reports/DACIPAD_Report_02_Final_20180330_Web_Amended.pdf).

is essential to ensure that military criminal investigative agencies provide accurate and timely reports of crime data to federal law enforcement agencies and databases.

- **Finding 15:** The command disposition/action reports that are found in investigative files are often unclear, incomplete, inaccurate, and inconsistent within and across the Services.
- **Finding 16:** Command disposition/action documentation found in investigative case files sometimes conflicts with the actual action taken by the command.
- **Finding 17:** Command disposition/action reports that are found in investigative files include terminology inconsistent with military criminal investigative organization (MCIO) federal database reporting requirements; to meet these federal reporting requirements, investigators must therefore interpret the terms used, leading to inconsistent and inaccurate database reporting.
- **Finding 18:** MCIOs need the command disposition/action report to officially close their cases and make required federal reports to the Defense Incident-Based Reporting System (DIBRS) and federal criminal history databases.
- **Finding 19:** Judge advocates testified that they do not routinely assist commanders in completing command disposition/action reports.
- **Finding 20:** Command disposition/action reports often are not submitted to the MCIOs within five days of command action, as required by DoD policy.

#### **Definition and Application of the Term “Unfounded”**

- **Finding 21:** There is significant confusion among investigators, judge advocates, and commanders as to what the terms “probable cause” (reasonable grounds to believe) and “unfounded” (false or baseless) mean, when and by whom probable cause and unfounded determinations are made, and how they are documented throughout the investigative process.

#### **Fingerprint Collection and Submission Processes for Federal Criminal History Reporting**

**DAC-IPAD Recommendation 7:** The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) should provide uniform guidance to the Services regarding the submission of final disposition information to federal databases for sexual assault cases in which, after fingerprints have been submitted, the command took no action, or took action only for an offense other than sexual assault.

- **Finding 22:** The standards, timing, and authority for collecting and submitting fingerprints to the federal database, making probable cause determinations, and submitting final disposition information to the federal database are unclear and not uniform across the Services.
- **Finding 23:** MCIO coordination with judge advocates on a probable cause determination for the submission of fingerprints often is not documented in the investigative file.
- **Finding 24:** Final dispositions being reported to the National Crime Information Center (NCIC) for sexual assault offenses are often inaccurate or misleading.

- **Finding 25:** DoD policy does not provide direction to the Services for cases in which the command elects not to prefer charges for a sexual assault offense, but fingerprints have already been submitted to the federal criminal history database as part of a sexual assault investigation.
- **Initial Assessment:** The Committee will continue to monitor the issues associated with collecting and submitting fingerprints and submitting final disposition information to the federal databases.

### **Sexual Assault Data Collection and Management in the New Article 140a, Uniform Code of Military Justice**

**DAC-IPAD Recommendation 8:** The uniform standards and criteria developed to implement Article 140a, UCMJ, should reflect the following best practices for case data collection:

- a. Collect all case data only from standardized source documents (legal and investigative documents) that are produced in the normal course of the military justice process, such as the initial report of investigation, the commander's report of disciplinary or administrative action, the charge sheet, the Article 32 report, and the Report of Result of Trial.
- b. Centralize document collection by mandating that all jurisdictions provide the same procedural documents to one military justice data office/organization within DoD.
- c. Develop one electronic database for the storage and analysis of standardized source documents, and locate that database in the centralized military justice data office/organization within DoD.
- d. Collect and analyze data quarterly to ensure that both historical data and analyses are as up-to-date as possible.
- e. Have data entered from source documents into the electronic database by one independent team of trained professionals whose full-time occupation is document analysis and data entry. This team should have expertise in the military justice process and in social science research methods, and should ensure that the data are audited at regular intervals.

**DAC-IPAD Recommendation 9:** The source documents referenced in DAC-IPAD Recommendation 8 should contain uniformly defined content covering all data elements that DoD decides to collect to meet the requirements of Articles 140a and 146, UCMJ.

**DAC-IPAD Recommendation 10:** The data produced pursuant to Article 140a, UCMJ, should serve as the primary source for the Military Justice Review Panel's periodic assessments of the military justice system, which are required by Article 146, UCMJ, and as the sole source of military justice data for all other organizations in DoD and for external entities.

**DAC-IPAD Recommendation 11:** Article 140a, UCMJ, should be implemented so as to require collection of the following information with respect to allegations of both adult-victim and child-victim sexual offenses, within the meaning of Articles 120, 120b, and 125, UCMJ (10 U.S.C. §§ 920, 920b, and 925 (2016)):

- a. A summary of the initial complaint giving rise to a criminal investigation by a military criminal investigative organization concerning a military member who is subject to the UCMJ, and how the complaint became known to law enforcement;
- b. Whether an unrestricted report of sexual assault originated as a restricted report;
- c. Demographic data pertaining to each victim and accused, including race and sex;
- d. The nature of any relationship between the accused and the victim(s);
- e. The initial disposition decision under Rule for Court-Martial 306, including the decision to take no action, and the outcome of any administrative action, any disciplinary action, or any case in which one or more charges of sexual assault were preferred, through the completion of court-martial and appellate review;
- f. Whether a victim requested an expedited transfer or a transfer of the accused, and the result of that request;
- g. Whether a victim declined to participate at any point in the military justice process;
- h. Whether a defense counsel requested expert assistance on behalf of a military accused, whether those requests were approved by a convening authority or military judge, and whether the government availed itself of expert assistance; and
- i. The duration of each completed military criminal investigation, and any additional time taken to complete administrative or disciplinary action against the accused.

**DAC-IPAD Recommendation 12:** The Services may retain their respective electronic case management systems for purposes of managing their military justice organizations, provided that

- a. The Services use the same uniform standards and definitions to refer to common procedures and substantive offenses in the Manual for Courts-Martial, as required by Article 140a; and
- b. The Services develop a plan to transition toward operating one uniform case management system across all of the Services, similar to the federal judiciary's Case Management/Electronic Court Filing (CM/ECF) system.

- **DAC-IPAD Assessment:** The Committee is very pleased that DoD is open in the future to further evaluation and consideration of its recommendation of a centralized, document-based military justice data collection system. The Committee will continue to collect and analyze sexual assault case adjudication data until its term ends and is hopeful that the Military Justice Review Panel required to be established in accordance with Article 146, UCMJ will continue and expand the sexual assault case adjudication data project.

## Expansion of Expedited Transfer to Restricted Reports

**DAC-IPAD Recommendation 13:** The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) expand the expedited transfer policy to include victims who file restricted reports of sexual assault. The victim's report would remain restricted and there would be no resulting investigation. The DAC-IPAD further recommends the following requirements:

- a. The decision authority in such cases should be an O-6 or flag officer at the Service headquarters organization in charge of military assignments, rather than the victim's commander.
- b. The victim's commander and senior enlisted leader, at both the gaining and losing installations, should be informed of the sexual assault and the fact that the victim has requested an expedited transfer—without being given the subject's identity or other facts of the case—thereby enabling them to appropriately advise the victim on career impacts of an expedited transfer request and ensure that the victim is receiving appropriate medical or mental health care.
- c. A sexual assault response coordinator, victim advocate, or special victims' counsel (SVC) / victims' legal counsel (VLC) must advise the victim of the potential consequences of filing a restricted report and requesting an expedited transfer, such as the subject not being held accountable for his or her actions and the absence of evidence should the victim later decide to unrestrict his or her report.

- **Finding 26:** 10 U.S.C § 673, the statutory basis for the expedited transfer policy, applies to Service members who are victims of sexual assault, not solely to Service member victims who file unrestricted reports. DoD policy limiting eligibility for expedited transfers to victims who file unrestricted reports is inconsistent with this law.
- **Finding 27:** Under current DoD policy, a sexual assault victim who files a restricted report and wants to transfer to a location closer to family and friends, or who wants to get away from the Service member who assaulted him or her, has no way to request a transfer that will help in the healing process except after filing an unrestricted report. Filing an unrestricted report to request an expedited transfer may lead to the victim's suffering the same negative consequences, such as the loss of privacy, that he or she sought to avoid by initially filing a restricted report.
- **Finding 28:** Filing an unrestricted report in order to request an expedited transfer triggers a full investigation of the allegation even if the victim does not want the case investigated or prosecuted. A sexual assault victim may elect not to participate in the investigation or prosecution of the case after unrestricting his or her report, but the case may proceed regardless of the victim's wishes.
- **Finding 29:** The Response Systems Panel, in its June 2014 report, recommended that the Secretaries of the Military Departments create a means by which a sexual assault victim who filed a restricted report could request an expedited transfer without making that report unrestricted.
  - a. In an October 21, 2015, Exception to Policy memo to the Secretaries of the Military Departments, the Acting Under Secretary of Defense for Personnel and Readiness allowed the Services to proceed with such an exception to the current expedited transfer policy set forth in DoDI 6495.02. This memo

expresses support for allowing sexual assault victims who file restricted reports to request expedited transfers, but does not change DoD policy to allow for it or provide the implementing procedures for how to accomplish this goal.

- b. In the three years since this memo was released, none of the Services has requested such an exception to policy, and it seems increasingly unlikely that they will do so without explicit direction from DoD.

### **Victims' Options Regarding Sexual Assault Reports Made by Third Parties**

**DAC-IPAD Recommendation 14:** The Secretary of Defense (in consultation with the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) establish a working group to review whether victims should have the option to request that further disclosure or investigation of a sexual assault report be restricted in situations in which the member has lost the ability to file a restricted report, whether because a third party has reported the sexual assault or because the member has disclosed the assault to a member of the chain of command or to military law enforcement. The working group's goal should be to find a feasible solution that would, in appropriate circumstances, allow the victim to request that the investigation be terminated. The working group should consider under what circumstances, such as in the interests of justice and safety, a case may merit further investigation regardless of the victim's wishes; it should also consider whether existing safeguards are sufficient to ensure that victims are not improperly pressured by the subject, or by others, to request that the investigation be terminated. This working group should consider developing such a policy with the following requirements:

- a. The victim be required to meet with an SVC or VLC before signing a statement requesting that the investigation be discontinued, so that the SVC or VLC can advise the victim of the potential consequences of closing the investigation.
- b. The investigative agent be required to obtain supervisory or MCIO headquarters-level approval to close a case in these circumstances.
- c. The MCIOs be aware of and take steps to mitigate a potential perception by third-party reporters that allegations are being ignored when they see that no investigation is taking place; such steps could include notifying the third-party reporter of the MCIO's decision to honor the victim's request.
- d. Cases in which the subject is in a position of authority over the victim be excluded from such a policy.
- e. If the MCIO terminates the investigation at the request of the victim, no adverse administrative or disciplinary action may be taken against the subject based solely on the reporting witness's allegation of sexual assault.

- **Finding 30:** Under current DoD sexual assault policy, 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. However, if the person to whom the victim confided is in the victim's chain of command—whether an officer or a noncommissioned officer—or is DoD law enforcement, the allegation

must be reported to the MCIO and is therefore treated as an unrestricted report, regardless of the victim's wishes or intent.

- **Finding 31:** DoD policy further states that if information about a sexual assault comes to a commander's attention, even if from a source other than the victim, that commander must immediately report the matter to an MCIO and an official investigation based on that independently acquired information may be initiated.
- **Finding 32:** DoD policy specifies that a victim's decision to decline to participate in an investigation should be honored; however, the victim cannot change a report from unrestricted to restricted, and the investigation may continue regardless of the victim's participation.
- **Finding 33:** Several commanders indicated in their testimony to the DAC-IPAD that the one change they would make to the system is to allow victims who have lost the ability to make a restricted report—whether because of third-party reports or because they were unaware of this consequence of reporting to a member of their chain of command—to restrict any further disclosure or investigation of the incident, if they so desire. Some representatives from the MCIOs testified in support of such a policy; others testified in opposition.
- **Finding 34:** Additional information is needed in order to fully evaluate the effects of such a policy change. Issues that should be considered include the impact on the accused and the unit of closing an investigation, potential liability for future sexual misconduct by the accused, and the potential loss of evidence of the alleged offense.

#### Approval Standard and Purpose of the Expedited Transfer Policy

*DAC-IPAD Recommendation 15: The Secretary of Defense (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) revise the DoD expedited transfer policy (and the policy governing the Coast Guard with respect to expedited transfers) to include the following points:*

- a. The primary goal of the DoD expedited transfer policy is to act in the best interests of the victim. Commanders should focus on that goal when they make decisions regarding such requests.
- b. The single, overriding purpose of the expedited transfer policy is to assist in the victim's mental, physical, and emotional recovery from the trauma of sexual assault. This purpose statement should be followed by examples of reasons why a victim might request an expedited transfer and how such a transfer would assist in a victim's recovery (e.g., proximity to the subject or to the site of the assault at the current location, ostracism or retaliation at the current location, proximity to a support network of family or friends at the requested location, and the victim's desire for a fresh start following the assault).
- c. The requirement that a commander determine that a report be credible is not aligned with the core purpose of the expedited transfer policy. It should be eliminated, and instead an addition should be made to the criteria that commanders must consider in making a decision on an expedited transfer request: "any evidence that the victim's report is not credible."

**DAC-IPAD Recommendation 16: Congress increase the amount of time allotted to a commander to process an expedited transfer request from 72 hours to no more than five workdays.**

- **Finding 35:** The stated purposes of the current DoD expedited transfer policy are (1) to address situations in which a victim feels safe, but uncomfortable, and (2) to assist in the victim's recovery by moving the victim to a new location where no one knows of the sexual assault. The expedited transfer policy does not address safety issues, which are the focus of other policies.
- **Finding 36:** Many Service presenters testified that the primary purpose of the expedited transfer program is to assist victims in their recovery.
- **Finding 37:** The standard that commanders must follow to reach a decision regarding an expedited transfer request is not clearly stated in DoD policy. According to DoD policy, a commander must find that a "credible report" has been made before approving an expedited transfer request, and the commander must consider a list of up to 10 additional criteria. However, DoD policy does not specify whether a commander should base his or her decision on what is in the best interests of the command, in the best interests of the victim, or both.
- **Finding 38:** Determining whether an expedited transfer request is based on a "credible report" is often problematic for commanders because they only have 72 hours to make such a determination, are prohibited from conducting their own investigation, and frequently have little information to consider beyond the victim's report.

**Inclusion of Temporary, Permanent, Intra- and Inter-installation Transfers in the Expedited Transfer Policy**

- **DAC-IPAD Final Assessment:** Having spoken to numerous presenters from the Services and DoD—SVCs and VLCs, SARCs, SAPR personnel, assignments personnel, prosecutors, and defense counsel—the Committee has determined that with regard to this issue, the current expedited transfer policy is working for both victims and command.

**Expansion of the Expedited Transfer Policy to Civilian Spouses and Children of Service Members**

- **DAC-IPAD Final Assessment:** Following the DAC-IPAD's initial review of this issue in its March 2018 Annual Report, Congress enacted a provision in the National Defense Authorization Act (NDAA) for Fiscal Year 2019 that expands the expedited transfer policy to include Service members whose dependents are victims of sexual assault by other Service members, thereby effectively resolving this issue. This section states:

The Secretary of Defense shall establish a policy to allow the transfer of a member of the Army, Navy, Air Force, or Marine Corps whose dependent is the victim of sexual assault perpetrated by a member of the Armed Forces who is not related to the victim.<sup>5</sup>

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<sup>5</sup> National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232 [hereinafter FY19 NDAA], § 536(b) (2019).

### Collection of Data Regarding Expedited Transfers

**DAC-IPAD Recommendation 17:** The Services track and report the following data in order to best evaluate the expedited transfer program:

- a. Data on the number of expedited transfer requests by victims; the grade and job title of the requester; the sex and race of the requester; the origin installation; whether the requester was represented by an SVC/VLC; the requested transfer locations; the actual transfer locations; whether the transfer was permanent or temporary; the grade and title of the decision maker and appeal authority, if applicable; the dates of the sexual assault report, transfer request, approval or disapproval decision and appeal decision, and transfer; and the disposition of the sexual assault case, if final.
- b. Data on the number of accused transferred; the grade and job title of the accused; the sex and race of the accused; the origin installation; the transfer installation; the grade and title of the decision maker; the dates of the sexual assault report and transfer; whether the transfer was permanent or temporary; and the disposition of the sexual assault case, if final.
- c. Data on victim participation in investigation/prosecution before and after an expedited transfer.
- d. Data on the marital status (and/or number of dependents) of victims of sexual assault who request expedited transfers and accused Service members who are transferred under this program.
- e. Data on the type of sexual assault offense (penetrative or contact) reported by victims requesting expedited transfers.
- f. Data on Service retention rates for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- g. Data on the career progression for sexual assault victims who receive expedited transfers compared with sexual assault victims who do not receive expedited transfers and with other Service members of similar rank and years of service.
- h. Data on victim satisfaction with the expedited transfer program.
- i. Data on the expedited transfer request rate of Service members who make unrestricted reports of sexual assault.

- **Finding 39:** Currently, DoD and the Services track and report the number of expedited transfer requests (within an installation and between installations) made by Service member victims and the number denied and approved, as specifically required by Congress.
- **Finding 40:** Currently, there is no consistent method of tracking other data related to victims who receive expedited transfers, such as career progression or retention in the military.

- **Finding 41:** Currently, there is no requirement that DoD and the Services track or report the number of subject transfers made in accordance with DoDI 6495.02.

#### **Transitional Assistance to Facilitate Recovery for Certain Service Members after a Sexual Assault**

***DAC-IPAD Recommendation 18:*** The Secretaries of the Military Departments (and the Secretary of Homeland Security with respect to the Coast Guard when not operating as a service in the Navy) incorporate into policy, for those sexual assault victims who request it, an option to attend a transitional care program at a military medical facility, Wounded Warrior center, or other facility in order to allow those victims sufficient time and resources to heal from the trauma of sexual assault.

- **Finding 42:** The expedited transfer policy and existing out-patient mental health, medical, and other resources that assist sexual assault victims in the recovery process are not sufficient for all sexual assault victims. Some victims may need extra time and resources to heal before resuming their regular duties.
- **Finding 43:** Existing arrangements, such as military medical facility in-patient programs or Wounded Warrior programs, provide effective treatment to those victims who require it prior to returning to their regular duties. However, these resources are not being sufficiently utilized by the Services to treat those sexual assault victims who require additional mental health or medical treatment beyond the out-patient care that may be available at their local installation.

# INTRODUCTION

## I. DAC-IPAD ESTABLISHMENT AND MISSION

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) was established by the Secretary of Defense in February 2016 pursuant to section 546 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015, as amended.<sup>6</sup> The mission of the DAC-IPAD is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.<sup>7</sup> In order to provide that advice, the Committee is directed to review, on an ongoing basis, cases involving allegations of sexual misconduct.<sup>8</sup>

In accordance with the authorizing statute and the Federal Advisory Committee Act of 1972 (FACA), the Department of Defense (DoD) filed the charter for the DAC-IPAD with the General Services Administration on February 18, 2016.<sup>9</sup> The swearing-in of 16 members and the first meeting of the DAC-IPAD was held on January 19, 2017.

The DAC-IPAD is required by its authorizing legislation to submit an annual report to the Secretary of Defense and to the Committees on Armed Services of the Senate and the House of Representatives, no later than March 30 of each year, describing the results of its activities.<sup>10</sup>

## II. COMPOSITION OF THE COMMITTEE

The Committee's authorizing legislation required the Secretary of Defense to select Committee members with experience in investigating, prosecuting, and defending against allegations of sexual assault offenses.<sup>11</sup> Active duty Service members are expressly prohibited from serving on the Committee.<sup>12</sup> In January 2017 the Secretary of Defense appointed to the DAC-IPAD 16 members, including its Chair, Martha S. Bashford. The members represent a broad range of perspectives and experience related to sexual assault both within and outside the military.<sup>13</sup>

The Committee members have spent decades working in their fields of expertise, which include

- Civilian sexual assault investigation and forensics

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6 FY15 NDAA, *supra* note 1, § 546; National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 537, 129 Stat. 726, 817 (2015).

7 FY15 NDAA, *supra* note 1, § 546(c)(1).

8 *Id.* at § 546(c)(2).

9 Federal Advisory Committee Act of 1972, 5 U.S.C. App. §§ 1–16. See Appendix B, Charter of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (Feb. 18, 2016; Renewed Feb. 16, 2018).

10 FY15 NDAA, *supra* note 1, § 546(d).

11 *Id.* at § 546.

12 *Id.*

13 See Appendix C, Committee Members, for a list and biographies of the DAC-IPAD members.

- Civilian and military sexual assault prosecution
- Civilian and military sexual assault defense
- Federal and state court systems
- Military command
- Criminology
- Academic disciplines and legal policy
- Crime victims' rights

Four members of the Committee retired from the military and two more served previously as judge advocates. Three of the members are sitting federal judges.

### **III. WORKING GROUPS**

In 2017 the DAC-IPAD established three working groups to support its mission: the Case Review Working Group, the Data Working Group, and the Policy Working Group.

The mission of the Case Review Working Group (CRWG) is to make recommendations to the Committee based on its review of cases involving allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct. The Case Review Working Group is chaired by retired Marine Corps Brigadier General James R. Schwenk, and comprises six additional members: Ms. Martha S. Bashford, Ms. Kathleen B. Cannon, Ms. Jennifer Gentile Long, Mr. James P. Markey, Dr. Cassia C. Spohn, and initially Judge Reggie B. Walton. In 2018 Judge Walton left the working group, and Ms. Meghan A. Tokash joined it.

The mission of the Data Working Group (DWG) is to make recommendations to the Committee based on its collection and analysis of case adjudication data from completed cases involving allegations of both penetrative sexual offenses (rape, forcible sodomy, and sexual assault) and contact sexual offenses (aggravated sexual contact, abusive sexual contact) for which charges were preferred. The Data Working Group is chaired by Dr. Cassia C. Spohn, and comprises two additional members: Mr. James P. Markey and Retired Chief Master Sergeant of the Air Force Rodney J. McKinley.

Finally, the mission of the Policy Working Group (PWG) is to make recommendations to the Committee based on its review of DoD policies, Military Department policies, and Uniform Code of Military Justice provisions applicable to allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct. The Policy Working Group is chaired by Chief Rodney J. McKinley and comprises four additional members: retired Army Major General Marcia M. Anderson, Ms. Margaret A. Garvin, Dr. Jenifer Markowitz, and General James R. Schwenk.

### **IV. PREVIOUS DAC-IPAD REPORTS**

#### **A. Initial Report – March 2017**

The DAC-IPAD held its first meeting on January 19, 2017—about two months before the statutory due date of March 30 for the Committee's annual report. In this initial report, the Committee reflected on its initial discussions, emphasizing the need for and importance of accurate, relevant data so that members can fully

understand the issues and make sound policy recommendations to the Secretary of Defense. The members expressed interest in analyzing key data points such as the impact of rank, race, and sexual orientation on charging decisions, conviction rates, and sentencing and agreed to continue the important data collection project developed by its predecessor panel, the Judicial Proceedings Panel (JPP).<sup>14</sup>

The Committee also discussed its directive to conduct case reviews. Recognizing the substantial privacy concerns that must be considered in reviewing investigative case files, particularly those involving children, the members agreed that they initially would concentrate exclusively on adult cases.<sup>15</sup> The Committee noted that the DAC-IPAD's authorizing legislation provides little guidance on how to conduct case reviews and acknowledged the need for continuing discussions about the scope and methodology of this process.<sup>16</sup>

The Committee outlined the development of its strategic plan in its Initial Report, which was released on March 30, 2017.<sup>17</sup>

## B. Second Annual Report – March 2018

The Committee held six public meetings in the 12 months preceding the release of its second annual report on March 30, 2018.<sup>18</sup> The Committee first received informational briefings on the mechanics of sexual assault investigation and prosecution in the military, the sexual assault case adjudication statistics collected and reported on by the JPP, and the sexual assault data collected and published annually by DoD's Sexual Assault Prevention and Response Office (SAPRO).<sup>19</sup> After completing its strategic plan, the Committee began its first substantive policy review by exploring the topics of expedited transfers and of the legal and sexual assault training received by convening authorities.<sup>20</sup>

In its second annual report, the Committee made 11 findings and 4 recommendations related to the Department's expedited transfer policy. The Committee's overall assessment was that the expedited transfer policy for sexual assault victims is an important sexual assault response initiative offered by the military and it strongly recommended the continuation and further improvement of the policy. It also recommended expanding the expedited transfer policy to include sexual assault victims who are active duty Service members covered by the Family Advocacy Program (FAP).

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<sup>14</sup> See *Transcript of DAC-IPAD Public Meeting* 238 (Jan. 19, 2017) (comment by Judge Reggie Walton, Committee member); *id.* at 238 (comment by Ms. Kathleen Cannon, Committee member); *id.* at 225–26 (comment by Major General (Ret.) Marcia Anderson, Committee member); *id.* at 230–31 (comment by Ms. Martha Bashford, Committee chair); *id.* at 231 (comment by Dean Keith Harrison, Committee member).

<sup>15</sup> See *Transcript of DAC-IPAD Public Meeting* 224 (Jan. 19, 2017) (comment by Ms. Meg Garvin, Committee member) (recommending that the DAC-IPAD review child cases and noting that there is a gap in data on children); *but see id.* at 264 (comment by Dr. Jenifer Markowitz, Committee member) (stating that she does not think the committee should review child sex abuse cases); *id.* at 266 (comment by Ms. Martha Bashford, Committee chair) (maintaining that for her the most important issue is ensuring that adults may serve in the military without getting sexually assaulted, but also noting that that doesn't mean the Committee can't ever look at children, domestic violence, or civilians).

<sup>16</sup> See, e.g., *Transcript of DAC-IPAD Public Meeting* 263–64, 271 (Jan. 19, 2017).

<sup>17</sup> DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION, AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES INITIAL REPORT (Mar. 2017), available at [https://daciipad.whs.mil/images/Public/08-Reports/DACIPAD\\_Initial\\_Report\\_20170330\\_Final\\_Web.pdf](https://daciipad.whs.mil/images/Public/08-Reports/DACIPAD_Initial_Report_20170330_Final_Web.pdf).

<sup>18</sup> See DAC-IPAD 2018 ANNUAL REPORT, *supra* note 4.

<sup>19</sup> See generally *Transcript of DAC-IPAD Public Meeting* (Apr. 28, 2017); *Transcript of DAC-IPAD Public Meeting* (July 21, 2017).

<sup>20</sup> See generally *Transcript of DAC-IPAD Public Meeting* (Oct. 19, 2017); *Transcript of DAC-IPAD Public Meeting* (Oct. 20, 2017).

Congress followed and expanded on this recommendation when it enacted a provision in the National Defense Authorization Act for Fiscal Year 2019 requiring the Secretary of Defense to extend the expedited transfer policy to Service members who are victims of sexual assault regardless of whether the case is handled by SAPRO or FAP.<sup>21</sup> The law also extends the expedited transfer policy to members who are victims of physical domestic violence committed by the spouse or intimate partner of the member regardless of whether the spouse or intimate partner is a member of the Armed Forces.<sup>22</sup> In addition, Service members whose dependent is sexually assaulted by a Service member not related to the victim are now eligible for expedited transfers.<sup>23</sup>

## V. THIRD ANNUAL DAC-IPAD REPORT – MARCH 2019

This report describes the Committee’s activities and the topics examined over the previous 12 months. The Committee held six public meetings between April 2018 and February 2019 during which it heard from 21 presenters, including three members of the public, on topics such as sexual assault data collection and management, sexual assault investigation practices, and the effects of sexual assault investigations on accused Service members and victims.<sup>24</sup> In addition, the Committee’s three working groups held 13 preparatory sessions during which members heard testimony from more than 50 presenters, including military prosecutors, defense counsel, investigators, victims’ counsel, program managers, victim services personnel, and an assistant United States Attorney on topics including sexual assault investigation practices, the DoD expedited transfer policy, and sexual assault prosecution standards in civilian and military jurisdictions.

The Committee makes 32 findings and 14 recommendations in this report in the areas of commanders’ disposition decisions with respect to penetrative sexual assault complaints, documentation of command disposition decisions, unfounded determinations, subject fingerprint collection and submission to federal criminal databases, Article 140a of the UCMJ regarding military justice data collection and management, and the DoD expedited transfer policy.

The first chapter of this report focuses on the outcome of the Committee members’ review of a random sample of 164 of the 2,055 penetrative sexual assault investigative case files closed in FY17 involving Service member subjects and adult victims.<sup>25</sup> The members of the CRWG recorded descriptive data from each case and assessed the reasonableness of the command disposition decisions based on the evidence available in the files and the members’ professional experience.

Chapter 2 of the report details the Committee’s collection and analysis of case adjudication data for completed penetrative and contact sexual assault cases in which charges were preferred, covering fiscal years 2015 through 2017. Chapter 3 provides the Committee’s recommendations and rationale regarding the implementation of the new Article 140a, UCMJ, which requires uniform data collection and management for military justice cases. These recommendations were initially submitted to the Secretary of Defense by the Committee on September 13, 2019, in order to be considered before the deadline for the guidance of January 1, 2019. The Committee Chair received a response from the DoD Office of General Counsel along with the Department’s uniform

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21 FY19 NDAA, *supra* note 5, § 536.

22 *Id.* at § 536.

23 *Id.* at § 536.

24 See Appendix N, DAC-IPAD Public Meetings, Preparatory Sessions, and Presenters.

25 See Chapter 1, Section II on Case Review Methodology for a more detailed discussion of the cases selected for review.

guidance on January 23, 2019. Both letters are discussed in the chapter and included as Appendixes J and K to the report.

The Committee's final assessment and recommendations related to the DoD expedited transfer policy are discussed in Chapter 4. Finally, in Chapters 5 and 6, the report identifies and makes initial comments on several additional topics that the Committee has been requested to explore by DoD and Congress, including collateral misconduct engaged in by victims of sexual assault and Articles 32, 33, and 34 of the UCMJ.

DEFENSE ADVISORY COMMITTEE ON INVESTIGATION, PROSECUTION,  
AND DEFENSE OF SEXUAL ASSAULT IN THE ARMED FORCES

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# CHAPTER 1.

## SEXUAL ASSAULT INVESTIGATIVE CASE FILE REVIEW – INITIAL ASSESSMENT

### I. INTRODUCTION

#### A. Case File Review Mandate and Scope of Review

Congress directed the DAC-IPAD to “review, on an ongoing basis, cases involving allegations of sexual misconduct”—including allegations of rape, forcible sodomy, and sexual assault—involving members of the Armed Forces, in order to advise the Secretary of Defense regarding the handling of those cases in the military justice system.<sup>26</sup> In accordance with this statutory mandate, the Committee formed and tasked a Case Review Working Group (CRWG), composed of seven Committee members, to individually review military sexual assault cases. The CRWG is chaired by retired Marine Corps Brigadier General James R. Schwenk. The other members of the working group are Ms. Martha S. Bashford (the DAC-IPAD Chair), Ms. Kathleen B. Cannon, Ms. Jennifer Gentile Long, Mr. James P. Markey, Dr. Cassia C. Spohn, and Ms. Meghan A. Tokash.

Neither the DAC-IPAD’s authorizing statute nor its charter specified the scope of or methodology for the Committee’s case review requirement. Recognizing that none of the previous military sexual assault panels evaluated military sexual assault cases at the investigative stage, the Committee decided to focus its case review on the period from the initial report of a penetrative sexual assault to military law enforcement through the decision of the commander whether to prefer charges for a penetrative sexual assault, thereby initiating a criminal justice proceeding.<sup>27</sup>

In October 2017 the Committee submitted a request for information (RFI) to the Services’ military criminal investigative organizations (MCIOs).<sup>28</sup> In this request the Committee asked for the Services to provide the total number of sexual assault investigations closed in fiscal year 2017 as well as case-by-case investigative data, including the case dispositions for all cases that met four criteria: (1) closed in fiscal year 2017 (2) involving a complaint of penetrative sexual assault (3) made by an adult victim (4) against an active duty military subject.<sup>29</sup>

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26 FY15 NDAA, *supra* note 1, § 546 (c)(2).

27 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).

28 See DAC-IPAD RFI Set 5 (Jun 29, 2017), available at [https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD\\_RFI\\_Set5\\_20171030\\_Web.pdf](https://dacipad.whs.mil/images/Public/07-RFIs/DACIPAD_RFI_Set5_20171030_Web.pdf). For purposes of this report, MCIOs are the U.S. Army Criminal Investigative Command (CID), Naval Criminal Investigative Service (NCIS), Air Force Office of Special Investigations (AFOSI), and Coast Guard Investigative Services (CGIS). A case is considered “closed,” in this context, after a completed MCIO investigation has been submitted to a commander to make an initial disposition decision and any action taken by the convening authority is complete and documentation of the outcome has been provided to the MCIO. *Id.* The Committee defined a “penetrative sexual assault” as a complaint of rape or sexual assault, in violation of Article 120 of the Uniform Code of Military Justice (UCMJ); forcible sodomy, in violation of Article 125 of the UCMJ; and any attempt to commit such offenses. *Id.*; see also Transcript of DAC-IPAD Public Meeting 294 (Oct. 20, 2017) (presentation by Member James Schwenk and Committee discussion); PowerPoint presentation by the Case Review Working Group, Initial Case Review Plan (Oct. 20, 2017). 10 U.S.C. § 920(b) (UCMJ, Art. 120(b)) defines a child as an individual who is under the age of 16; therefore, the Committee defined an adult victim as a victim over the age of 16. See DAC-IPAD 2018 ANNUAL REPORT, *supra* note 4, at 15–22.

29 The dates of fiscal year 2017 are from October 1, 2016, to September 30, 2017. Disposition options are outlined in Rule for Courts-Martial (R.C.M.) 306(c) of the Manual for Courts-Martial; they include no action, administrative action, non-judicial punishment, and preferral of charges. The

The Service MCIO responses indicated that while more than 6,000 sexual assault cases were closed by the MCIOs in FY17, only about 2,000 of those cases—a third—involved penetrative sexual assault complaints made against a Service member by an adult victim.<sup>30</sup> The individual case data provided by the MCIOs also revealed that a majority of the penetrative sexual assault investigations closed in FY17 did not result in the preferral of criminal charges for a penetrative sexual assault.<sup>31</sup>

## B. Objectives

The Committee outlined its objectives and plan for the case review project in detail in its March 2018 report.<sup>32</sup> After regularly reviewing individual investigative case files over the past year and gaining a hands-on perspective regarding military sexual assault cases as documented in military investigative case files, the Committee identified the following objectives for its case review project:

- Assess the reasonableness of case disposition decisions in the military.
- Compile descriptive case data regarding the facts of the cases reviewed.
- Examine investigative files for issues involving the discretion afforded to military investigators and the duration of investigations.
- Review practices for documenting a commander’s disposition decision in penetrative sexual assault cases in which a Service member is the subject.
- Review MCIO practices for submitting fingerprints and case disposition information to federal databases and for documenting cases as unfounded.

A sixth objective outlined in last year’s report, examining predictive factors for case outcomes, is not addressed in this report. That objective will require an analysis of the full set of 2,055 cases from FY17, which is not yet complete; it will therefore be addressed in a future report.

The Committee’s initial case review assessments, findings, and recommendations outlined in this chapter were derived from members’ review and analysis of 164 individual penetrative sexual assault investigative cases closed in FY17.<sup>33</sup> The report was further informed by the testimony of civilian and military investigators, military prosecutors, military defense counsel, an assistant United States attorney, and Federal Bureau of Investigation (FBI) analysts received by the Committee and its working group in March, July, August, and October of 2018, and by over 25 hours of Committee and working group deliberations on these issues.

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Committee decided that a case would be categorized as “action taken” only if the action was for a reported penetrative sexual assault, and not for a lesser included or other criminal offense, including collateral misconduct. “No action taken” means that the penetrative sexual assault report was thoroughly investigated by the relevant Service’s MCIO, a report of the investigation was completed and submitted to the commander, and the commander decided against taking any action, whether administrative, non-judicial, or judicial, for the penetrative sexual assault.

30 See Appendix H, Aggregated Service Responses to DAC-IPAD RFI Sets 3, 4, and 5 (Oct. 30, 2017), at H-16.

31 *Id.*

32 DAC-IPAD 2018 ANNUAL REPORT, *supra* note 4, at 25.

33 See Section II on Case Review Methodology for a more detailed discussion of the cases selected for review.

## II. CASE REVIEW METHODOLOGY

### A. Case Data and Files Provided by the MCIOs

In its October 2017 RFI regarding military sexual assault investigations closed in FY17, the DAC-IPAD asked for specific descriptive details about each case, including the Service branch of the subject(s), status of the victim as either civilian or Service member, date the case was closed, type of penetrative offense reported, and the case disposition, both as reflected in the Service MCIO case management systems and as submitted by the MCIOs for FBI crime data reporting purposes.<sup>34</sup>

Once the Committee received the requested information from the MCIOs, the staff thoroughly reviewed the lists of cases provided by each of the Services and found that some were outside the scope of the data request, such as cases involving victims under the age of 16 or non-Service member subjects. These cases were eliminated before the data were evaluated. To further streamline the Committee's review and avoid possible duplication of cases, the staff also excluded any cases in which the subject was from a different branch of Service than the MCIO; cases in which the subject was a member of the Reserves or National Guard, or had retired or separated from the Service prior to the initiation of the investigation; and cases in which the Service member subject was prosecuted by civilian authorities.<sup>35</sup> If there were multiple subjects in an investigation, the Committee counted the investigation with respect to each subject as a separate "case" for purposes of the Committee's review.<sup>36</sup> The resulting list comprised 2,055 cases closed in FY17 in which a Service member was investigated for a penetrative sexual assault against an adult victim.

Next, the cases were sorted by Service of the subject and by the disposition of the case. The DAC-IPAD RFI requested that the MCIOs provide the case disposition for each of the penetrative sexual assault offenses identified. However, once the Committee members began reviewing the case files, the reviewers found that the MCIOs' categorization by case disposition of the 2,055 penetrative sexual assault cases was not always specific to the penetrative sexual assault offense and, in some cases, may have represented action taken for other non-sexual offenses that were investigated in conjunction with the penetrative sexual assault, such as adultery, fraternization, or underage drinking. Since the focus of the DAC-IPAD's review is exclusively on whether an investigation resulted in preferral of criminal charges or other adverse action specifically for a penetrative sexual assault, the DAC-IPAD will provide case disposition data specifically for the penetrative sexual assault offense in all 2,055 cases once the individual case reviews are complete. The table below, which is based on the MCIOs' responses to the RFI and not on the DAC-IPAD's own categorization of case disposition, illustrates the number of cases in which charges were preferred or not preferred for a penetrative sexual assault (PSA) offense.

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34 DAC-IPAD RFI Set 5 (Oct. 30, 2017). In DAC-IPAD RFI Set 5, the MCIOs were requested to provide the disposition of the penetrative sexual assault case, including whether no action was taken and/or the case was unfounded, for all FY17 sexual assault investigations for a penetrative sexual assault with a military subject and adult victim closed between October 1, 2016, and September 30, 2017 (regardless of the date the allegation was made or the investigation opened). See Appendix E, DAC-IPAD Requests for Information Sets 1–10.

35 The staff excluded all cases in which the MCIOs designated the subject as retired in the case lists provided; however, reviewers realized during the course of the case reviews that some of the remaining investigations also included Service members who were retired at the time of the investigation. The CRWG members determined that they would still review these cases, since the case files were provided to the Committee. The retired status of these subjects is noted in the DAC-IPAD's collected data.

36 In their case lists, the MCIOs included a separate entry for each subject in an investigation. Therefore, if one investigation had multiple subjects, the case was indicated multiple times on the case list for each separate subject. During the course of the reviews, however, the reviewers realized that some cases that had not been designated as multi-subject by the MCIOs in the case lists also involved multiple subjects; the number of cases for review was revised accordingly.

**PENETRATIVE SEXUAL ASSAULT CASES CLOSED IN FY 2017 INVOLVING ADULT VICTIMS  
AND SERVICE MEMBER SUBJECTS (N=2,055)<sup>37</sup>**

Military Service of Subject	Cases with Charges Preferred for PSA Offense (n=408)	Cases with No Charges Preferred for PSA Offense (n=1,647)	Total PSA Cases Closed in FY 2017
Army	148	16%	914
Marine Corps	66	23%	289
Navy	65	16%	400
Air Force	117	28%	423
Coast Guard	12	41%	29

The Committee members were particularly struck that an average of 80% of the 2,055 cases involving reports of rape, sexual assault, and forcible sodomy that were closed in FY17 did not result in charges being preferred for those offenses. The Committee sought to examine these investigative case files first to learn more about the specific facts of the cases, the evidence collected, and the decision-making process of the command in choosing not to prefer charges (including any written legal advice received, if available).

The Committee decided that its working group members would individually review a random sample of case files selected from the 2,055-case list, proportionately weighted by case disposition, as designated by the MCIOs, and by the Service of the subject. With guidance from the DoD Office of Inspector General, the staff identified a random sample of cases for the Committee members to review; the random sample was generated from the MCIO case lists utilizing the random number function in Microsoft Excel, which identified 184 cases for inclusion in the sample stratified by Service and disposition category. These cases were each classified by the MCIOs as having one of the following dispositions: preferral of charges, administrative action, non-judicial punishment, or no action taken.<sup>38</sup>

To establish a baseline against which to compare facts and evidence in the cases in which no action was taken for the penetrative sexual assault, the Committee also reviewed the cases from the random sample in which charges were preferred. Out of the random sample of 184 cases, the combined cases with dispositions of no action and preferral of charges was 152. The remaining 32 cases with dispositions of non-judicial punishment or administrative action were set aside to be reviewed in a later report.

When the Committee members began reviewing and documenting case information from the investigative files, they found that some case files involved multiple subjects that were not separately identified in the case lists provided by the MCIOs. Since each “case” is composed of a single subject-victim pair, the discovery of additional subjects and victims during case reviews increased the number of random sample cases from 152 to 164. Of

<sup>37</sup> The cases reported in this table comprise MCIO investigations of all penetrative sexual assault complaints made by adult victims against Service member subjects closed in FY17, including those investigations in which a judge advocate determined that no probable cause existed for the penetrative sexual assault. Case disposition classifications were provided to the DAC-IPAD by the Service MCIOs in DAC-IPAD RFI Set 5. See Appendix E, DAC-IPAD Requests for Information Sets 1–10, and Appendix H, Aggregated Service Responses to DAC-IPAD RFI Sets 3, 4, and 5.

<sup>38</sup> The distribution of dispositions of the 184 cases was as follows: preferral of charges 37 (20%), administrative action 19 (10%), non-judicial punishment 13 (7%), and no action taken 115 (63%).

the 164 cases reviewed, 42 were cases in which charges were preferred for the penetrative sexual assault and 122 were cases in which no action was taken against the subject for the penetrative sexual assault offense. In the cases in which no action was taken for the penetrative sexual assault, it is possible that some other adverse action was taken against the subject for offenses other than the penetrative sexual assault.

For the random sample cases, the Committee ensured that the dispositions in the “preferred” and “no action” categories reflected the disposition of the penetrative sexual assault offense specifically. When a case file indicated that the disposition action was for an offense other than the penetrative sexual assault, the case was replaced with another randomly selected case file from the universe of 2,055 penetrative sexual assault cases. This process was repeated until a case file was identified that reflected the disposition of the penetrative sexual assault.

**PENETRATIVE SEXUAL ASSAULT CASES CLOSED IN FY 2017 INVOLVING ADULT VICTIMS  
AND SERVICE MEMBER SUBJECTS – RANDOM SAMPLE (N=164)<sup>39</sup>**

Military Service of Subject	Cases with Charges Preferred for PSA Offense (n=42)	Cases with No Action Taken for PSA Offense (n=122)		Total PSA Cases Reviewed
Army	17	23%	56	77%
Marine Corps	6	25%	18	75%
Navy	6	20%	24	80%
Air Force	12	36%	21	64%
Coast Guard	1	25%	3	75%

## B. The Case Review Process

At the Committee’s request, each Service’s criminal investigative organization provided the Committee members and professional staff with copies of the identified investigative case files, unredacted, for review at the DAC-IPAD office in Arlington, Virginia.<sup>40</sup> Because investigative case files contain personal and sensitive information, all files provided to the DAC-IPAD by the MCIOs were carefully safeguarded as required by law and DoD policy and were returned to the MCIOs upon completion of the reviews.<sup>41</sup>

The investigative files provided to the Committee typically contained the following documents: the report of investigation; verbatim statements from key witnesses; summaries of statements made by the complainant, the subject, and other witnesses; a description of the crime scene; evidentiary photographs; digital evidence; forensic laboratory test results; and, in some cases, video recordings and/or agent notes. The investigative files usually included documentation of the initial disposition decision by commanders and the final outcome of any

<sup>39</sup> For the 164 random sample cases, the dispositions of the penetrative sexual assault offenses were verified by DAC-IPAD staff through case file reviews.

<sup>40</sup> Case files were provided to the DAC-IPAD in paper copies, on CD-ROMs, on external hard drives, or by other secure electronic method.

<sup>41</sup> DEP’T. OF DEF. DIRECTIVE 5400.11, DoD PRIVACY PROGRAM (Oct. 29, 2014), available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/540011p.pdf>.

disciplinary or legal proceedings. In addition, some of the investigative files contained documentation of the subject's fingerprints, probable cause determinations, and legal memoranda from a judge advocate.

For cases in which one or more charges of a penetrative sexual assault were preferred, reviewers also examined relevant procedural case documents such as the charge sheet, Report of the Article 32 Preliminary Hearing Officer, and Report of Result of Trial, in addition to the information available in the investigative file. These judicial documents were retrieved from the DAC-IPAD's sexual assault case adjudication database, which is discussed in greater detail in Chapter 2 of this report.

During their examination of the available documents from case files and the DAC-IPAD's sexual assault case adjudication database, reviewers recorded relevant factual and evidentiary details, including their independent assessment of and any comments regarding the investigation of the case and its disposition. To guide the reviews, the Committee developed a 21-page standardized data collection form with 231 data elements that reviewers filled in by hand with data and comments for each case reviewed.<sup>42</sup> To establish standardized procedural and interpretive rules for the data gathered in each case, the Committee also developed a detailed instruction manual for completing each item on the case review informational form.

All of the information collected was entered into a secure electronic database developed and maintained by DoD and Committee staff. To ensure consistency across reviews by the Committee members and staff, the information documented by Committee members in the course of their reviews was routinely compared with the information recorded by staff. In addition, the Committee staff met frequently to ensure their own consistent practices in conducting reviews. The CRWG staff attorneys and paralegals conducted secondary and tertiary reviews of the completed forms prior to entering the information into the database to reconcile any factual discrepancies across reviewers and to further ensure consistency in the interpretation of the data collection form. Finally, the data extracted from the database were also reviewed for accuracy.

### C. Status of the Case Review Project

Beginning in February 2018, the Committee members individually traveled to the DAC-IPAD's Arlington, Virginia, office to review cases on a regular basis. The professional staff began its ongoing review of the full data set of 2,055 FY17 cases at the same time, starting with the random sample cases reviewed by the Committee members.

As of the October 19, 2018, DAC-IPAD public meeting, the Committee members had reviewed all of the 164 random sample cases in which charges were preferred or no action was taken for the penetrative sexual assault. The Committee makes its findings and recommendations in this chapter drawing on its review of these 164 cases. Once the Committee and staff have finished their review of all of the FY17 cases, the Committee will publish its complete results.

The process of reviewing and collecting data from investigative files has proved to be extremely time-intensive. Reviewers observed that not all investigative files included the same documents and that the contents varied across the Services. For example, Air Force files always contained agent's notes, while the Navy and Army included these notes only some of the time. Further, each of the Services documents command disposition

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42 See Appendix F, Investigative Case Review Data Form, for the complete list of items documented for every MCIO case file reviewed by the Committee and staff.

decisions differently. Command disposition documentation was also often missing from the investigative files provided to the Committee and had to be specifically requested from the Service MCIOs.

On average, a thorough examination of a case in which no charges were preferred for the penetrative sexual assault takes a reviewer about three hours to complete; reviews of cases in which audio or video files are available, multiple subjects or victims are involved, or charges are preferred take even longer. Furthermore, considerable resources have been required to perform quality control tests on the checklists, to develop and refine the database in which the data from the forms are collected, and to enter and review the data. Lastly, the process of requesting, physically inventorying, collecting, maintaining, and returning case files has itself required significant resources.

#### D. Way Ahead

As of February 5, 2019, the Committee members and staff have reviewed 1,482 cases out of the total population of 2,055 investigative cases closed in FY17. The Committee members and staff plan to have their review of the remaining cases completed by the summer of 2019. The results from the review of the entire population of cases will be presented in the DAC-IPAD's 2020 report.

**STATUS OF CASE REVIEWS AS OF FEBRUARY 5, 2019<sup>43</sup>**  
**NUMBER OF CASES REVIEWED TO DATE (N=1,482)**

Military Service of Subject	Charges Preferred	Non-judicial Punishment	Admin. Action	No Action	Total Cases Reviewed
Army	68	17	9	461	555
Marine Corps	52	2	3	186	243
Navy	16	3	3	237	259
Air Force	116	8	34	238	396
Coast Guard	12	3	6	8	29

**NUMBER OF CASES PENDING REVIEW (N=573)**

Military Service of Subject	Charges Preferred	Non-judicial Punishment	Admin. Action	No Action	Total Cases Pending
Army	80	35	84	160	359
Marine Corps	14	16	16	0	46
Navy	49	38	29	25	141
Air Force	1	7	17	2	27
Coast Guard	0	0	0	0	0

43 Although the data requested from the MCIOs was for the disposition of the penetrative sexual assault offense specifically, Committee and staff case reviewers have found that in some instances the action taken is for other, non-sexual misconduct. Therefore, the categorization by case disposition of the 2,055 penetrative sexual assault cases identified in this report is not always specific to the penetrative sexual assault offense and may in some cases reflect action taken for other offenses that were investigated in conjunction with the penetrative sexual assault. These case categorizations will be corrected in the 2020 report to accurately reflect the disposition of the penetrative sexual assault offense.

### III. COMMAND DISPOSITION OF PENETRATIVE SEXUAL ASSAULT COMPLAINTS

#### A. Introduction and Background

Over the past decade, the military, including commanders, has been criticized for taking insufficient action against Service members accused of sexual assault.<sup>44</sup> Reflecting this concern, in 2014 the United States Senate considered a bill to remove court-martial disposition authority from commanders in sexual assault cases and place it with military prosecutors.<sup>45</sup> Such a change would require a dramatic and unprecedented restructuring of the military justice process. However, to date, no entity has attempted to systematically analyze individual sexual assault cases for the specific purpose of determining whether commanders are making appropriate disposition decisions, or if there is indeed a systemic problem in how commanders are exercising this discretion.

The Judicial Proceedings Panel (JPP) was directed by Congress in 2013 to conduct this type of analysis; however, that panel quickly discovered that reliable data on sexual assault case dispositions and sentencing across the Services were not available from DoD.<sup>46</sup> Without reliable data, or access to investigative case files, the JPP determined in 2014 that it could not make qualitative assessments of military sexual assault cases because it was unable to review the facts and evidence in individual cases.<sup>47</sup> Therefore, the DAC-IPAD, which was specifically directed by Congress to look at individual cases, followed up on the previous congressional directive to the JPP and undertook a review of sexual assault investigative files in order to evaluate the reasonableness of command disposition decisions in these cases.

The Committee leveraged members' collective expertise in sexual assault case investigation and adjudication to assess whether, from an investigatory and legal standpoint, commanders are systematically exercising their authority to dispose of sexual assault offenses under the Uniform Code of Military Justice (UCMJ) appropriately, particularly when the commander declines to prefer charges for a penetrative sexual assault complaint. While such assessments are inherently subjective, they are an important way of responding to the need for Service members to have confidence in the military's criminal justice system and for the public to perceive the system as fair.

In making its assessment, the Committee cannot and does not relitigate or second-guess any single case or decision. The members recognize that they are not in a position to identify any individual case as having rightly

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44 See, e.g., THE INVISIBLE WAR (Chain Camera Pictures 2012); Craig Whitlock, *How the Military Handles Sexual Assault Behind Closed Doors*, WASH. POST, Sept. 30, 2017; Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES, Nov. 26, 2014.

45 Military Justice Improvement Act of 2013, S. Res. 1752, 113th Cong. § 2(a) (2013). Congress directed the Response Systems to Adult Sexual Assault Crimes Panel (RSP) to make "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." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013) [hereinafter FY14 NDAA], § 1731(a)(1)(A). The RSP recommended that Congress not adopt the Military Justice Improvement Act to modify the authority vested in convening authorities to refer sexual assault charges to courts-martial. See REPORT OF THE RESPONSE SYSTEMS TO ADULT SEXUAL ASSAULT CRIMES PANEL 2, 22 (June 2014) [hereinafter RSP REPORT], available at [http://responsesystemspanel.whs.mil/public/docs/Reports/00\\_Final/RSP\\_Report\\_Final\\_20140627.pdf](http://responsesystemspanel.whs.mil/public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf).

46 See National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, 126 Stat. 1632, § 576 (d)(2) (2013) (tasking the JPP with assessing the appropriateness and consistency of case dispositions, outcomes, and punishments).

47 JUDICIAL PROCEEDINGS PANEL REPORT ON STATISTICAL DATA REGARDING MILITARY ADJUDICATION OF SEXUAL ASSAULT OFFENSES 27 (April 2016) [hereinafter JPP REPORT ON STATISTICAL DATA], available at [http://jpp.whs.mil/public/docs/08-Panel\\_Reports/05\\_JPP\\_StatData\\_MilAdjud\\_SexAsslt\\_Report\\_Final\\_20160419.pdf](http://jpp.whs.mil/public/docs/08-Panel_Reports/05_JPP_StatData_MilAdjud_SexAsslt_Report_Final_20160419.pdf) ("Without knowing more about the facts of individual cases, the JPP cannot assess the appropriateness of case disposition decisions. Specific factors in each case, including the nature of the offenses, any mitigating or extenuating circumstances, the willingness of a victim to testify, and the strength of available evidence, affect disposition decisions. It is neither possible nor appropriate to make collective assessments based solely on the general nature of charges and the forum for disposition").

or wrongly resulted in the preferral or non-preferral of charges for the penetrative sexual assault, as there are many variables that cannot be gleaned from a review of an investigative file alone. However, on the basis of their review of 164 individual case files, the Committee members could develop a sense of whether commanders charged with making preferral decisions in sexual assault cases are doing so in a manner consistent with the Committee members' own experience and judgment. In addition, the reviewers could identify any concerning patterns regarding command decision-making in sexual assault cases.

## **B. Methodology for Assessing the Reasonableness of Disposition Decisions**

Committee members serving on the Case Review Working Group reviewed 164 investigative files closed in FY17 that involved a complaint of a penetrative sexual assault made by an adult victim against an active duty Service member subject. In assessing the “reasonableness” of the command’s disposition decision in individual cases—that is, whether the command’s disposition decision was within an appropriate zone of discretion—the members were informed by their diverse perspectives and expertise in criminal justice.

The Committee members recognized that what is “reasonable” to one person may not be “reasonable” to another. Therefore every investigative case file reviewed from the random sample was reviewed at least twice, by both a Committee member and a DAC-IPAD professional staff member. Further, a third reviewer—either a Committee member or DAC-IPAD staff attorney—reviewed the case file if any previous reviewer determined that the command’s disposition decision was not supported by the evidence reviewed in the investigative file. Each reviewer made an independent assessment based on the same facts. All reviewers recorded their individual comments and opinions.

In the 122 cases in which the investigation of a penetrative sexual assault complaint resulted in no action taken for the penetrative sexual assault, the reviewers evaluated whether the command’s decision to decline to prefer charges for the penetrative sexual assault was reasonable. Reviewers did not assess whether they would have reached a different conclusion in a specific case; reviewers assessed whether the decision regarding the penetrative sexual assault, based on all of the evidence contained in the investigative file, was reasonable.

In the 42 cases in which the investigation of a penetrative sexual assault complaint resulted in preferred charges for a penetrative sexual assault, the reviewers assessed whether the command’s decision to prefer charges and initiate a criminal justice proceeding was reasonably supported by the evidence contained in the investigative file.

## **C. The Committee’s Evaluation of Command Disposition Decisions in Penetrative Sexual Assault Cases**

In 95% of the investigative case files that the Committee reviewed, a majority of reviewers (two out of two reviewers or two out of three reviewers) determined that the command’s disposition decision regarding the penetrative sexual assault complaint was reasonable. The percentage of command disposition decisions determined to be reasonable was similar whether the commander preferred charges for the penetrative sexual assault (95%) or did not prefer charges for the penetrative sexual assault (94%).

The reviewers’ decisions were largely consistent regardless of whether the reviewer was a Committee member or professional staff member, regardless of whether the reviewer had expertise in military justice, and regardless of whether the reviewer’s professional background involved investigating, prosecuting, or defending individuals charged with sexual assault offenses. Reviewers determined that the commander’s disposition decision was not

supported by the evidence in the investigative file reviewed by the Committee in 7—or 6%—of the 122 cases in which no charges were preferred. Similarly, out of the 42 cases in which charges were preferred for a penetrative sexual assault, reviewers determined that the commander’s decision to prefer charges was not supported by the evidence reviewed in the case file in 2—or 5%—of those cases.

**ASSESSMENT OF COMMAND DISCRETION BASED ON  
THE COMMITTEE’S REVIEW OF INVESTIGATIVE CASE FILES CLOSED IN FY 2017  
INVOLVING PENETRATIVE SEXUAL ASSAULT COMPLAINTS (N=164)<sup>48</sup>**

Reviewer Assessment of Disposition Decision	Charges Preferred for PSA Offense (n=42)		No Charges Preferred for PSA Offense (n=122)		Total Reviewed Sample PSA Cases Closed in FY 2017	
Majority found reasonable	40	95%	115	94%	155	95%
Majority found unreasonable	2	5%	7	6%	9	5%

#### D. Discussion

Through its independent assessment of 164 cases, in 122 (or 74%) of which charges were not preferred for a penetrative sexual assault, the Committee determined that the overwhelming majority of those cases—115 out of 122 (94%)—were appropriately declined for preferral by the command. The remaining 6% of decisions not to prefer charges for a penetrative sexual assault were found by the majority of reviewers not to be supported by the evidence reviewed in the case file. The Committee members note that these do not necessarily constitute cases in which charges should have been preferred; rather, the reviewers felt they would need to consider more information before they could adequately evaluate whether the disposition decision was reasonable. Such additional information could include a review of the prosecution merits memorandum and perhaps interviews with the judge advocates and commander involved. However, the Committee felt that such an endeavor would be unnecessary, since review of the 164 cases from the random sample reveals no sign of systemic problems with the reasonableness of commanders’ decisions on whether to prefer charges in cases involving a penetrative sexual assault.

The same is true for the 42 cases reviewed in which the command preferred charges for a penetrative sexual assault. The Committee noted that 95% of these cases were deemed to have been reasonably decided as well. The remaining 5% of decisions to prefer charges were found by the majority of reviewers not to have been sufficiently supported by the case file. Again, this is not a dispositive finding that it was unreasonable for the command to have preferred charges, only a finding that more information would need to be reviewed in these cases.

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48 Out of the 42 cases in which charges were preferred for a penetrative sexual assault, reviewers unanimously (three out of three reviewers) found the command decision reasonable in 37 (88%) of the cases, and the majority of reviewers (two out of three reviewers) found the command decision reasonable in 3 (7%) of the cases. Of the preferred cases, reviewers unanimously found the command decision unreasonable in one case, and a majority of reviewers found the command decision unreasonable in one case. Out of the 122 cases in which no charges were preferred for a penetrative sexual assault, reviewers unanimously found that the command disposition was reasonable in 105 (86%) of the cases, and a majority of reviewers found the command decision reasonable in another 10 (8%) of the cases. A majority of reviewers found the command decision unreasonable in 3 (2%) of the cases in which charges were not preferred, and reviewers unanimously found that the command decision was unreasonable in 4 (3%) of those cases in which charges were not preferred.

The Committee noted that the reasonableness of command decisions was nearly identical both in the cases in which charges were preferred and in those in which no action was taken. This consistency lends support to the Committee’s conclusion that there is no systemic problem with command decision-making regarding preferral of charges for penetrative sexual assaults.

Regardless of whether a case should be prosecuted at trial or court-martial, it is vital to continue encouraging people to report suspected sexual offenses. In many of the cases that cannot be prosecuted for evidentiary reasons—often involving excessive alcohol consumption—the victims or reporting witnesses are terribly upset and traumatized by what has occurred. Whether or not the reported incident rises to the level of a criminal offense or is provable in a court-martial, it is still important that these men and women feel comfortable reporting the event so that they may receive the support they need and appropriate counseling or other medical treatment. Reporting also makes it possible for victims and reporting witnesses to discuss their cases with investigators or victim services personnel who can help them process the upsetting or traumatic events.

### **E. Finding**

**Finding 12:** Based on the review of 164 military investigative cases, the DAC-IPAD finds that commanders’ dispositions of penetrative sexual assault complaints are reasonable in 95% of cases.

## **IV. DESCRIPTIVE DATA COLLECTED FROM INVESTIGATIVE CASE FILES**

### **A. Introduction and Background**

The data reported in this section provide descriptive characteristics of the 164 penetrative sexual assault cases closed in FY17 that were reviewed by the Committee members.<sup>49</sup> The data are drawn from reviews of the investigative files and, for cases in which charges were preferred, any additional documents in the Committee’s separate sexual assault case adjudication database, such as the transcript and findings from the preliminary hearing and documentation of the trial result.

### **B. Characteristics Related to Reporting Type, Reporting Party, and Reporting Time in Military Sexual Assault Investigations**

A victim of sexual assault in the military has the option to make a restricted or an unrestricted report of the assault. A restricted report allows the victim to confidentially disclose the assault to specifically identified individuals—such as a health care professional, a sexual assault response coordinator (SARC), a victim advocate (VA), or a representative from the Services’ Family Advocacy Programs (FAP), known as a domestic abuse victim advocate (DAVA)—without triggering a criminal investigation.<sup>50</sup> An unrestricted report, on the other hand, triggers a criminal investigation. If the victim initially makes a restricted report, he or she may convert it into an unrestricted report at a later point.

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<sup>49</sup> This report does not address the race or ethnicity of victims or subjects, because this information is not consistently or reliably documented in the investigative case files. The DAC-IPAD will address the categorizations of race and ethnicity after it receives clarification from the Services.

<sup>50</sup> Reporting Options and Sexual Assault Reporting Procedures, 32 C.F.R. § 105.8(a)(5) (2016).